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# CRIMINAL LAW INSTRUCTIONS MANUAL

for the

## STATE OF WEST VIRGINIA

## 7TH EDITION

BY

## PUBLIC DEFENDER SERVICES,

A STATE AGENCY

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# Preface to the Seventh Edition

The Seventh Edition of the *West Virginia Criminal Jury Instructions* brings the instructions into the digital age; the *Instructions* are available in electronic format, and the volume has been constructed in a way that maximizes its usefulness to practitioners using the internet to access these materials. It is the Criminal Law Research Center's (CLRC) goal to: (1) provide for a wider distribution of the *Instructions* to the legal community, particularly those involved in the representation of indigents in criminal proceedings; (2) make using the *Instructions* easier; and (3) enable the CLRC to update the *Instructions* in a more timely and accurate fashion.

Substantively, the Seventh Edition of the *Instructions* incorporates much of the material from the first six editions and has been supplemented by the inclusion of relevant statutory changes and pertinent judicial decisions through March 2018. In that regard, the CLRC wishes to express its deepest gratitude for the dedication and hard work of its previous editors and contributors, particularly Russell Cook, who edited the 6th Edition and currently serves as an attorney in the 6th Circuit Public Defender Corporation.

As with previous editions, these instructions cover substantive law, evidentiary and procedural matters, and include comments and footnotes. **N. B.: These instructions are not a substitute for counsel's own research.** Each case is unique and must be viewed as unique. The Instructions provide the starting point, not the ending point, for drafting instructions that fit a specific case.

Special thanks to the attorneys (past and present) in the Appellate Division of the Public Defender Services — Crystal Walden, Matthew Brummond, Scott Johnson, and Jason Parmer, and to Lori Waller (who now serves as Juvenile Specialist in the Public Defender Resource Center) — for their time and expertise in drafting the bulk of these *Instructions*. Credit also goes to the PDS appellate staff, Sarah Saul and Rhonda Ashworth, for their assistance in putting the instructions into print and getting them formatted for online access, and to Robert Evans, our law intern for Summer 2018, for his assistance in editing the final drafts.

A brief note on the formatting of the *Instructions*: Each instruction, along with its footnotes, is available individually on the PDS website (www.pds.wv.gov) in a filing-friendly format: Times New Roman 12 point and true double-spaced (24 points, not the default Word Double Space). This should facilitate downloading and editing the instruction in a format with which courts are comfortable. Obviously, the attorney may make any changes to formatting if preferred. The actual text of the written volume is not double-spaced and the "Comments" are set altogether differently, to minimize confusing such material with the actual instructions. The downloadable instructions do not include comments and practice tips; these are available only from the manual, which is available for free in pdf format on the website and in print for a reasonable fee.

Donald L. Stennett
Deputy Director, Public Defender Services

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# Guide to Using Jury Instruction Manual

## Contents: Four Types of materials

| | |
|---|---|
| **Discussion →** | General introduction to the topic<br>Found mostly in earlier part of Manual<br>Available in Manual and in pdf of Manual<br>Not included in downloadable instructions |
| Available for download online<br>Download at www.pds.wv.gov<br>Reviewed and current through March 2018<br>Cases and authorities for each Instruction footnoted to Instruction and available for download with Instruction | **← Instructions** |
| **Comments →** | Available in Manual only (print or pdf)<br>Contain discussion of individual Instructions<br>Citations to cases and authorities inline |
| Boxed content that contain additional commentary and practical advice for using the Instructions<br>Available in Manual only (print or pdf) | **← Practice Tips** |

## Downloadable Online Format

- Available at www.pds.wv.gov
- Times New Roman 12 pt.
- Double-spaced, 1-inch margins
- Instructions only (includes footnotes to Instructions)

**Choices** Bracketed material indicates a choice, either:
Between two or more bracketed choices, or
Whether to include

**Inserts** Items that need to be filled in by attorney or court
[*Insert* material or information desired]

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# INTRODUCTION AND GENERAL INFORMATION

## 1.01 The Jury's Role and Jury Instructions

"Perhaps the most fundamental rule of our system of jurisprudence is that questions of fact are to be determined by a jury and questions of law by a court."[1] Thus, jurors are given instructions, substantive and procedural, by the Court to assist them in discharging their fact-finding function. This instructional direction is one of the essential attributes of a fair trial under the Fourteenth Amendment's Due Process Clause.[2] "The trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error."[3]

The law applicable to a case must come from the trial court in the form of instructions.[4] "All of the law which the jury considers with regard to the ultimate issues must come to it through instructions in open court."[5] The trial court has great discretion when instructing a jury,[6] but "the question of whether a jury was properly instructed is a question of law," so that "review is de novo."[7]

[1] *Fitzwater v. Spangler*, 150 W. Va. 474, 478, 147 S.E. 2d 294, 296 (1966)

[2] *Rivera v. Illinois*, 556 U.S. 148, 162 (2009)

[3] Syl. Pt.1, *State v. Miller*, 184 W. Va. 367, 400 S.E.2d 611 (1990)

[4] *State v. Loveless*, 139 W. Va. 454, 467, 80 S.E.2d 442, 450 (1954)

[5] FRANKLIN D. CLECKLEY, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE II 215 (2d ed. 1993)

[6] *State v. Parsons*, 214 W. Va. 342, 354, 589 S.E.2d 226, 238 (2003) (*per curiam*)

[7] Syl. Pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996)

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## 1.02 W. VA. R. CRIM. P. 30 and T.C.R. 42.02

West Virginia Rule of Criminal Procedure 30 is the paramount authority dealing with jury instructions in criminal trials in West Virginia courts.[8] Rule 30 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time, copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests and disclose to counsel all other instructions it intends to give before the arguments to the jury are begun and the instructions given by the court. The court may instruct the jury before or after the arguments are completed or at both times. The instructions given by the court, whether in the form of a connected charge or otherwise, shall be in writing and shall not comment upon the evidence, except that supplemental written instructions may be given later, after opportunity to object thereto has been accorded to the parties. The court may show the written instructions to the jury and permit the jury to take the written instructions to the jury room. No party may assign as error the giving or the refusal to give an instruction or the giving of any portion of the charge unless that party objects thereto before the arguments to the jury are begun, stating distinctly the matter to which that party objects and the grounds of the objection; but the court or any appellate court may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of objection. Opportunity shall be given to make objection to the giving or refusal to give an instruction out of the presence of the jury.

W. VA. R. CRIM. P. 30. Rule 30 is supplemented by Trial Court Rule 42.02, which provides:

> Each counsel shall prepare jury instructions, indicating citations and authorities, and if the court directs, verdict forms and special interrogatories, and present them to the presiding judicial officer and serve them on opposing counsel not less than three (3) business days before the day set for trial or at such other times as the presiding judicial officer may order.

[8]Syl. Pt. 5, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999) ("The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect.").

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T.C.R. 42.02. These two rules set out the procedural requirements for submitting a party's proposed jury instructions to the court. The purpose of the Rules is to alert the court to any possible error[9] in the instructions so the court may have the opportunity to correct the error or errors. This procedure allows building a record should appeal of an adverse instructional error become necessary. The Rules are best understood as "putting rules," that is, timely *put* your instructions and objections in writing, *put* your specific objections on the record before the judge, and *put* your foot down to get a ruling and reasons for the court's decision.

While a court normally has no duty to issue a jury instruction absent a request from the parties, the court carries the ultimate responsibility to see the jury is instructed consistent with constitutional requirements, that is, the court shall not give unconstitutional instructions that deny due process.[10]

## COMMENTS

"The general rule is that a party may not assign as error the giving of an instruction unless he objects, stating distinctly the matters to which he objects and the grounds of his objection." Syl. Pt. 3, *State v. Gangwer*, 169 W. Va. 177, 286 S.E.2d 389 (1982)

"Objecting to the refusal to give an instruction is not an objection to the giving of instructions on the same subject." *Bush v. Legursky*, 966 F.2d 897, 900 (4th Cir. 1992) (interpreting West Virginia law).

[9] FRANKLIN D. CLECKLEY, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE II 210 (2d ed. 1993)

[10] *Syl. Pt. 2, State v. Dozier*, 163 W. Va. 192, 255 S.E.2d 552 (1979) ("When given, instructions to a jury are the court's instructions and, irrespective of who requests them, the court must see to it that all instructions conform to constitutional requirements.").

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## PRACTICE TIPS

### Preparing Instructions

Too many defense attorneys leave it up to the prosecution to provide instructions on basics of the offense, thereby foregoing the opportunity to take the lead on presenting the applicable law to the presiding judge. In those circumstances in which the attorneys have worked together over a long time and have developed a working relationship that does not unfairly impact the defendant, this is understandable; however, it must surely lead over time to the court's deference to the prosecutor on matters of law and trial procedure.

The best practice, therefore, is for the defense attorney to present instructions to the court concerning all aspects of the case; if the parties can agree on instructions, they can stipulate to the court their agreement. This practice can only make courts aware that defense counsel is prepared and conversant with the applicable law.

If no other order of the court changes the requirements concerning instructions, the following is the basic outline of how they are to be submitted:

- At the earliest possible time (excepting the rare circumstance when tactics or strategy dictate), defense counsel should request an instruction be given. W. VA. R. CRIM. P. 30.
- The requests shall be *not less than three business days* prior to the day trial is set. T.C.R. 42.02.
- This request shall be in writing. W. VA. R. CRIM. P. 30; T.C.R. 42.02.
- Counsel shall provide copies to all parties. W. VA. R. CRIM. P. 30; T.C.R. 42.02.
- The instructions shall include citations and authorities. T.C.R. 42.02.

Counsel needs to anticipate evidence and have instructions ready to go, including citations and authorities, to be presented during and after the presentation of evidence. There is simply no time for the busy solo practitioner to try a case and generate instructions on the fly when the evidence is foreseeable.

### Objections

Objections need to be made *early* and *often*! Non-specific objections, *i.e.*, objections that fail to cite any law or specific argument why a given instruction is inappropriate, are worthless. West Virginia's Supreme Court of Appeals has made it clear that it will rarely, if ever, "in the interest of justice, notice plain error in the giving or refusal to give an instruction," in the absence of an objection.

It is, therefore, incumbent on the defense practitioner to think at length about the instructions that will help the client, and to prepare to address with specificity and legal authority the erroneous instructions offered by the opposing attorney and read by the court to the jury. Remember, "[n]o party may assign as error the giving or the refusal to give an instruction or the giving of any portion of the charge unless that party objects thereto before the arguments to the jury are begun, stating distinctly

- The matter to which that party objects, and
- The grounds of the objection;"

W. VA. R. CRIM. P. 30.

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## 1.03 Keep it Simple

Lawyers are steeped in legalese; jurors are not. Scientific studies have proved that jurors have problems understanding jury instructions written in legalese, that is, instructions that use legal jargon, ambiguous language, awkward grammatical constructions, and an organization that is difficult to discern.[11] The rule of KISS (Keep It Super Simple) applies to jury instructions.

### PRACTICE TIPS

Word your jury instructions as simply as possible:

- Draft in the singular (refer to an "issue rather than "issues");
- Use base verbs, not nominalizations ("we discussed" rather than "we had a discussion");
- Use active voice, not passive ("the clerk must tax costs," rather than "costs must be taxed by the clerk");
- Draft in the present tense and address the jury directly ("the court requires" rather than "the court will require" and "you must find" rather than "the jury must find");
- Use shorter sentences, omitting surplus words ("her death" rather than "the fact that she died"—unless required by the sense of the instruction);
- Arrange words with care, and use numbering or listing where appropriate;
- Avoid multiple negatives (avoid "not uncommon");
- Avoid jargon; simplify as much as possible (say "upon receiving" instead of "upon receipt");
- Avoid "wh" phrases (avoid clauses beginning with "which").

James D. Wascher, *The Long March Toward Plain English Jury Instructions*, CBA Rec., February/March 2005, at 50, 54–55.

[11]Nancy S. Marder, *Bringing Jury Instructions into the Twenty-first Century*, 81 NOTRE DAME L. REV. 449, 454 (2006).

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## Preliminary Instructions

Preliminary instructions are the jury instructions given at the beginning of trial, before opening statements. Preliminary instructions are designed to orient the jurors by acquainting them with a wide variety of subjects.[12] Unless otherwise noted, these preliminary and final instructions are drawn from Kevin F. O'Malley, Jay E. Grenig, and Hon. William Lee, Federal Jury Practice and Instructions (6th ed. 2008).

### 2.01 Orienting the Jury

Members of the Jury:

What I say now is intended to serve as an introduction to the entire trial of this case. It is not a substitute for the detailed instructions on the law which I will give to you at the end of the case and before you retire to consider your verdict. It is only a brief overview of the trial process.

### 2.02 Defining Terms

Beginning with these preliminary instructions and during the trial you will hear me use a few terms with which you may not be familiar. Let me now briefly explain some of the most common. You will sometimes hear me refer to "counsel." "Counsel" is another way of saying "lawyers" or "attorneys." I will sometimes call myself "the Court." The State and the DEFENDANT(S) are sometimes called "the parties."

When I "sustain" an objection, I am excluding that evidence from this trial for good reason. When I "overrule" an objection, I am permitting that evidence to be admitted.

When I say "admitted into evidence," I mean that this particular statement or this particular exhibit is now part of the trial and, most importantly, may be considered by you in making decisions at the close of this case. Statements or exhibits which are not "admitted into evidence" may not be considered by you in reaching your verdict.

[12]Robert E. Larsen, Navigating the Federal Trial § 2:14 (2015 ed.).

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The term "Burden of Proof" or "sustaining its burden of proof" means the State's obligation to produce proof beyond a reasonable doubt of the charges in the INDICTMENT.

## 2.03 The Indictment—Presumption of Innocence—Elements

This is a criminal case commenced by the State of West Virginia, which I may sometimes refer to as "the prosecution" and sometimes as "the State," against [*insert* name of DEFENDANT] whom I may refer to as "DEFENDANT(S)." The case is initiated by way of an INDICTMENT, which [is summarized] [reads] as follows:

[*Insert* the text or summary of the INDICTMENT]

You should understand that the INDICTMENT is simply a charge by the State to begin a case and that it is not, in any sense, evidence of the allegations or statements it contains. The [DEFENDANT has] [DEFENDANTS have] pleaded "not guilty" to the INDICTMENT. DEFENDANT(S) contend(s) that {[he][she] is} {they are} not guilty because [*insert* the defense's theory if requested].

The State has the burden or obligation to prove each of the essential elements of the crime(s) charged in the INDICTMENT to you beyond a reasonable doubt. The purpose of this trial is to determine whether or not the State can meet this burden or obligation. You must presume that [*insert* name(s)], the [DEFENDANT, is] [DEFENDANTS, are] not guilty of the crime(s) charged in the INDICTMENT.

The crime(s) charged in the INDICTMENT [is][are] based on West Virginia Code Section(s) [*insert* Code Sections], which provide(s) as follows:

[*insert* the relevant portions of the statute(s) upon which the INDICTMENT rests]

To help you analyze the evidence as you hear it at trial, I will now give you a preliminary summary of the individual elements of the crime(s) charged which the State is required to prove beyond a reasonable doubt.

In order to prove the crime of [*insert* crime] charged in Count [*insert* count number], the State must prove:

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[*Insert* elements of crime]

At the end of the trial, after you have heard all the evidence and after I have conferred with the lawyers, I will give you the final and controlling statement as to what the elements of the crime(s) are. I am giving you this preliminary summary now to help you as you hear the evidence and see the exhibits as the trial progresses.

## 2.04 The Order of Trial

The trial will proceed in the following order:

*First*, the parties have the opportunity to make opening statements. The State may make an opening statement at the beginning of the case. The DEFENDANT(S) may make an opening statement following the State's opening statement or may postpone the making of an opening statement until the close of the State's case. The DEFENDANT(S) [is] [are] not obligated to make an opening statement.

What is said in the opening statements is not evidence. The opening statements serve as an introduction to the evidence which the party making the opening statement intends to produce during the trial.

*Second*, after the opening statements, the State will introduce evidence which it feels supports the charge(s) contained in the INDICTMENT.

*Third*, after the State has presented its evidence, the DEFENDANT(S) may present evidence, but [is] [are] not obligated to do so.

The burden or obligation, as you will be told many times during the course of this trial, is always on the State to prove each and every element of the offense(s) charged beyond reasonable doubt. The law never imposes on a DEFENDANT in a criminal case the burden of calling any witnesses, producing any exhibits, or introducing any evidence. A DEFENDANT is presumed to be innocent of the charge(s).

*Fourth*, after all the evidence has been received—in other words, after all the witnesses have testified and after all the exhibits have been admitted—each party will be given the opportunity to present argument to you in support of its case. This is called "closing argument."

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What is said in closing argument is not evidence, just as what is said in the opening statements is not evidence. The closing arguments are designed to present the parties' theories and conclusions as to what each believes the evidence has shown and what inferences may be drawn from the evidence.

*Fifth*, [after] [before] you hear the parties' closing arguments, I will give you, orally [*insert*, *if applicable*, and in writing], the final instructions concerning the law which you must apply to the evidence received during the trial. Those instructions will be much more detailed than these I am giving you now. You will then retire to consider your verdict. Your verdict must be unanimous—all twelve of you must agree to it. Your deliberations are secret. You will not be required to explain your verdict to anyone.

*Sixth*, you must keep an open mind to both the State and the defense during this trial. As you know, there are generally two sides to most stories and you must not make up your mind about any of the questions in this case until you have heard all the evidence and all the law which you must apply to that evidence—in other words, until you begin your deliberations.

## 2.05 Duty of the Jury—Duty of the Court—Evidence

Your duty as jurors is to find the facts. Under our system of justice you are the sole judge of the facts. If at any time I should make any comment regarding the facts, or you think I am making some comment on a piece of evidence, you are at liberty to disregard it totally. It is especially important that you perform your duty diligently and conscientiously, for ordinarily there is no way to correct a jury's erroneous determination of the facts.

On the other hand, and with equal emphasis, I instruct you that the law as given by the Court in these and other instructions constitute the only law for your guidance. It is your duty to accept and to follow the law as I give it to you even though you may disagree with it.

You are to determine the facts solely from the evidence admitted in the case. This evidence consists of the testimony of witnesses and exhibits received. Questions asked by the lawyers are not evidence: the evidence consists of the witnesses' answers to the questions, not the questions themselves. As I said earlier, statements and arguments of counsel are not evidence. [*Insert if applicable*: Counsel, however, may enter into agreements or stipulations of

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facts which are not in dispute in this case, and when they do so, you may accept those facts as established] [*insert if applicable*: I may also tell you that I am taking judicial notice of certain facts, and you then may accept those facts as true.] It is always up to you, however, to decide what facts the evidence established and what inferences are to be drawn from the evidence.

The parties may sometimes present objections to some of the testimony or exhibits. An objection is the only proper method of requesting a ruling from the Court concerning evidence. It is a lawyer's duty to object to evidence which the lawyer thinks may not properly be received or admitted. You should not be prejudiced in any way against a lawyer who makes objections or against the party the lawyer represents. At times I may sustain objections or direct that you disregard certain testimony or exhibits. You must not consider any evidence to which an objection has been sustained or which I have instructed you to disregard.

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## 2.06 Direct and Circumstantial Evidence

You may have already heard the terms "direct evidence" and "circumstantial evidence." "Direct evidence" is generally the testimony of a person who claims to have actual and direct knowledge of a fact—for example, the testimony of an eyewitness who claims to have seen an event. "Circumstantial evidence" is generally testimony of a chain of facts which may lead to a conclusion of some kind. The law makes no distinction between "direct evidence" and "circumstantial evidence." In considering the evidence in this trial you should give the evidence such weight or importance as you think it deserves, whether it is called "direct" or "circumstantial" evidence, and make the deductions and reach the conclusions to which your experience and common sense lead.

## 2.07 Witness Credibility

In attempting to determine the facts in this case you may be called upon to judge the credibility of the witnesses who testify. In deciding whether or not to believe a witness, you may consider (1) the witness's intelligence, (2) the witness's ability to have seen or heard what the witness said was seen or heard, (3) the witness's ability to remember what happened, (4) any interest that the witness might have in how this case is decided, and (5) whether the testimony is reasonable. You are free to believe all of what a witness or exhibit says, some of it, or none of it. I will address this subject again after you have heard all the evidence in the trial.

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## 2.08 Judge's Questioning and Rulings

No statement, ruling, remark, or comment which I may make during the course of the trial is intended either to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts. I may, for example, ask questions of witnesses. If I do so, it is for the purpose of explaining matters which I feel should be brought out and not in any way to indicate my opinion about the facts or about the weight you should give to the testimony of the witness I question. I may also find it necessary, for example, to admonish the lawyers and, if I do, you should not show prejudice toward a lawyer or the client of that lawyer because I have found it necessary to correct him or her.

At times during this trial it will be important for me to confer privately with the lawyers and others about various issues. During these conferences—both here and in my office—it is not our intention to hide anything from you, but simply to determine how certain issues will be handled. Please be patient with us during any such delays. We are only taking care to ensure the trial is being conducted fairly and according to the law.

At times you will also be required to wait in your jury room while I am required to hear and decide other matters from other cases not connected with this one. These delays are unavoidable. I will do everything I can to keep these interruptions to a minimum, but I can never avoid them entirely. Again, please be patient.

## 2.09 Sentencing Not Jury Concern—Exceptions

You are not to concern yourself in any way with the sentence a DEFENDANT might receive if you find [him] [her] guilty. Your sole function is to decide whether the State has sustained or carried its burden of proving the charges to you beyond a reasonable doubt. If, and only if, you find a DEFENDANT guilty of the charge(s) will it become the Court's duty to pronounce sentence.

### COMMENTS

In some circumstances, e.g., First Degree Murder, the jury will have a sentencing role. Specific instructions for those limited crimes will be applicable.

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## 2.10 Non-Communication Instructions

The lawyers and the parties will not speak with you because I have already instructed them that they must not. When you see a lawyer in the hallway, for example, and he or she does not speak with you, that lawyer is not being rude, cold, or unfriendly, but is simply doing what I have ordered all the lawyers to do in this case. It does not look appropriate for one side or the other to be speaking with any of you no matter how innocent or trivial that conversation might be.

Until this case is submitted to you to begin your deliberations, you must not discuss it with anyone at all—even with your fellow jurors. After it is submitted, you must discuss the case only in the jury room with your fellow jurors. It is important that you keep an open mind and not decide any issue in the case until the entire case has been submitted to you and you have received the final instructions of the Court regarding the law you must apply to the evidence.

## 2.11 Extraneous Information—Internet—Social Media[13]

You, as jurors, must decide this case based solely on the evidence presented here in this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case.

Please do not try to find out information from any source outside the confines of this courtroom. I know that many of you use cell phones, Blackberries, I-Phones, and other technological tools. You must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, I-Phone, text messaging, or on Twitter, Snapchat, or through any blog or website, including Facebook, Google+, MySpace, Linkedin, or

[13]These instructions on Social Media are taken from a proposed instruction authored by the Committee on Court Administration and Case Management of the United States Judicial Conference.

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YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions. Do not read any news accounts about this case in any newspaper or on the internet or watch any such news accounts on television or listen to any such news accounts on the radio.

You must not consider anything you may have read or heard about the case outside of this courtroom, whether before or during the trial or during your deliberations. Do not attempt any independent research or investigation about this matter. Your decision in this case must be based solely and exclusively upon the evidence received during this trial and my final instructions, and not upon anything else.

## 2.12 Juror Note Taking

There will not be a transcript of the proceedings for your deliberations. However, you are permitted to take notes during the trial. You are not required to take notes but you are allowed to take notes if you choose to do so. Please remember that the notes you take are to be an aid in your memory but not a substitute for it. Therefore, do not try to write down every word that is said. Listen to the witnesses and watch them and remember their testimony. You may take notes if you choose to in order to help your memory but it is your memory upon which you should rely in recalling the testimony. If you choose to take notes your notes must be your own. Do not look at another juror's notes and do not share or show your notes to another juror. I mentioned earlier that you must not discuss the case among yourselves until you begin to deliberate at the end of the trial, but by the same token if you begin to compare notes before the end of the trial then that's a form of deliberation. For the same reason, you must not look at each other's notes or compare notes during the trial. So, if you miss something that you were trying to write down you can't look at your neighbor and say "What was that?" Don't do that. It's from your notes and your notes only.

For this purpose each of you will be given a clipboard and notepad and pencil after opening statements. When you get the pad write only your name on the front sheet, just your name, so that we will know who it belongs to, and then

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begin your notes on the second page; that way there is always a cover sheet and no one can inadvertently see your notes.

The bailiff will collect your notepads at the lunch break and at evening breaks and redistribute them to you as we reassemble; during the recesses no one will look at your notes, and that includes me. I won't look at them either. They are your private notes for your use only.

Take notes only of the evidence. You will not be permitted to take notes of opening statements or closing summation or the Court's instructions because these are not evidence. And remember this is optional for you; you can just choose not to altogether if you don't want to.[14]

## 2.13 Conclusion

Please keep a few things in mind as we begin this trial.

Your job is to decide all the factual questions in this case—like who should be believed and who should not be believed. I will decide all the legal questions in this case—like what testimony or exhibits are received into evidence and which are not received. Please do not concern yourselves with the legal questions.

The DEFENDANT(S) [has] [have] pled not guilty and [is] [are] presumed to be innocent of the crime(s) charged. As such, the DEFENDANT(S) [is] [are] not required to produce any evidence whatsoever. By bringing the indictment, moreover, the State has accepted the responsibility of proving the DEFENDANT'S(S') guilt to each of you—unanimously—beyond a reasonable doubt. Finally, do not discuss this case with anyone and keep an open mind regarding each issue in the case until all the evidence has been received. At that time, I will be able to give you the complete and final instructions that you must use to guide you in reaching your decisions. Then and only then will you be fully prepared to begin your deliberation and reach your verdict.

[14] *State v. Triplett*, 187 W. Va. 760, 767-68, 421 S.E.2d 511, 518-19 (1992).

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## Comments

It "certainly is the obligation of the court to do all within its power to assist the jury in understanding the issues involved and the application of the law." *United States v. Bynum*, 566 F.2d 914, 924 n.7 (5th Cir. 1978). The general instructions at the beginning of a criminal trial should at least cover the following:

1. The nature of the underlying dispute in the case;
2. Basic legal principles such as the burden of proof;
3. Their duties and responsibilities in the trial;
4. The essential elements of the claim, charge, or affirmative defense in the case;
5. What is and what is not evidence;
6. How they may judge credibility of witnesses;
7. The unavailability of a transcript for their use;
8. The reasons for conducting bench conferences between the judge and counsel during the trial;
9. The code of conduct that applies to jurors during the trial; and
10. A step-by-step outline of how the trial will proceed.

Robert E. Larsen, Navigating the Federal Trial § 2:14 (2015 ed.).

Case specific evidentiary or substantive issues should generally not be addressed until they arise during the trial or in the final instructions immediately before deliberations. Even at the beginning of the trial, however, the jury should be given some general guidance concerning the essential elements of the offense or offenses charged. This should be discussed with counsel in advance of the preliminary charge.

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## EVIDENTIARY INSTRUCTIONS

During trial, courts will sustain objections made to evidence or will admit evidence admissible for one purpose but not for others.[15] It is presumed jurors will follow the court's instructions to either disregard the evidence or to limit the evidence to its proper scope.[16]

### 3.01 Impeachment by Prior Inconsistent Statement(s)[17]

A witness's testimony may be discredited by showing the witness testified falsely, or by evidence that at some other time the witness said or did something, or failed to say or do something, that was inconsistent with the witness's trial testimony.

Earlier statements of a witness are not admitted in evidence to prove that the contents of those statements are true, and therefore you may not consider the earlier statements to prove that the content of an earlier statement is true; you may only use earlier statements to determine whether the earlier statements are consistent or inconsistent with the trial testimony of the witness and, therefore, whether they affect the credibility of that witness.

If you believe a witness has been discredited in this manner, it is your exclusive right to give that witness's testimony whatever weight you think it deserves.

## COMMENTS

In *State v. Collins*, 186 W. Va. 1, 409 S.E.2d 181 (1990), the Supreme Court of Appeals ruled that prior inconsistent statements cannot be used as substantive evidence of guilt, but only to attack the veracity of the witness's trial testimony. The Court required a limiting instruction constraining the jury's consideration of the prior inconsistent statement to this reason, "the trial court has an obligation to instruct the jury that the impeaching testimony may only be considered as bearing on the witness's credibility and not substantive evidence." *Id.* at 189-90.

[15] W. VA. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

[16] *State v. Miller*, 197 W. Va. 588, 605-606, 476 S.E.2d 535, 553 (1996).

[17] W. VA. R. EVID. 607; *State v. Collins*, 186 W. Va. 1, 409 S.E.2d 181 (1990).

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### 3.02 Flight Evidence[18]

The Court instructs the jury that evidence of a DEFENDANT'S flight is competent along with other facts and circumstances, on the DEFENDANT'S guilt, but the jury should consider any evidence of flight with caution since such evidence has only a slight tendency to prove guilt.

The jury is further instructed that the farther away the flight is from the time of the commission of the offense the less weight it will be entitled to, and the circumstances should be cautiously considered, as flight may be attributed to reasons other than consciousness of guilt.

## COMMENTS

Before a flight instruction is given, the court must conduct an *in camera* hearing to determine if the probative value of the flight evidence is substantially outweighed by its prejudicial effect. Syl. Pt. 6, *State v. Payne*, 167 W. Va. 252, 280 S.E.2d 72 (1981).

In *State v. Goff*, No. 12-0432 (W. Va. Mar. 12, 2013) (Memorandum Decision), the petitioner argued this instruction was impermissible because the term "flight" was not defined within the instruction. The Supreme Court of Appeals rejected this argument.

Evidence that the Defendant did not flee by not escaping incarceration is inadmissible evidence. Syl. Pt. 1, *State v. Bickle*, 167 W. Va.252, 45 S.E. 917 (1903).

### 3.03 "Other Acts" Evidence under Rule 404(b)[19]

You have heard evidence concerning alleged "other acts" of the DEFENDANT which are not charged in this INDICTMENT. You are instructed that this evidence is not admitted as proof of the DEFENDANT'S guilt on the current charge. This evidence is admitted for a limited purpose only, and it may be considered by you only in deciding whether a given issue or element relevant to the present charge has been proven. In this instance, [*insert* specific purpose of the evidence].

You may not use this evidence in considering whether the State has established the crime(s) charged in the INDICTMENT. In addition, such evidence is not relevant to any other matters, such as the character of the DEFENDANT, whether the DEFENDANT is a bad person, or whether the DEFENDANT had the propensity or the disposition to commit the crime

[18] *State v. Payne*, 167 W. Va. 252, 280 S.E.2d 72 (1981).

[19] W. VA. R. EVID. 404(b). *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

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charged. This evidence may not be considered in that regard, since the DEFENDANT'S character is not an issue.

Accordingly, this evidence may be considered by you only for the limited purpose for which it has been admitted.

## COMMENTS

Rule 404(b) "other acts" evidence is one of the most litigated of the rules of evidence. In *State v. McGinnis*, 193 W. Va. 147, 153, 455 S.E.2d 516, 522 (1994), the Supreme Court of Appeals recognized "that Rule 404(b) determinations are among the most frequently appealed of all evidentiary rulings and the erroneous admission of evidence of other acts is one of the largest causes of reversal of criminal convictions."

In *State v. McGinnis*, the Supreme Court cited an instruction given at trial drafted by the defense. The Court condemned a portion of the instruction, observing that the terms "criminal," "crime," or "offense" should not be used when giving a 404(b) limiting instruction. The above instruction should be offered when the evidence is to be introduced as well as in the general jury instructions at the end of the case, unless the defendant requests that the instruction not be given.

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## JURY RECESSES

### 4.01 Admonitions at Court Recesses (Long Form)

We are about to take a break from the courtroom proceeding, which we usually call a "recess." It is very important that you keep in mind and obey the following instructions with reference to each of the recesses of Court during the day and over the evening whether I specifically remind you of this or not.

*First*, you should keep an open mind throughout the trial, reaching your decision only during your deliberations, which will take place after all the evidence has been admitted, after you have heard the closing arguments of counsel, and after I have given you my instructions on the law that governs this trial.

*Second*, do not discuss the case among yourselves or with anyone else during the course of the trial. Do not permit any third person to discuss the case in your presence and, if anyone does so, despite your telling him or her not to, please report that to the Court immediately.

*Third*, though it is a normal human tendency to talk with people you meet, please do not talk, either in or out of the courtroom, with any of the parties or their attorneys or with any witness. By this I mean not only to avoid talking about the case, but do not talk at all, even to pass the time of day or simply to be polite. In no other way can all parties to this case be assured of the absolute impartiality they are entitled to expect from you as jurors. The lawyers already know that no communication is permitted between them and the jurors. They are not being unfriendly when they do not speak with you. The lawyers are simply following my orders.

*Fourth*, do not read about the case in the newspapers or on the internet; do not listen to radio or watch television broadcasts or stream content through the internet or any app about the trial. If a newspaper headline or news broadcast about the case catches your eye or ear, do not examine the article or watch or listen to the broadcast any further. The person who wrote or is reporting the story may not have listened to all the testimony, or may be getting information from people whom you will not see in court under oath and subject to cross-examination, or may emphasize an unimportant point, or may simply be

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wrong. You must base your verdict solely and exclusively on the evidence received here in court during the trial.

## COMMENTS

The long form instruction is best reserved for particularly involved or important cases. In most situations, the short form instruction will suffice. *See* § 4.02.

### 4.02 Admonitions at Court Recesses (Short Form)

During recess and all other recesses, you must not discuss this case with anyone. This includes your family, other jurors, and anyone involved in the trial. If anyone attempts in any way to talk to you about this trial during a recess, it is your obligation to tell me immediately.

Do not watch or listen to any news reports concerning this trial on television or on radio or streamed through the internet or an app, and do not read any news accounts of this trial in a newspaper or on the internet. Do not speak at all with any of the parties, the witnesses, or the attorneys.

You are required to keep an open mind until you have heard all the evidence in this case, the closing arguments of counsel, and the final instructions of law provided by the Court.

## COMMENTS

This instruction should be repeated before the taking of all recesses.

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## FINAL JURY CHARGE

Final jury instructions are the concluding charge from the bench to the jurors that outline crucial legal concepts that will govern the deliberations.

### 5.01 Introduction to the Final Charge—Provinces of the Court and Jury

Members of the jury:

Now that you have heard all the evidence that is to be received in this trial [and each of the arguments of counsel] [before the arguments of counsel], it is my duty to give you the final instructions of the Court as to the law that is applicable to this case. You should use these instructions to guide you in your decisions.

All the instructions of law given to you by the Court—those given to you at the beginning of the trial, those given to you during the trial, and these final instructions—must guide and govern your deliberations.

It is your duty as jurors to follow the law as stated in all the instructions of the Court and to apply these rules of law to the facts as you find them to be from the evidence received during the trial.

Counsel [have quite properly referred] [may quite properly refer] to some of the applicable rules of law in their closing arguments to you. If, however, any difference appears to you between the law as stated by counsel and that as stated by the Court in these instructions, you are to be governed by the instructions the Court has given you.

You are not to single out any one instruction alone as stating the law, but must consider the instructions as a whole in reaching your decisions.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base any part of your verdict upon any other view or opinion of the law than that given in these instructions, just as it would be a violation of your sworn duty, as the judges of the facts, to base your verdict upon anything but the evidence received in the case. You were chosen as jurors for this trial in order to evaluate all the evidence received and to decide each of the factual questions presented by the allegations

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brought by the State in the INDICTMENT and the DEFENDANT['S] [S'] plea(s) of not guilty.

In resolving the issues presented to you for decision in this trial, you must not be persuaded by bias, prejudice, or sympathy for or against any party to this case or by any public opinion. Justice—through trial by jury—depends on the willingness of each individual juror to seek the truth from the same evidence presented to all the jurors here in the courtroom and to arrive at a verdict by applying the same rules of law as are now being given to each of you in these instructions.

## 5.02 Judging the Evidence

There is nothing particularly different in the way you should consider the evidence in a trial from the way any reasonable and careful person would deal with a very important question that must be resolved by examining facts, opinions, and evidence. You are expected to use your good sense in considering and evaluating the evidence in the case. Use the evidence only for those purposes for which it has been received and give the evidence a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the State proves the DEFENDANT guilty beyond a reasonable doubt, say so. If the State does not prove guilt beyond a reasonable doubt, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything other than the evidence received in the case and the Court's instructions. Remember as well that the law never imposes upon a DEFENDANT in a criminal case the burden or duty of calling any witnesses or producing any evidence, because the burden of proving guilt beyond a reasonable doubt is always with the State.

## COMMENTS

As noted in *Smith v. Slack*, 125 W. Va. 812, 26 S.E.2d 387, 389 (1943), "[c]ommon knowledge and common sense do not depart from a man upon…entering a jury box." The Eleventh Circuit observed that:

> Jurors are correctly instructed to use their common sense and to evaluate the facts in light of their "common knowledge of the natural tendencies and inclinations of human beings."…It has long been the

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> law that in giving effect to such inferences as may reasonably be drawn from the evidence juries properly apply their common knowledge, observations and experience in the affairs of life.

*United States v. Cruz-Valdez*, 773 F.2d 1541, 1546 (11th Cir. 1985).

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## 5.03 Evidence Received in the Case, Stipulations, Judicial Notice, and Inferences

The evidence in this case consists of the sworn testimony of the witnesses—regardless of who may have called them; all exhibits received in evidence—regardless of who may have produced them; all facts which may have been agreed to or stipulated; and all facts and events which may have been judicially noticed.

[*Insert if applicable*: Depositions have also been received in evidence. These contain sworn testimony with counsel for each party being entitled to ask questions. A deposition may be accepted by you, subject to the same instructions which apply to testimony received in court].

[*Insert if applicable*: When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts].

[*Insert if applicable*: The Court has taken judicial notice of certain facts or events. When the Court declares that it has taken judicial notice of some fact or event, you may accept the Court's declaration as evidence and regard as proved that fact or event. You are not required to do so, however, since you are the sole judge of the facts].

You must entirely disregard any proposed testimony or proposed exhibit to which the Court sustained an objection and any testimony or exhibit the Court ordered struck. Anything you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

Questions, objections, statements, and arguments of counsel are not evidence in the case [*insert if applicable*: unless made as an admission or stipulation of fact].

You are to base your verdict only on the evidence received in the case. In your consideration of the evidence received, however, you are not limited to the bald statements of the witnesses or to the bald assertions in the exhibits. In other words, you are not limited solely to what you see and hear as the witnesses testify or as the exhibits are admitted. You are permitted to draw from the facts which you find have been proved such reasonable inferences as you feel are justified in the light of your experience and common sense.

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## COMMENTS

*See* W. Va. R. Evid. 201(g), which governs instructing juries on judicial notice.

"[A] stipulation is more potent than simply an admission. By so stipulating, a defendant waives the requirement that the government produce evidence (other than the stipulation itself) to establish the facts stipulated to beyond a reasonable doubt." *United States v. Muse*, 83 F.3d 672, 678 (4th Cir. 1996). *See also, in re Starcher*, 202 W. Va. 55, 61, 501 S.E. 2d 772, 778 (1998) (*dicta*) ("Numerous jurisdictions have upheld convictions in criminal cases where one or more of the elements of the crime was proven by stipulation.").

For a discussion of the use of stipulations, *see State v. Herbert*, 234 W. Va. 576, 767 S.E.2d 471 (2014).

"Jurors are not expected in their deliberations to lay aside matters of common knowledge or their own observation and experience to the affairs of life, but are expected to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct." 89 C.J.S *Trial* § 956. Thus, jurors may permissibly draw from the evidence reasonable inferences.

### 5.04 Direct and Circumstantial Evidence

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case.

## COMMENTS

There is no qualitative difference between direct and circumstantial evidence and guilt may be found based solely on circumstantial evidence. *State v. Guthrie*, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995). Juries are routinely given this instruction. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003).

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## 5.05 Inferences

Inferences are simply deductions or conclusions which reason and common sense lead the jury to draw from the evidence received in the case.

### COMMENTS

In criminal cases inferences are constitutionally permissible; presumptions are not. *Sandstrom v. Montana*, 442 U.S. 510 (1979); Syl. Pt. 1, *State v. O'Connell*, 163 W. Va. 366, 256 S.E.2d 429 (1979) ("In a criminal prosecution, it is constitutional error to give an instruction which supplies by presumption any material element of the crime charged.").

## 5.06 Jury's Recollection Controls

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel. You are the sole judges of the evidence received in this case.

### COMMENTS

*See State v. Meadows*, 172 W. Va. 247,304 S.E.2d 831, 840 (1983), where the Supreme Court of Appeals held that, while a prosecuting attorney misstated some facts in closing, such misstatements were objected to. The objections were sustained, and the court "cautioned the jury members to use their own memories on the subject, and not the memory of the prosecuting attorney."

"When a dispute occurs between counsel during argument as to the characterization of testimony heard during trial, the trial court may properly advise the jury that it is their prerogative to rely on their own memories in determining what the testimony was and in accepting or rejecting argument thereon." *State v. Bennett*, 183 W. Va. 570, 577, 396 S.E.2d 751, 758 (1990).

## 5.07 Statements, Arguments, and Questions are Not Evidence

Nothing the lawyers who have tried this case have said or done can be considered by you as evidence of any fact in this case. The lawyer's opening statements are only intended to give you a brief outline of what each side expects to prove, so that you may better understand the testimony of witnesses.

The lawyers' closing arguments are often helpful in refreshing your recollection of the witnesses' testimony and such facts as may be developed

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thereby, but your verdict shall not be based upon the statements the lawyers made to you at the opening of the trial or upon their closing arguments at the end of the trial. Such statements and arguments are not evidence.

The lawyer's function is to point out those things they believe are most significant or most helpful to their side of the case, and in doing so to call to your attention certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls this case.[20]

## COMMENTS

Not only is "it proper to instruct the jury that comments or questions by counsel are not substantive evidence[,]" *United States v. Cruz*, 26 F.3d 1119 (5th Cir. 1994) (*per curiam*) (Table), trial courts "should instruct the jury that statements by counsel, including assertions of fact, are not to be considered evidence." *United States v. Gholston*, 10 F.3d 384, 389 (6th Cir. 1993). *See Perrine v. E. I. DuPont De Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 n. 56 (2010) (quoting *Crum v. Ward*, 146 W. Va. 421, 457, 122 S.E.2d 18, 38 (1961) (Haymond, Pres., dissenting) ("This Court has made clear that closing arguments are not evidence: 'Every trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual views, and that jurors almost without exception during the trial of a case are so informed or instructed by counsel and the court").

[20]This instruction is taken from one approved by the West Virginia Supreme Court in *Stewart v. Ballard*, No. 14-0300, 2015 WL 570147, at *10 & n.12 (W. Va. Feb. 9, 2015) (Memorandum Decision).

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## 5.08 Consider Only the Offense Charged

The DEFENDANT(S) [is] [are] not on trial for any act or any conduct not specifically charged in the INDICTMENT.

### COMMENTS

This instruction should be augmented if lesser included offenses are presented to the jury.

## 5.09 Presumption of Innocence, Burden of Proof, and Reasonable Doubt

The State is not required to prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is one based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

The jury will remember that a DEFENDANT is never to be convicted on mere suspicion or conjecture.

The burden is always upon the State to prove guilt beyond a reasonable doubt. This burden never shifts to a DEFENDANT, for the law never imposes upon a DEFENDANT in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So, if you, after careful and impartial consideration of all the evidence in the case, have a reasonable doubt that the DEFENDANT is guilty of the charge, you must acquit. If you view the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—you should adopt the conclusion of innocence.

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## COMMENTS

This instruction was drawn from *State v. Goff*, 166 W. Va. 47, 272 S.E.2d 457, n.9 (1980). *See also, State v. Boswell*, 170 W. Va. 433, 442, 294 S.E.2d 287, 296 (1982) (reemphasizing the continuing validity of the *Goff* instruction). The Supreme Court of Appeals has "repeatedly discouraged the giving of instructions which attempt to define the reasonable doubt standard beyond the traditional formulation." *State v. Boswell*, 170 W. Va. 433, 442, 294 S.E.2d 287, 296 (1982).

### 5.10 Verdict as to Defendant Only

You are here to determine whether the State has proven the DEFENDANT guilty of the charge(s) in the INDICTMENT beyond a reasonable doubt. You are not called upon to return a verdict as to the guilt or innocence of any other person.

So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of DEFENDANT(S) for the crime(s) charged in the INDICTMENT, you should so find, even though you may believe that one or more other unindicted persons are also guilty. But if any reasonable doubt remains in your mind after impartial consideration of all the evidence in the case, it is your duty to find DEFENDANT(S) not guilty.

## COMMENTS

The validity of this instruction has been upheld by federal courts on several occasions. *E.g.*, *Nadeau v. Matesanz*, 289 F.3d 13, 15 (1st Cir. 2002); *United States v. Falls*, 90 Fed. App'x 351, 358-59 (10th Cir. 2004); *United States v. Dennis*, 645 F.2d 517, 522-23 (5th Cir. 1981) (*overruled on other grounds)*, *United States v. Lane*, 474 U.S. 438 (1986); *United States v. Falls*, 90 Fed. App'x 351, 358-59 (10th Cir. 2004).

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## 5.11 Consider Each Count Separately in Multi-Defendant Trial

A separate crime is alleged against one or more of the DEFENDANTS in each count of the INDICTMENT. You should consider each alleged offense and any evidence pertaining to it separately. The fact that you find one DEFENDANT guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against that DEFENDANT or any other DEFENDANT. You must give separate and individual consideration to each charge against each DEFENDANT.[21]

### COMMENTS

Even in civil cases the West Virginia Supreme Court of Appeals has recognized, "[t]he law has long held that separate defendants must be treated separately. In rulings and proceedings, defendants are entitled to preserve their separateness and to not be conflated together." *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 549, 584 S.E.2d 176, 182 (2003). *See United States v. Porter*, 821 F.2d 968, 972 (4th Cir. 1987) ("No prejudice exists if the jury could make individual guilt determinations by following the court's cautionary instructions, appraising the independent evidence against each defendant.").

## 5.12 Single Defendant—Multiple Counts

A separate crime is charged in each count of the INDICTMENT. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the DEFENDANT guilty or not guilty as to one of the crimes charged should not control your verdict as to any other.

### COMMENTS

This instruction relates to a single defendant charged in a multicount indictment. "Prejudice from a failure to sever counts can be cured by proper jury instructions, and juries are generally presumed to follow their instructions." *United States v. Hickerson*, 489 F.3d 742, 746 (5th Cir. 2007).

[21] *United States v. Johnson*, 219 F.3d 349, 357 (4th Cir. 2000).

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## 5.13 Witness Credibility—Sole Judges

Now, I have said you must consider the evidence. You are the sole judges of the credibility or believability of each witness and the weight to be given to a witness's testimony.

### COMMENTS

This instruction is based on a practically axiomatic point of law. *See, e.g.*, Syl. Pt. 2, *State v. Scurlock*, 99 W. Va. 629, 130 S.E. 263 (1925) ("Where the fact of guilt or innocence depends on the conflicting evidence of witnesses to the crime, the jury are the sole judges of the weight and credibility that should be given their testimony."); Syl. Pt. 9, *State v. Cirullo*, 142 W. Va. 56, 93 S.E.2d 526 (1956) ("When the fact of guilt or innocence depends on the conflicting evidence of witnesses to the crime, the jury is the sole judge of the weight and the credibility to be given to their testimony."); Syl. Pt. 2, *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967) (The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.").

## 5.14 Witness Credibility—Elements

In instructing you to consider all the evidence, I do not mean that you must accept all the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness and of the weight to be given to that witness's testimony. A witness's credibility means a witness's truthfulness or lack of truthfulness. The weight of evidence means the extent to which you are, or are not, convinced by the evidence.

The number of exhibits and the number of witnesses testifying on one side or the other of any issue are not alone the test of credibility of the witnesses and the weight of the evidence. If the evidence warrants, you may believe one witness against a number of witnesses testifying differently. The tests are how truthful is the witness and how convincing is that witness's evidence in light of all the evidence and circumstances shown?

In determining the credit and weight you will give to the testimony when any witness has testified before you, you may consider, if found by you from the evidence[22]:

1. The witness's good memory, or lack of memory;

[22] *See State v. Stevenson*, 147 W. Va. 211, 235-36, 127 S.E.2d 638, 653 (1962); *State v. McKenzie*, 197 W. Va. 429, 442-43, 475 S.E.2d 521, 534-35 (1996).

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2. The witness's interest, or lack of interest, in the outcome of this trial;
3. The witness's demeanor and manner of testifying;
4. The witness's opportunity or means of having knowledge of the matters about which the witness testified or, conversely, the lack of opportunity or means of having such knowledge;
5. The reasonableness or unreasonableness of the witness's testimony; and
6. The witness's fairness or lack of fairness.

## 5.15 Testifying Defendant

You should judge the DEFENDANT'S testimony in the same way as you judge the testimony of any other witness in this case.

## COMMENTS

A defendant's right to testify in his or her own defense is an aspect of the right to a fair trial under W. VA. CONSTITUTION, art. III, § 10, the Compulsory Process Clause of the Sixth Amendment to the UNITED STATES CONSTITUTION, the Fifth Amendment's Self-Incrimination Clause, and the Due Process Clause of the Fourteenth Amendment. As the West Virginia Supreme Court of Appeals held, "[a] criminal defendant's right to give testimony on his own behalf is protected under article three, section ten of our Constitution, as well as the due process provisions of the federal constitution." Syl. Pt.4, *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988). *See also, Rock v. Arkansas*, 483 U.S. 44, 51–52 (1987).

The statutory foundation for the right to testify in West Virginia is stated as follows:

> In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, with his consent (but not otherwise) be a competent witness on such trial or examination; and if he so voluntarily becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by anyone.

W. VA. CODE § 57–3–6 (2012).

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## 5.16 Non-Testifying Defendant

The DEFENDANT in a criminal case has an absolute right under our Constitution not to testify. The fact the DEFENDANT did not testify must not be discussed or considered by you in any way when deliberating and arriving at your verdict. No inference of any kind may be drawn from the fact that the DEFENDANT decided to exercise [his] [her] privilege under the Constitution and did not testify. As stated before, the law never imposes upon a DEFENDANT in a criminal case the burden or duty of calling any witnesses or of producing any evidence.

### COMMENTS

The right to decline to testify with no adverse consequences is of constitutional magnitude arising under the Fifth Amendment to the UNITED STATES CONSTITUTION's Self-Incrimination Clause (*see, e.g., Griffin v. California*, 380 U.S. 609 (1965)) and the WEST VIRGINIA CONSTITUTION's Fifth Amendment analogue, West Virginia Constitution Article III, § 5.

The statutory foundation of the right against self-incrimination is W. VA. CODE § 57–3–6 (2012) (see the previous section's Comments for the text of the statute).

## 5.17 Voluntariness of Defendant's Statements

The Court instructs the jury that if you do not believe the statement(s) the DEFENDANT made [was] [were] freely and voluntarily made, then you have a right to reject the statement wholly from your consideration.

The Court instructs the jury that if you do not believe the statement(s) the DEFENDANT made [was] [were] freely made without influence of hope or fear held out by the officers, then you are at liberty to disregard the statement.

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## Comments

In Syl. Pt. 4, *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978), the Supreme Court of Appeals "adopt[ed] the 'Massachusetts' or 'humane' rule whereby the jury can consider the voluntariness of the confession, and…approve[d] an instruction telling the jury to disregard the confession unless it finds that the State has proved by a preponderance of the evidence it was made voluntarily." The Court continued in Syllabus Point 5 that "[i]n all trials conducted hereafter where a confession or admission is objected to by the defendant at trial or prior to trial on the grounds of voluntariness, the trial court must instruct the jury on this issue if requested by the defendant." *Id*.

The West Virginia Supreme Court has issued several opinions which dealt with the so-called humane instructions. *See, e.g.*, *State v. Goodmon*, 170 W. Va. 123, 290 S.E.2d 260, n.4 (1981); *State v. Taylor*, 174 W. Va. 225, 324 S.E.2d 367 n.2 (1984).

### 5.18l Missing Witness Instruction

If it is particularly within the power of either the State or the defense to produce a witness who could give relevant testimony on an issue in the case, the failure to call that witness may give rise to an inference that this testimony would have been unfavorable to that party. No such conclusion should be drawn by you, however, with regard to a witness who is equally available to both parties or where the testimony of that witness would be merely repetitive or cumulative. The jury must always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

## Comments

"The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893). The leading West Virginia case on missing witness instructions is a civil case, *McGlone v. Superior Trucking Co.*, 178 W. Va. 659, 363 S.E.2d 736 (1987).

For a missing or absent witness instruction to be justified, the proposing party must demonstrate that it is not within that party's power to compel the witness's attendance and the opposing party has such ability—in other words, if a witness is equally available or unavailable to both sides, no missing witness instruction is warranted. *See United States v. Milton*, 52 F.3d 78, 81 (4th Cir. 1995). Some courts eschew a missing witness rule directed against a defendant because it implicates the defendant's right not to present a defense. *See, e.g.*, *McGlone, supra.* However, the final sentence of the instruction is meant to address that concern. In short, in West Virginia a missing witness rule invoked against a defendant should be offered and given only with extreme caution.

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## 5.19 Lost or Destroyed Evidence Rule (Adverse Inference Instruction)

If you find that the State has lost, destroyed, or failed to preserve any evidence whose contents or quality are material to any issue in this case, then you may draw an inference unfavorable to the State which in itself may create reasonable doubt as to the DEFENDANT'S guilt.[23]

## COMMENTS

In *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995), the Supreme Court of Appeals held that the West Virginia Due Process Clause provides greater protection for a defendant than the federal due process clause does when the State negligently loses or destroys evidence.

> When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

*Id*, Syl. Pt. 2.

[23] *State v. Morris*, 227 W. Va. 76, 705 S.E.2d 583, n.14 (2010)

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## 5.20 Eyewitness Identification Instruction

One of the disputed issues in this case is the identification of the DEFENDANT as the person who committed the crime(s) charged. The State has the burden of proving this beyond a reasonable doubt. In considering whether the State has proved beyond a reasonable doubt that the DEFENDANT was the person who committed the crime(s) charged in the INDICTMENT, you may consider the following with regard to an identification witness's testimony:

1. The witness's opportunity to observe the person(s) committing the crime, which includes the amount of time for observation, and the physical conditions such as lighting, distance, or obstructions at the time of the observation;
2. The witness's degree of attention at the time of the observation, whether the witness was under stress, and whether the witness had occasion to see or know the person in the past;
3. Whether the witness gave a description of the person after the crime and, if so, the description's accuracy and the length of time after the crime the description was given; and
4. Whether the witness made any subsequent identification of the person after the crime, along with the circumstances surrounding such subsequent identification, the witness's level of certainty at such subsequent identification, and the length of time between the crime and the subsequent identification.[24]

## COMMENTS

In *State v. Payne*, 167 W. Va. 252, 263, 280 S.E.2d 72, 79 (1981), the Supreme Court of Appeals "emphasize[d] that we are not here mandating the use of this type instruction in every case involving identification testimony. Rather, we note that this type instruction may be proper in cases where the identification testimony is uncorroborated."

[24] *State v. Watson*, 173 W. Va. 553, 318 S.E.2d 603 n.16 (1984).

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## 5.21 Accomplice Instruction

The Court instructs the jury that an accomplice is a person who knowingly and with criminal intent participates directly or indirectly with another person in the commission of a crime. An accomplice's testimony is admissible in evidence; however, in considering such testimony which purports to connect the DEFENDANT with the commission of the crime but which is not supported by other evidence and circumstances, you should carefully and cautiously examine such testimony in determining what weight to give it. You may, however, find the DEFENDANT guilty on the evidence of an accomplice that is not supported by other evidence *only* if the accomplice convinces you beyond a reasonable doubt of the DEFENDANT'S guilt.[25]

## COMMENTS

A court must issue this instruction upon the Defendant's request. "Conviction for a crime may be had upon the uncorroborated testimony of an accomplice; but in such case the testimony must be received with caution and the jury should, upon request, be so instructed." Syl. Pt. 12, in part, *State v. Humphreys*, 128 W. Va. 370, 36 S.E.2d 469 (1945).

[25] *State v. Satterfield*, 193 W. Va. 503, 515, 457 S.E.2d 440, 452 (1995).

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## INSTRUCTIONS DURING DELIBERATIONS

### 6.01 *Allen* Charge

Members of the Jury, you have informed the Court of your inability to reach a verdict in this case. At the outset, the Court wishes you to know that, although you have a duty to reach a verdict if possible, the Court has neither the power nor the desire to compel agreement upon a verdict. These remarks are to point out to you the importance and desirability of reaching a verdict in this case, provided, however, that you, as individual jurors, can do so without surrendering or sacrificing your conscientious scruples or personal convictions. You will recall that, upon assuming your duties in this case, each of you took an oath. That oath places upon each of you, as individuals, the responsibility of arriving at a true verdict upon the basis of your own opinion and not merely upon acquiescence in the conclusions of your fellow jurors. This allows for the possibility that opinions may be changed by conference in the jury room. The jury system's object is to reach a verdict by a comparison of views and by a consideration of the proofs of your fellow jurors.[26]

## COMMENTS

An *Allen* charge is a "supplemental instruction given to encourage deadlocked juries to reach an agreement." *State v. Shabazz*, 206 W. Va. 555, 559, 526 S.E.2d 521, 525 (1999). The Supreme Court of Appeals has explained that, "[w]here a jury has reported that it is unable to agree and the trial court addresses the jury urging a verdict, but does not use language the effect of which would be to cause the minority to yield its views for the purpose of reaching a verdict, the trial court's remarks will not constitute reversible error." Syl. Pt. 2, *State v. Johnson*,168 W. Va. 45, 282 S.E.2d 609 (1981).

[26] *State v. Waldron*, 218 W. Va. 450, 460, 624 S.E.2d 887, 897 (2005) (*per curiam*).

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# SUBSTANTIVE OFFENSES

## 7.1 CRIMES AGAINST THE GOVERNMENT

### 7.1.1 Impersonating a Law Enforcement Officer or Law Enforcement Official.

Count ___ of the INDICTMENT charges the DEFENDANT with Impersonating a Law Enforcement Officer or Law Enforcement Official.

Impersonating a Law Enforcement Officer or Law Enforcement Official occurs when a person {falsely represents [himself] [herself] to be a Law-Enforcement Officer or Law-Enforcement Official} {falsely represents [he] [she] is under the order or direction of a Law Enforcement Officer or Law Enforcement Official} {, not a Law-Enforcement Officer or Law-Enforcement Official, wears the uniform prescribed for a Law-Enforcement Officer or Law Enforcement Official} {, not a Law Enforcement Officer or Law Enforcement Official, wears the badge or other insignia adopted for use by such Law Enforcement Officers or Law Enforcement Officials} with the intent to deceive another.[27]

A "Law Enforcement Officer" is a duly authorized member of a law-enforcement agency who is authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality thereof, other than parking ordinances. It includes those persons employed as campus police officers at state institutions of higher education, persons employed by the Public Service Commission as motor carrier inspectors and weight enforcement officers charged with enforcing commercial motor vehicle safety and weight restriction laws and those persons employed as rangers by resort area districts. The term does not include the West Virginia State Police and individuals hired by nonpublic entities to provide security services.

A "Law-Enforcement Official" is the duly appointed chief administrator of a designated law-enforcement agency or a duly authorized designee.

A "Law Enforcement Agency" is any duly authorized state, county or municipal organization employing one or more persons whose responsibility is the enforcement of laws of the state or any county or municipality thereof

[27] W. VA. CODE § 61–1–9 (2014).

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but does not include the Public Service Commission, any state institution of higher education, or any resort area district.

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Impersonating a Law Enforcement Officer or Law Enforcement Official, the State must overcome the presumption that the DEFENDANT is innocent and prove to your satisfaction beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on the ___ day of [*insert* month], [*insert* year],
4. did {falsely represent [himself] [herself] to be a Law-Enforcement Officer or Law-Enforcement Official} {falsely represent [himself] [herself] to be under the order or direction of a Law Enforcement Officer or Law Enforcement Official} {,not being a Law-Enforcement Officer or Law-Enforcement Official, wear the uniform prescribed for a Law-Enforcement Officer or Law Enforcement Official} {not being a Law Enforcement Officer or Law Enforcement Official, wear the badge or other insignia adopted for use by such Law Enforcement Officers or Law Enforcement Officials},
5. with the intent to deceive another.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Impersonating a Law Enforcement Officer or Law Enforcement Official as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

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## COMMENTS

"The offense contours are…straightforward: whenever one falsely represents himself/herself to be a law enforcement officer with the intent to deceive another, that person has violated the statute." *Jordan v. Town of Pratt*, 886 F. Supp. 555, 559 (S. D. W. Va. 1995)

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## 7.2 CRIMES AGAINST THE PERSON

### *Homicide*

#### 7.2.1 General Homicide Instruction

Count ___ of the INDICTMENT charges the DEFENDANT with First Degree Murder.[28] Right now and at all times during this trial, the DEFENDANT is presumed innocent.[29] [He] [She] does not need to prove [his] [her] innocence. It is up to the State to overcome this presumption and prove to you beyond a reasonable doubt that that the DEFENDANT is guilty.[30]

In West Virginia not all homicides are murder. If the State has proven beyond a reasonable doubt that the DEFENDANT caused the death of [*insert* name(s) of victim(s)], then whether the DEFENDANT is guilty of a crime, and what specific crime [he] [she] is guilty of, will depend on [his] [her] mental state. You can only infer [his] [her] mental state from the circumstances.[31] You are instructed to infer a guilty mental state from only those circumstances which the State has proven beyond a reasonable doubt. Furthermore, you should consider any fact indicating a guilty mental state in its full context and not in isolation.

## COMMENTS

A recurring problem in murder prosecutions in West Virginia is courts giving poor instructions on the *mens rea* elements of the various homicide degrees. Instructions are often confusing, contradictory, or stated in such abstract terms that they could mean anything, and consequently mean nothing. The resulting uncertainty creates the possibility for juries to focus on the act and pick a degree based on how blameworthy it is.

Therefore, these instructions focus on the defendant's mental state. This initial instruction tells jurors the defendant's mental state determines the degree of homicide (assuming the State charged premeditated murder) and how they should analyze the evidence. The next section instructs jurors to "build up" from acquittal by incrementally adding a new mental state with each degree rather than the usual practice of defining First Degree Murder and working down. It is hoped this will aid juries' conceptual understanding of homicide and prompt them to take a more nuanced approach in determining the defendant's culpable mental state.

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[28] W. VA. CODE § 61–2–1 (2014)

[29] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

[30] *In re Winship*, 397 U.S. 358, 364 (1970).

[31] *See, e.g.*, *State v. Guthrie*, 194 W. Va. 567, 461 S.E.2d 163, n.23 (1995).

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This approach is intended to make more specific instructions, like inferred malice from the use of a deadly weapon, unnecessary. Of course, jury instructions should be tailored to the facts of the case; however, there is no principled reason the use of a deadly weapon should be singled out from any other fact from which a mental state can be inferred. Instructions such as these, and those saying malice can be explicit or implied, are likely vestiges from when West Virginia treated direct and circumstantial evidence differently. Now that the Supreme Court of Appeals of West Virginia has mooted the distinction, *State v. Guthrie*, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995), instructions about what jurors may properly infer from specific types of evidence are unnecessary.

### 7.2.2 Not Guilty

> If you agree unanimously that the State failed to prove beyond a reasonable doubt the DEFENDANT killed [*insert* name of alleged victim] in [*insert* name of county] County, West Virginia, or if the State proved [he] [she] did kill the decedent but failed to prove beyond a reasonable doubt that the killing was not lawful, you must find the DEFENDANT not guilty.
>
> A lawful killing is one that is reasonable under the circumstances or which resulted from mere negligence or accident.[32] A lawful killing must be both subjectively and objectively reasonable.[33] Subjective reasonableness means the DEFENDANT believed [he] [she] had a legitimate purpose for taking a life.[34] Objective reasonableness means that, apart from the DEFENDANT'S personal belief, a reasonable person in the same situation could have also formed that belief.[35]

## COMMENTS

The "lawful killing" portion of this instruction sets the stage for more specific instructions such as defense of self and others or the castle doctrine, depending on the facts of the defendant's case. As noted in the previous comment section, the substantive instructions start by asking jurors to consider acquittal first, and then move upwards depending on the defendant's mental state. Because the only difference between the degrees of homicide is mental state, and mental state can only be inferred, one could argue the jury should consider any lesser included offense regardless of the defense theory, assuming the State is trying to prove premeditated murder. *But see State v. Skeens*, 233 W. Va. 232, 241, 757 S.E.2d 762, 771 (2014). Unless the trial practitioner has an articulable tactical reason for

[32] *See State v. Lough*, 143 W. Va. 838, 843, 105 S.E.2d 538, 541-42 (1958); *State v. Cross*, 42 W. Va. 253, 24 S.E. 996 (1896).

[33] *See, e.g.*, Syl. Pt. 3, *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

[34] *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

[35] *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

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not doing so, the preferred practice is to request instruction on each degree to aid the jury's conceptual understanding of homicide.

### 7.2.3 Involuntary Manslaughter

If you believe the State has proved beyond a reasonable doubt that the DEFENDANT caused [*insert* name(s) of victim(s)]' death in [*insert* county] County, West Virginia, and did so unlawfully, then you may find the DEFENDANT guilty of involuntary manslaughter.[36]

The essential characteristics of Involuntary Manslaughter are that the DEFENDANT committed an act which caused the decedent's death and that the act was unlawful or undertaken in an unlawful manner.[37] An act is unlawful or undertaken unlawfully if it is objectively unreasonable under the circumstances because, apart from the fatal consequences, the act itself is criminal or was done with criminal recklessness.[38] This requires more than mere negligence.[39]

To find the DEFENDANT guilty of Involuntary Manslaughter, the State must prove beyond a reasonable doubt that:

1. the DEFENDANT
2. killed [*insert* name(s) of victim(s)],
3. in [*insert* name of county] County, West Virginia,
4. and did so unlawfully.

## COMMENTS

The West Virginia Supreme Court of Appeals has ruled that trial courts do not err by failing to instruct on involuntary manslaughter where the defense theory implies intent. *State v. Beegle*, 188 W. Va. 681, 686, 425 S.E.2d 823, 828 (1992). However, the legislature has evidently provided otherwise. *See* W. VA. CODE § 62–3–16 (2014) ("On an indictment for felonious homicide, the jury may find the accused not guilty of the felony, but guilty of involuntary manslaughter.").

[36] *State v. Lough*, 143 W. Va. 838, 843, 105 S.E.2d 538, 541-42 (1958).

[37] W. VA. CODE § 61–2–5 (2014); *See State v. Crouch*, 229 W. Va. 618, 621, 730 S.E.2d 401, 404 (2012) (*per curiam*).

[38] *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

[39] *State v. Lough*, 143 W. Va. 838, 843, 105 S.E.2d 538, 541-42(1958).

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### 7.2.4 Voluntary Manslaughter

If you believe the State has proved beyond a reasonable doubt that the DEFENDANT killed [*insert* name(s) of victim(s)] in [*insert* county] County, West Virginia, and did so unlawfully, and also intentionally,[40] then you may find the DEFENDANT guilty of Voluntary Manslaughter.

The essential difference between Involuntary and Voluntary Manslaughter is whether the DEFENDANT intended to kill the decedent.[41] Intent requires more than purposely committing the act which resulted in death. It requires that the DEFENDANT undertook this action knowing it would likely result in the decedent's death and that the DEFENDANT desired that outcome.[42]

To find the DEFENDANT guilty of Voluntary Manslaughter, the State must prove beyond a reasonable doubt that:

1. the DEFENDANT
2. killed [*insert* name(s) of victim(s)],
3. in [*insert* county] County, West Virginia,
4. unlawfully,
5. and intentionally.

## COMMENTS

The case law says Voluntary Manslaughter requires *specific* intent to kill.[43] However, the law of homicide in West Virginia is internally incoherent on this point. While Voluntary Manslaughter requires specific intent to kill, elsewhere "specific intent to kill" is said to be synonymous with malice. *State v. Davis*, 220 W. Va. 590, 594, 648 S.E.2d 354, 358 (2007). If these cases are read literally, then Voluntary Manslaughter and Second Degree Murder are indistinguishable. However, *Davis* can also be read as meaning malice strictly dominates specific intent so that if the State proves malice it necessarily has proven specific intent. These instructions are intended to clear up this confusion, and trial practitioners should be aware of the ambiguity in existing law when arguing for these instructions.

[40] *See State v. Hamrick*, 160 W. Va. 673, 674-75, 236 S.E.2d 247, 248 (1977).

[41] *See State v. McGuire*, 200 W. Va. 823, 832-33, 490 S.E.2d 912, 921-22 (1997). *See also id.* Syl. Pt. 3.

[42] *See State v. Duvall*, 152 W. Va. 162, 168, 160 S.E.2d 155, 158-59 (1968).

[43] *State v. Hamrick*, 160 W. Va. 673, 674-75, 236 S.E.2d 247, 248 (1977).

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### 7.2.5 Second Degree Murder

If you believe the State has proved beyond a reasonable doubt that the DEFENDANT killed [*insert* name(s) of victim(s)] in [*insert* county] County, West Virginia, and did so unlawfully, intentionally, and with malice, then you may find the DEFENDANT guilty of Second Degree Murder.[44]

The essential difference between Second Degree Murder and Voluntary Manslaughter is malice.[45] A killing is malicious if, more than being unlawful, the circumstances indicate a wanton disregard for human life and societal duty.[46]

"Unlawful" means it was not objectively reasonable for the DEFENDANT to commit an action resulting in death.[47] Malice requires more than this—that the DEFENDANT'S action was not *subjectively* reasonable, either. The DEFENDANT'S purpose for intentionally taking a life was unjustifiable.

To find the DEFENDANT guilty of Second Degree Murder the State must prove beyond a reasonable doubt that:

1. the DEFENDANT
2. killed [*insert* name(s) of victims(s)],
3. in [*insert* county] County, West Virginia,
4. unlawfully,
5. intentionally,
6. and with malice.

## COMMENTS

Homicide's incoherency in West Virginia is perhaps most apparent regarding Second Degree Murder. *See* Comments under Instruction 7.2.6. The West Virginia Supreme Court of Appeals ruled that a prosecutor's closing argument—that premeditation or deliberation for First Degree Murder can happen in a moment—is consistent with *State v. Guthrie*, 194, W. Va. 657, 461 S.E.2d 163 (1995). *See State v. Rogers*, 231 W. Va. 205, 216, 744 S.E.2d 315, 326 (2013) (*per curiam*). The devaluing of this element completely erodes the difference between First and Second Degree Murder, and as

[44] *See State v. Hatfield*, 169 W. Va. 191, 298, 286 S.E.2d 402, 407-408 (1982).

[45] *State v. McGuire*, 200 W. Va. 823, 834-35, 490 S.E.2d 912, 923-24 (1997).

[46] *See State v. Williams*, 209 W. Va. 25, 31, 543 S.E.2d 306, 312 (2000) (*per curiam*).

[47] *See* Instruction 7.2.3.

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noted earlier the line between Second Degree Murder and Voluntary Manslaughter is also perilously thin.

### 7.2.6 First Degree Murder (Premeditated)

If you believe the State has proved beyond a reasonable doubt that the DEFENDANT killed [*insert* name(s) of victim(s)] in [*insert* county] County, West Virginia, and did so unlawfully, intentionally, with malice, and that the DEFENDANT premeditated and deliberated before acting, then you may find the DEFENDANT guilty of First Degree Murder.[48]

The essential difference between First and Second Degree murder is premeditation and deliberation.[49] To premeditate and deliberate means to take a moment to reflect upon one's course of action, consciously weighing the implications of taking a life, and still choosing to kill. First Degree Murder is reserved for calculated killings, where a defendant chose to take a life following a rational thought process as opposed to reacting quickly and out of emotion.[50]

To find the DEFENDANT guilty of First Degree Murder, the State must prove beyond a reasonable doubt that:

1. the DEFENDANT
2. killed [*insert* name(s) of victim(s)],
3. in [*insert* county] County, West Virginia,
4. unlawfully,
5. intentionally,
6. maliciously,
7. and after premeditation and deliberation.

## COMMENTS

*Guthrie* sought to remedy the convergence of First and Second Degree murder caused by a series of decisions requiring less and less from the State to prove premeditation and deliberation. *State v.*

[48]W. VA. CODE § 61–2–1 (2014); *State v. Guthrie*, 194 W. Va. 657, 676-77, 461 S.E.2d 163, 182-83 (1995). *See also State v. Prophet*, 234 W. Va. 33, 762 S.E.2d 602 (2014) (*per curiam*).

[49]*State v. Prophet*, 234 W. Va. 33, 41, 762 S.E.2d 602, 610 (2014) ("'Under West Virginia law, the terms 'deliberate' and 'premeditate' are synonymous.'" (*quoting State v. Miller*, 197 W. Va. 588, 600, 476 S.E.2d 535, 547 (1996)).

[50]*State v. Guthrie*, 194 W. Va. 657, 674, 461 S.E.2d 163, 180 (1995).

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*Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). As noted in the previous Comments section, homicide's incoherency in West Virginia is perhaps most apparent regarding the distinction between Second and First Degree Murder and the degree of premeditation or deliberation required in the latter. The West Virginia Supreme Court of Appeals ruled that a prosecutor's closing argument—that premeditation or deliberation for First Degree Murder can happen in a moment—is consistent with *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Inexplicably, that convergence seems to be reappearing. *See State v. Rogers*, 231 W. Va. 205, 216, 744 S.E.2d 315, 326 (2013) *(per curiam*). It is important that trial practitioners be aware of this and advocate instructions emphasizing that premeditation/deliberation is a thought *process*, which takes time.

### 7.2.7 *Clifford* Instruction

The Court instructs the jury that premeditation and deliberation can precede the formation of the intent to kill, in so far as the intent to kill is often the consequence of the prior calculation.[51]

## COMMENTS

The usual instruction is as follows: "to constitute a willful, deliberate, and premeditated killing, it is not necessary that the intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that such intention should have come into existence for the first time at the time of such killing, or at any time previously." *State v. Clifford*, 59 W. Va. 1, 52 S.E. 981 (1906). However, the West Virginia Supreme Court of Appeals has explained that this instruction merely means that premeditation and deliberation can precede the intent to kill and that, if a court gives this instruction, it must explain its limited purpose to the jury. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163, 180 (1995). That being the case, why not cut to the chase, skip the confusing bit requiring explanation, and just give the explanation itself? That's the point of this instruction—to offer a less confusing alternative.

### 7.2.8 First Degree Murder (Lying in Wait)

If you believe the State has proven beyond a reasonable doubt that the DEFENDANT killed [*insert* name(s) of victim(s)] in [*insert* county] County, West Virginia, and did so unlawfully, intentionally, maliciously, and by lying in wait, then you may find the defendant guilty of First Degree Murder.[52]

[51] *State v. Guthrie*, 194 W. Va. 657, 676-67, 461 S.E.2d 163, 182-83 (W. Va. 1995).

[52] W. VA. CODE § 61–2–1 (2014).

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The essential difference between Second Degree Murder and First Degree Murder by Lying in Wait is the element of lying in wait.[53] Lying in wait requires two things (1) the physical act of concealing one's presence to allow for secret observation and (2) the mental state of doing so for the purpose of killing the decedent.[54]

To find the DEFENDANT guilty of First Degree Murder by Lying in Wait, the State must prove beyond a reasonable doubt sufficient to overcome the presumption of innocence that:

1. the DEFENDANT
2. killed [*insert* name(s) of victim(s),
3. in [*insert* county] County, West Virginia,
4. unlawfully,
5. intentionally,
6. maliciously,
7. and was lying in wait.

## COMMENTS

The West Virginia Supreme Court has held that a murder under the lying in wait *et al*. clause requires only malice plus the extra element—the State need not prove specific intent to kill. *State v. Davis*, 205 W. Va. 569, 583, 519 S.E.2d 852, 866 (1999). However, the West Virginia Supreme Court distinguishes between "intent" and "specific intent," by holding that the State still must prove unlawfulness and intent. *Cf. id.* at Syl. Pt. 8 (regarding poison, rather than lying in wait). This distinction is curious. The court cannot mean general intent because the court specifically states the intent required is to poison *and kill*. *Id.* Nor is it an archaic reference equating specific intent with premeditation deliberation, because (1) *Davis* post-dates *Guthrie* and (2) *Davis* itself distinguishes between specific intent and premeditation/deliberation. *See id.* In all likelihood, this is simply another example of incoherency in the law of homicide, albeit one that rarely arises.

[53] *State v. Davis*, 205 W. Va. 569, 583, 519 S.E.2d 852, 866 (1999) ("in order to elevate a murder by one of the four enumerated acts…to first degree murder, it is not necessary to prove specific intent to kill, deliberation and premeditation.").

[54] Syl. Pt. 1, *State v. Walker*, 181 W. Va. 162, 381 S.E.2d 277 (1989) (*per curiam*) (quoting Syl. Pt. 2, *State v. Harper*, 179 W. Va. 27, 365 S.E.2d 69 (1987)).

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## 7.2.9 First Degree Murder (Poisoning)

If you believe the State has proven beyond a reasonable doubt that the DEFENDANT killed [*insert* name(s) of victim(s)] in [*insert* county] County, West Virginia, and did so unlawfully, intentionally, maliciously and by poison, then you may find the defendant guilty of First Degree Murder.[55]

The essential difference between Second Degree Murder and First Degree Murder by Poison is the element of employing a poison.[56] To employ a poison means to administer a substance at a dosage the DEFENDANT believes will have a destructive effect on the recipient with the intent to kill.[57]

To find the DEFENDANT guilty of First Degree Murder by Poison, the State must prove beyond a reasonable doubt that:

1. the DEFENDANT
2. killed [*insert* name(s) of victim(s)
3. in [*insert* county] County, West Virginia,
4. unlawfully,
5. intentionally,
6. maliciously,
7. and with a poison.

### COMMENTS

The West Virginia Supreme Court held that poisoning requires either that a defendant know, *or that he reasonably should know*, that the administered dosage will be destructive. *State v. Weaver*, 181 W. Va. 274, 382 S.E.2d 327 (1989). The constructive knowledge portion of this statement of law is inconsistent with the mental state the First Degree Murder statute assumes for one who is poisoning, lying in wait, etc. and is probably a relic from when direct and circumstantial evidence were treated differently. It is no longer necessary.

[55] W. VA. CODE § 61–2–1 (2014).

[56] *State v. Davis*, 205 W. Va. 569, 583, 519 S.E.2d 852, 866 (1999) ("in order to elevate a murder by one of the four enumerated acts…to first degree murder, it is not necessary to prove specific intent to kill, deliberation and premeditation.").

[57] *Cf.* Syl. Pt. 1, *State v. Weaver*, 181 W. Va. 274, 382 S.E.2d 327 (1989) (in reference to statute prohibiting the attempt to kill or injure by poison.).

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## 7.2.10 First Degree Murder (Imprisonment)

If you believe the State has proven beyond a reasonable doubt that the DEFENDANT killed [*insert* name(s) of victim(s)] in [*insert* county] County, West Virginia, and did so unlawfully, intentionally, maliciously and by imprisonment then you may find the DEFENDANT guilty of First Degree Murder.[58]

The essential difference between Second Degree Murder and First Degree Murder by Imprisonment is the element of imprisonment.[59] To kill by imprisonment means the DEFENDANT in some manner restrained the decedent such that the DEFENDANT expected and desired the restraint to result in the decedent's death.

To find the DEFENDANT guilty of First Degree Murder, the State must prove beyond a reasonable doubt that:

1. he DEFENDANT
2. killed [*insert* name(s) of victim(s)],
3. in [*insert* county] County, West Virginia,
4. unlawfully,
5. intentionally,
6. maliciously,
7. and by imprisonment.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[58] W. VA. CODE § 61–2–1 (2014).

[59] *State v. Davis*, 205 W. Va. 569, 583, 519 S.E.2d 852, 866 (1999) ("in order to elevate a murder by one of the four enumerated acts…to first degree murder, it is not necessary to prove specific intent to kill, deliberation and premeditation.").

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## COMMENTS

There do not appear to be any reported West Virginia Supreme Court of Appeals cases concerning a prosecution for murder by imprisonment, and so there are no points of law authoritatively controlling the definition or required mental state for this form of First Degree Murder. Earlier editions of this manual cite to an old Virginia case for the assertion that it requires only general intent—that is, the defendant intended to imprison the decedent without the specific intent to cause death. *See Commonwealth v. Jones*, 28 Va. (1 Leigh) 598 (1829). However, this would be inconsistent with the statutory scheme requiring intent to kill as an element of murder by poison and lying in wait. *See* Syl. Pt. 8, *Davis*, 205 W. Va. 569, 519 S.E.2d 852.

### 7.2.11 First Degree Murder (Starvation)

If you believe the State has proven beyond a reasonable doubt that the DEFENDANT killed [*insert* name(s) of victim(s)] in [*insert* county] County, West Virginia, and did so unlawfully, intentionally, maliciously and by starvation then you may find the defendant guilty of First Degree Murder.[60]

The essential difference between Second Degree Murder and First Degree Murder by Starvation is the element of starvation.[61] To kill by starvation means the DEFENDANT in some manner deprived the decedent of food, water, or other necessary sustenance with the knowledge and purpose that the deprivation kills the decedent.

To find the DEFENDANT guilty of First Degree Murder, the State must prove beyond a reasonable doubt that:

1. the DEFENDANT
2. killed [*insert* name(s) of victim(s)],
3. in [*insert* county] County, West Virginia,
4. unlawfully,
5. intentionally,
6. maliciously,
7. and by starvation.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a

[60] W. VA. CODE § 61–2–1 (2014).

[61] *State v. Davis*, 205 W. Va. 569, 583, 519 S.E.2d 852, 866 (W. Va. 1999) ("in order to elevate a murder by one of the four enumerated acts … to first degree murder, it is not necessary to prove specific intent to kill, deliberation and premeditation.").

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reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

As with imprisonment, there do not appear to be any West Virginia cases where the State prosecuted a theory of murder by starvation. Therefore, the same comments for imprisonment apply here as well.

### 7.2.12 General Instructions Regarding Mental State

As used in these instructions, lawfulness, intent, malice, premeditation, and deliberation are defined by the DEFENDANT'S mental state and not by an arbitrary amount of time preceding the killing.[62] It is sufficient that at the moment of the killing itself these elements existed. If you agree unanimously that the State has proven any of these mental states existed at that time you may deliver a verdict appropriate to the mental state or states you find.

However, the Court cautions you to be mindful of the fact that an opportunity for these mental states to exist does not mean that in actuality they did exist. Your job as a juror is to decide from the totality of the circumstances whether the State has proven beyond a reasonable doubt that the required mental states actually did exist.

Furthermore, although these mental states do not require any fixed period of time, be mindful of the fact that premeditation and deliberation, by their very meaning, require the passage of some amount of time prior to the killing for the defendant to have actually reflected upon the act, and to have thought about whether [he] [she] should proceed, and to have then chosen to kill the decedent.[63]

[62] *See State v. Horn*, 232 W. Va. 32, 39, 750 S.E.2d 248, 255 (2013) (*citing* Syl. Pts. 5 and 6, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163).

[63] *State v. Prophet*, 234 W. Va. 33, 762 S.E.2d 602 (2014), (citing Syl. Pt. 5, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163).

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## COMMENTS

Consistent with the previously stated goal of focusing jurors' attention on the nuances of *mens rea*, this instruction returns to the topic of mental state.

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### 7.2.13 Transferred Intent

These instructions speak with regards to the DEFENDANT'S mental state as directed towards the decedent. This is merely shorthand. The doctrine of transferred intent provides that where a person intends to kill or injure someone, but in the course of attempting to commit the act injures or kills a third party, the DEFENDANT'S criminal intent will be transferred to the third party.[64]

## COMMENTS

The transferred intent doctrine prevents the absurdity of defendants benefiting from their own wrongdoing.

[64] *E.g.*, Syl. Pt. 6, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).

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### 7.2.14 Parole Eligibility Instruction (Unitary Trials)[65]

If you find the State has proven beyond a reasonable doubt the DEFENDANT committed a First Degree Murder and deliver this as your verdict, you will also be asked whether to make a recommendation of parole eligibility. If you recommend parole eligibility, the DEFENDANT may be considered eligible for parole after serving fifteen years in prison.[66]

This does not mean the DEFENDANT will be released in fifteen years, but after that time a parole board will be able to evaluate the DEFENDANT'S situation and decide whether it is in the best interests of both the DEFENDANT and the State of West Virginia for [him] [her] to be released from prison.[67] If the DEFENDANT is released on parole, [he] [she] will still be subject to the rules and supervision of the Parole Board.[68] If you do not recommend parole eligibility, the DEFENDANT will receive a life sentence and never be eligible for parole regardless of any change in [his] [her] character or circumstances.

As with all other aspects of your verdict, you must unanimously agree regarding your recommendation for parole eligibility.[69]

## COMMENTS

This proposed instruction does not use the word "mercy," despite statutory language and common practice. This is an attempt to remove the moral sting out of the jury's parole determination by using less emotion-laden terms.

[65]W. VA. CODE § 62–3–15 (2014).

[66]W. VA. CODE § 62–12–13(c) (2014).

[67]W. VA. CODE § 62–12–13(a) (2014).

[68]W. VA. CODE § 62–12–17 (2014).

[69]Syl. Pt. 4, *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010).

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### 7.2.15 Felony Murder

If you agree unanimously that the State has proven beyond a reasonable doubt the DEFENDANT caused a death by committing or attempting to commit a felony, then you may find the DEFENDANT guilty of First Degree Murder.[70]

This is commonly known as "felony murder," because instead of requiring a guilty mental state as is normally required for First Degree Murder, all that is required is that a death occur during and caused by the commission or attempted commission of the felony of [*insert* felony].

However, if you believe the circumstances do not warrant a finding of felony murder, you may find the DEFENDANT not guilty of felony murder and instead find the DEFENDANT guilty of Involuntary Manslaughter.[71]

To find the DEFENDANT guilty of First Degree Murder, the State must prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. participated in the attempt or commission of the felony crime of [*insert* felony],
4. and during the attempt or commission of the felony crime of [*insert* felony],
5. the death of [*insert* name(s) of victim(s)] occurred as a direct result of injuries received in the commission of the felony crime of [*insert* felony] in which the DEFENDANT participated.

Before you can find the DEFENDANT guilty of felony murder, the State must prove beyond a reasonable doubt sufficient to overcome the DEFENDANT'S presumption of innocence that the DEFENDANT participated in or attempted the underlying felony. This means you must find the following: [*insert* instructions on predicate felony/attempt].

Furthermore, there are certain classes of individuals whose death during the commission of a felony cannot be the basis for a felony murder. You cannot

[70]W. VA. CODE § 61–2–1 (2014).

[71]W. VA. CODE § 62–3–16 (2014).

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convict the DEFENDANT of felony murder if the decedent was a co-conspirator who committed suicide.[72]

For a defendant to be guilty of felony murder, the initial felony or attempted felony and the homicide must be parts of one continuous transaction, closely related in point of time, place, and causal connection.[73]

## COMMENTS

Although the West Virginia Supreme Court has ruled that involuntary manslaughter is not a lesser included offense of felony murder, there is an obscure statute on point that apparently says otherwise. *Compare* W. VA. CODE § 62–3–16 (2014) *with State v. Wade*, 200 W. Va. 637, 490 S.E.2d 724 (1997); *State v. Ruggles*, 183 W. Va. 58, 64, 394 S.E.2d 42, 48 (1990).

[72]Syl. Pt. 2, *State ex. rel. Painter v. Zakaib*, 186 W. Va. 82, 411 S.E.2d 25 (1991).

[73]*See State v. Wayne*, 169 W. Va. 785, 289 S.E.2d 480 (1982); Syl. Pt. 9, *State v. Wade*, 200 W. Va. 637, 490 S.E.2d 724 (1997).

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## *Assault & Battery*

### 7.2.16.1. Malicious Assault (including lesser offenses) (effective June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Malicious Assault. You may return one of five verdicts under this Count of the INDICTMENT:

1. guilty of Malicious Assault;
2. guilty of Unlawful Assault;
3. guilty of Battery;
4. guilty of Assault; or
5. not guilty.

Malicious Assault occurs when a person maliciously shoots, stabs, cuts or wounds or by any means causes bodily injury to another with the intent to permanently[74] maim, permanently disfigure, permanently disable, or kill the other person.[75] Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[76]

Unlawful Assault occurs when a person unlawfully, but not maliciously, shoots, stabs, cuts, wounds, or by any means causes bodily injury to another with intent to permanently maim, permanently disfigure, permanently disable, or kill the other person.[77]

Battery occurs when a person unlawfully and intentionally makes physical contact of an insulting or provoking nature to another person, or unlawfully and intentionally causes physical harm to another person.[78]

Assault occurs when a person unlawfully and intentionally attempts to commit a violent injury to another person or unlawfully commits an act which

[74] *State v. Taylor*, 105 W. Va. 298, 142 S.E.254 (1928).

[75] W. VA. CODE § 61–2–9(a) (LexisNexis Supp. 2017). The 2017 amendment to this section did not affect subsection 9(a).

[76] *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

[77] W. VA. CODE § 61–2–9(a) (LexisNexis Supp. 2017). The 2017 amendment to this section did not affect subsection 9(a).

[78] W. VA. CODE § 61–2–9(c) (LexisNexis Supp. 2017).

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places another person in reasonable apprehension of immediately receiving a violent injury.[79]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Malicious Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ____ day of [*insert* month, [*insert* year],
4. did maliciously (cut) (stab) (wound) (shoot) (or by any means) cause bodily injury to
5. [*insert* name(s) of victim(s)],
6. with the intent to permanently maim, permanently disfigure permanently disable, or kill
7. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Malicious Assault as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Malicious Assault (and deliberate on the lesser included offense of Unlawful Assault as instructed).

Before the DEFENDANT can be convicted of Unlawful Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,

[79]W. VA. CODE § 61–2–9(b) (LexisNexis Supp. 2017).

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3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully but not maliciously (cut) (stab) (wound) (shoot) (by any means) cause bodily injury to [*insert* name(s) of victim(s)],
5. with the intent to permanently maim, permanently disfigure, permanently disable, or kill
6. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing, and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Unlawful Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you must find the DEFENDANT not guilty of Unlawful Assault, and deliberate on the lesser included offense of Battery as instructed.

Before the DEFENDANT can be convicted of Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ___day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally [make physical contact of an insulting or provoking nature] [cause physical pain or injury] to
5. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Battery (and deliberate on the lesser included offense of Assault as instructed).

Before the DEFENDANT can be convicted of Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT

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2. in [*insert* county] County, West Virginia
3. on or about the __day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to [*insert* name(s) of victim(s)]} {unlawfully commit an act that placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The 2017 changes to this section are similar to the changes in the Domestic Assault and Battery sections. They are consistent now with other assault and battery statutes, although, as noted elsewhere, the phrase "commit a violent injury" is unfortunate.

*State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d 636 (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d 906 (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.16.2. Malicious Assault (including lesser offenses) (pre-June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Malicious Assault. You may return one of five verdicts under this Count of the INDICTMENT:

1. guilty of Malicious Assault;
2. guilty of Unlawful Assault;
3. guilty of Battery;
4. guilty of Assault; or
5. not guilty.

Malicious Assault occurs when a person maliciously shoots, stabs, cuts or wounds or by any means causes bodily injury to another with the intent to permanently[80] maim, permanently disfigure, permanently disable, or kill the other person.[81] Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[82]

Unlawful Assault occurs when a person unlawfully, but not maliciously, shoots, stabs, cuts, wounds, or by any means causes bodily injury to another with intent to permanently maim, permanently disfigure, or permanently disable, or kill the other person.[83]

Battery occurs when a person unlawfully and intentionally makes physical contact with force capable of causing physical pain or injury to another person, or unlawfully and intentionally causes physical pain or injury to another person.[84]

Assault occurs when a person unlawfully and intentionally attempts to use physical force capable of causing physical pain or injury to another person or

[80] *State v. Taylor*, 105 W. Va. 298, 142 S.E.254 (1928).

[81] W. VA. CODE § 61–2–9(a) (2014 and LexisNexis Supp. 2017).

[82] *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

[83] W. VA. CODE § 61–2–9(a) (2014 and LexisNexis Supp. 2017).

[84] W. VA. CODE § 61–2–9(c) (2014).

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unlawfully commits an act which places another person in reasonable apprehension of immediately suffering physical pain or injury.[85]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Malicious Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ____ day of [*insert* month, [*insert* year] ,
4. did maliciously (cut) (stab) (wound) (shoot) (or by any means) cause bodily injury to
5. [*insert* name(s) of victim(s)] ,
6. with the intent to permanently maim, permanently disfigure permanently disable, or kill
7. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Malicious Assault as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Malicious Assault (and deliberate on the lesser included offense of Unlawful Assault as instructed).

Before the DEFENDANT can be convicted of Unlawful Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,

[85]W. VA. CODE § 61–2–9(b) (2014).

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3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully but not maliciously (cut) (stab) (wound) (shoot) (or by any means) cause bodily injury to [*insert* name(s) of victim(s)],
5. with the intent to permanently maim, permanently disfigure, permanently disable, or kill [*insert* name(s) of victim(s)].

If, after impartially considering, weighing, and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Unlawful Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you must find the DEFENDANT not guilty of Unlawful Assault, and deliberate on the lesser included offense of Battery as instructed.

Before the DEFENDANT can be convicted of Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ___day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally (make physical contact with force capable of causing physical pain or injury) (cause physical pain or injury) to
5. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Battery (and deliberate on the lesser included offense of Assault as instructed).

Before the DEFENDANT can be convicted of Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT

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2. in [*insert* county] County, West Virginia
3. on or about the __day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to use physical force capable of causing physical pain or injury to [*insert* name(s) of victim(s)]} {unlawfully commit an act that placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately suffering physical pain or injury}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The 2017 changes to this section are similar to the changes in the Domestic Assault and Battery sections. They are consistent now with other assault and battery statutes, although, as noted elsewhere, the phrase "commit a violent injury" is unfortunate.

*State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d 636 (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d 906 (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.17 Malicious Assault

Count ___ of the INDICTMENT charges the DEFENDANT with Malicious Assault. You may return one of two verdicts under this Count of the INDICTMENT:

1. guilty of Malicious assault; or
2. not guilty.

Malicious Assault occurs when a person maliciously shoots, stabs, cuts, wounds, or by any means causes bodily injury to another with the intent to permanently[86] maim, permanently disfigure, permanently disable, or kill the other person.[87] Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[88]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Malicious Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did maliciously (cut) (stab) (wound) (shoot) (by any means) cause bodily injury to
5. [*insert* name(s) of victim(s)],
6. with the intent to permanently maim, permanently disfigure, permanently disable, or kill
7. [*insert* name(s) of victim(s)].

[86] *State v. Taylor*, 105 W. Va. 298, 142 S.E.254 (1928).

[87] W. VA. CODE § 61–2–9(a) (2014 and LexisNexis Supp. 2017).

[88] *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements of Malicious Assault, you shall find the DEFENDANT not guilty.

## COMMENTS

Relevant cases follow. *State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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### 7.2.18.1. Unlawful Assault (including lesser offenses) (effective June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Unlawful Assault. You may return one of four verdicts under this Count of the INDICTMENT:

1. guilty of Unlawful Assault;
2. guilty of Battery;
3. guilty of Assault; or
4. not guilty.

Unlawful assault occurs when a person unlawfully, but not maliciously, shoots, stabs, cuts, wounds, or by any means causes bodily injury to another with intent to permanently[89] maim, permanently disfigure or permanently disable, or kill the other person.[90]

Battery occurs when a person unlawfully and intentionally makes physical contact of an insulting or provoking nature to another person, or unlawfully and intentionally causes physical harm to another person.[91]

Assault occurs when a person unlawfully and intentionally attempts to commit a violent injury to another person or unlawfully commits an act which places another in reasonable apprehension of immediately receiving a violent injury.[92]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Unlawful Assault, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,

[89] *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928).

[90] W. VA. CODE § 61–2–9(a) (LexisNexis Supp. 2017).

[91] W. VA. CODE § 61–2–9(c) (LexisNexis Supp. 2017).

[92] W. VA. CODE § 61–2–9(b) (LexisNexis Supp. 2017).

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3. on or about the ___ day of [*insert* month, [*insert* year],
4. did unlawfully but not maliciously (cut) (stab) (wound) (shoot) (by any means) cause bodily injury to
5. [*insert* name(s) of victim(s)],
6. with the intent to permanently maim, permanently disfigure, permanently disable, or kill
7. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Unlawful Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Unlawful Assault, and deliberate on the lesser included offense of Battery as instructed.

Before the DEFENDANT can be convicted of Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___day of [*insert* month, [*insert* year],
4. did unlawfully and intentionally (make physical contact of an insulting or provoking nature) (cause physical harm) to [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Battery (and deliberate on the lesser included offense of Assault as instructed).

Before the DEFENDANT can be convicted of Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

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1. the DEFENDANT,
2. in [*insert* county] County, West Virginia
3. on or about the ___day of [*insert* month, [*insert* year],
4. did unlawfully {attempt to commit a violent injury to [*insert* name(s) of victim(s)]} {unlawfully commit an act that placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Relevant cases follow. *State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.18.2. Unlawful Assault (including lesser offenses) (pre-June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Unlawful Assault. You may return one of four verdicts under this Count of the INDICTMENT:

1. guilty of Unlawful Assault;
2. guilty of Battery;
3. guilty of Assault; or
4. not guilty.

Unlawful assault occurs when a person unlawfully, but not maliciously, shoots, stabs, cuts, wounds, or by any means causes bodily injury to another with intent to permanently[93] maim, permanently disfigure or permanently disable, or kill the other person.[94]

Battery occurs when a person unlawfully and intentionally makes physical contact with force capable of causing physical pain or injury to the person of another, or unlawfully and intentionally causes physical pain or injury to another person.[95]

Assault occurs when a person unlawfully and intentionally attempts to use physical force capable of causing physical pain or injury to the person of another or unlawfully commits an act which places another in reasonable apprehension of immediately suffering physical pain or injury.[96]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Unlawful Assault, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

[93] *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928).

[94] W. VA. CODE § 61–2–9(a) (2014 and LexisNexis Supp. 2017).

[95] W. VA. CODE § 61–2–9(c) (2014).

[96] W. VA. CODE § 61–2–9(b) (2014).

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1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month, [*insert* year],
4. did unlawfully but not maliciously (cut) (stab) (wound) (shoot) (by any means) cause bodily injury to
5. [*insert* name(s) of victim(s)],
6. with the intent to permanently maim, permanently disfigure, permanently disable, or kill
7. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Unlawful Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Unlawful Assault, and deliberate on the lesser included offense of Battery as instructed.

Before the DEFENDANT can be convicted of Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___day of [*insert* month, [*insert* year],
4. did unlawfully and intentionally (make physical contact with force capable of causing physical pain or injury) (cause physical pain or injury) to [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Battery (and deliberate on the lesser included offense of Assault as instructed).

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Before the DEFENDANT can be convicted of Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia
3. on or about the ___day of [*insert* month, [*insert* year],
4. did unlawfully {attempt to use physical force capable of causing physical pain or injury to [*insert* name(s) of victim(s)]} {unlawfully commit an act that placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately suffering physical pain or injury}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Relevant cases follow. *State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v.*

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*Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.19 Unlawful Assault

Count ___ of the INDICTMENT charges the DEFENDANT with Unlawful Assault. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Unlawful Assault; or
(2) not guilty.

Unlawful assault occurs when a person unlawfully, but not maliciously, shoots, stabs, cuts, wounds, or by any means causes bodily injury to another with intent to permanently[97] maim, permanently disfigure or permanently disable, or kill the other person.[98]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Unlawful Assault, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully but not maliciously (cut) (stab) (wound) (shoot) (or by any means) cause bodily injury to [*insert* name(s) of victim(s)],
6. with the intent to permanently maim, permanently disfigure, permanently disable, or kill
7. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you

[97] *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928).

[98] W. VA. CODE § 61–2–9(a) (2014 and LexisNexis Supp. 2017).

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may find the DEFENDANT guilty of Unlawful Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Unlawful Assault.

## COMMENTS

Relevant cases follow. *State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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### 7.2.20.1. Battery (including lesser included offenses) (effective June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Battery. You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Battery;
(2) guilty of Assault; or
(3) not guilty.

Battery occurs when a person unlawfully and intentionally makes physical contact of an insulting or provoking nature or unlawfully and intentionally causes physical harm to another person.[99]

Assault occurs when any person unlawfully attempts to commit a violent injury to another person, or unlawfully commits an act that places another in reasonable apprehension of receiving a violent injury.[100]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. The law presumes the DEFENDANT to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Battery, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally {make physical contact of an insulting or provoking nature with [*insert* name(s) of victim(s)]} {cause physical harm to [*insert* name(s) of victim(s)]}.

If, after impartially considering, weighing, and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Battery as charged. If you have a reasonable

[99]W. VA. CODE § 61–2–9(c) (LexisNexis Supp. 2017).

[100]W. VA. CODE § 61–2–9(b) (LexisNexis Supp. 2017).

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doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Battery (and deliberate on the lesser included offense of Assault as instructed).

Before the DEFENDANT can be convicted of Assault, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to [*insert* name(s) of victim(s)]} {commit an act that placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Syl. Pt. 6, *State v. Henning,* 238 W. Va. 193, 793 S.E.2d 843 (2016) ("assault as defined by West Virginia Code § 61-2-9(b) (2014) is a lesser included offense of malicious assault as set forth in West Virginia Code § 61-2-9(a)"); *State v. Lobb,* No. 14-0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Mason,* No. 12-0400, 2013 WL 1632501 (W. Va. Apr. 16, 2013) (revving a chainsaw and threatening to kill a State Trooper and his family is sufficient to constitute assault); *State v. Wilkerson,* 230 W. Va. 366, 738 S.E.2d 32 (2013) (misdemeanor assault and battery are not lesser included offenses of robbery in the first degree); *State v. Parsons,* 214 W. Va. 342, 589 S.E.2d 226 (2003) (battery is not a lesser included offense of third degree sexual assault).

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### 7.2.20.2. Battery (including lesser included offenses) (pre-June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Battery. You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Battery;
(2) guilty of Assault; or
(3) not guilty.

Battery occurs when a person unlawfully and intentionally makes physical contact with force capable of causing physical pain or injury to another person, or when a person unlawfully and intentionally causes physical pain or injury.[101]

Assault occurs when any person unlawfully attempts to use physical force capable of causing physical pain or injury to another person, or unlawfully commits an act that places another in reasonable apprehension of immediately suffering physical pain or injury.[102]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. The law presumes the DEFENDANT to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Battery, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally {make physical contact with force capable of causing physical pain or injury to [*insert* name(s) of victim(s)]} {cause physical pain or injury to [*insert* name(s) of victim(s)]}.

[101]W. VA. CODE § 61–2–9(c) (2014).

[102]W. VA. CODE § 61–2–9(b) (2014).

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If, after impartially considering, weighing, and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty of Battery (and deliberate on the lesser included offense of Assault as instructed).

Before the DEFENDANT can be convicted of Assault, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to use physical force capable of causing physical pain or injury to the person of [*insert* name(s) of victim(s)]} {commit an act that placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately suffering physical pain or injury}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.[103]

## COMMENTS

Syl. Pt. 6, *State v. Henning,* 238 W. Va. 193, 793 S.E.2d 843 (2016) ("assault as defined by West Virginia Code § 61-2-9(b) (2014) is a lesser included offense of malicious assault as set forth in West Virginia Code § 61-2-9(a)"); *State v. Lobb,* No. 14-0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Mason,* No. 12-0400, 2013 WL 1632501 (W.Va. Apr. 16, 2013) (revving a chainsaw and threatening to kill a State Trooper and his family is sufficient to constitute assault); *State v. Wilkerson,* 230 W. Va. 366, 738 S.E.2d 32 (2013) (misdemeanor assault and

[103] W. VA. CODE §§ 61–2–9(b), 61–2–9(c) (2014).

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battery are not lesser included offenses of robbery in the first degree); *State v. Parsons,* 214 W. Va. 342, 589 S.E.2d 226 (2003) (battery is not a lesser included offense of third degree sexual assault).

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### 7.2.21.1. Battery (effective June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Battery. You may return one of two verdicts under this Count of the INDICTMENT:

1. guilty of Battery; or
2. not guilty.

Battery occurs when a person unlawfully and intentionally makes physical contact of an insulting or provoking nature or unlawfully and intentionally causes physical harm to another person.[104]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Battery, the State of West Virginia must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally {make physical contact of an insulting or provoking nature with [*insert* name(s) of victim(s)]} {cause physical harm to [*insert* name(s) of victim(s)]}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[104] W. VA. CODE § 61–2–9(c) (LexisNexis Supp. 2017).

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## COMMENTS

*State v. Lobb,* No. 14-0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence not a lesser included offense of malicious assault); *State v. Mason,* No. 12-0400, 2013 WL 1632501 (W. Va. Apr. 16, 2013) (revving a chainsaw and threatening to kill a State Trooper and his family is sufficient to constitute assault); *State v. Wilkerson,* 230 W. Va. 366, 738 S.E.2d 32 (2013) (misdemeanor assault and battery are not lesser included offenses of robbery in the first degree); *State v. Parsons,* 214 W. Va. 342, 589 S.E.2d 226 (2003) (battery is not a lesser included offense of third degree sexual assault).

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## 7.2.21.2. Battery (pre-June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Battery. You may return one of two verdicts under this Count of the INDICTMENT:

1. guilty of Battery; or
2. not guilty.

Battery occurs when a person unlawfully and intentionally makes physical contact with force capable of causing physical pain or injury to another person, or when a person unlawfully and intentionally causes physical pain or injury.[105]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Battery, the State of West Virginia must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally {make physical contact with force capable of causing physical pain or injury to [*insert* name(s) of victim(s)]} {cause physical pain or injury to [*insert* name(s) of victim(s)]}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[105]W. VA. CODE § 61–2–9(c) (2014).

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## COMMENTS

*State v. Lobb,* No. 14-0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence not a lesser included offense of malicious assault); *State v. Mason,* No. 12-0400, 2013 WL 1632501 (W. Va. Apr. 16, 2013) (revving a chainsaw and threatening to kill a State Trooper and his family is sufficient to constitute assault); *State v. Wilkerson,*230 W. Va. 366, 738 S.E.2d 32 (2013) (misdemeanor assault and battery are not lesser included offenses of robbery in the first degree); *State v. Parsons,* 214 W. Va. 342, 589 S.E.2d 226 (2003) (battery is not a lesser included offense of third degree sexual assault).

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### 7.2.22.1 Assault (effective June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Assault. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Assault; or
(2) not guilty.

Assault occurs when any person unlawfully attempts to commit a violent injury to another person, or unlawfully commits an act that places another in reasonable apprehension of receiving a violent injury.[106]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to [*insert* name(s) of victim(s)]} {commit an act that placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[106]W. VA. CODE § 61–2–9(b) (LexisNexis Supp. 2017).

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## COMMENTS

*State v. Lobb,* No. 14-0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Mason,* No. 12-0400, 2013 WL 1632501 (W. Va. Apr. 16, 2013) (revving a chainsaw and threatening to kill a State Trooper and his family is sufficient to constitute assault); *State v. Wilkerson,*230 W. Va. 366, 738 S.E.2d 32 (2013) (misdemeanor assault and battery are not lesser included offenses of robbery in the first degree); *State v. Parsons,* 214 W. Va. 342, 589 S.E.2d 226 (2003) (battery is not a lesser included offense of third degree sexual assault).

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## 7.2.22.2. Assault (pre-June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Assault. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Assault; or
(2) not guilty.

Assault occurs when any person unlawfully attempts to use physical force capable of causing physical pain or injury to another person, or unlawfully commits an act that places another in reasonable apprehension of immediately suffering physical pain or injury.[107]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to use physical force capable of causing physical pain or injury to the person of [*insert* name(s) of victim(s)]} {commit an act that placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately suffering physical pain or injury}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Assault as charged. If you have a reasonable

[107] W. VA. CODE § 61–2–9(b) (2014).

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doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

*State v. Lobb,* No. 14-0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Mason,* No. 12-0400, 2013 WL 1632501 (W. Va. Apr. 16, 2013) (revving a chainsaw and threatening to kill a State Trooper and his family is sufficient to constitute assault); *State v. Wilkerson,*230 W. Va. 366, 738 S.E.2d 32 (2013) (misdemeanor assault and battery are not lesser included offenses of robbery in the first degree); *State v. Parsons,* 214 W. Va. 342, 589 S.E.2d 226 (2003) (battery is not a lesser included offense of third degree sexual assault).

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## 7.2.23 Stalking

Count ___ of the INDICTMENT charges the DEFENDANT with Stalking. You may return one of two verdicts under this Count:

(1) guilty of Stalking; or
(2) not guilty.

Stalking occurs when a person repeatedly follows another, and knows or has reason to know that this conduct causes the other person to reasonably fear for [his] [her] safety or suffer significant emotional distress.[108]

"Repeatedly" means on two or more occasions.

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge, and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Stalking, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did repeatedly follow
5. [*insert* name(s) of victim(s)],
6. and the DEFENDANT knew or had reason to know that this conduct caused [*insert* name(s) of victim(s)] to reasonably fear for [his] [her] safety or suffer significant emotional distress.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Stalking as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[108] W. VA. CODE § 61–2–9a (2014).

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## COMMENTS

The only West Virginia case addressing this statute is *State v. Malfregeot*, 224 W. Va. 264, 685 S.E.2d 237 (2009) *(per curiam)*, a case dealing with the sufficiency of the evidence to support a conviction under this statute.

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## 7.2.24 Harassment

Count ___ of the INDICTMENT charges the DEFENDANT with Harassment. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Harassment; or
(2) not guilty.

Harassment occurs when a person repeatedly harasses or repeatedly makes credible threats against another.[109]

"Credible threat" means a threat of bodily injury made with the apparent ability to carry out the threat and with the result that a reasonable person would believe that the threat could be carried out.[110]

"Harasses" means willful conduct directed at a specific person or persons which would cause a reasonable person mental injury or emotional distress.[111]

"Repeatedly" means on two or more occasions.[112]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge, and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Harassment, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did repeatedly harass or make credible threats against
5. [*insert* name(s) of victim(s)],
6. and the DEFENDANT knew or had reason to know that this conduct caused [*insert* name(s) of victim(s)] to reasonably fear for [his] [her] safety or suffer significant emotional distress.

[109]W. VA. CODE § 61–2–9a(b) (2014).

[110]W. VA. CODE § 61–2–9a(f)(2) (2014).

[111]W. VA. CODE § 61–2–9a(f)(3) (2014).

[112]W. VA. CODE § 61–2–9a(f)(3) (2014).

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Harassment as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

*See State v. Malfregeot,* 224 W. Va. 264, 685 S.E.2d 237 (2009)

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## 7.2.25 Malicious Assault of a Child Within 1,000 Feet of a School.

Count ___ of the INDICTMENT charges the DEFENDANT with Malicious Assault of a Child Within 1,000 Feet of a School. You may return one of two verdicts under this this Count of the INDICTMENT:

(1) guilty of Malicious Assault of a Child within 1,000 Feet of a School; or

(2) not guilty.

Malicious Assault of a Child within 1,000 Feet of a School occurs when a person maliciously shoots, stabs, cuts, wounds or by some other means causes bodily injury to a child within one thousand feet of a school with the intent to kill or permanently maim, disfigure or disable the other person.[113] Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[114]

For the purposes of this charge, a "child" is a person 16 years of age or under.

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Malicious Assault of a Child within 1,000 feet of a school, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ___day of [*insert* month], [*insert* year],
4. did unlawfully and maliciously (cut) (stab) (wound) (shoot) (or describe other means) cause bodily injury to
5. [*insert* name(s) of victim(s)], who was a child sixteen years of age or under,
6. within one thousand feet of a school,

[113]W. VA. CODE § 61–2–9b (2014).

[114]*State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

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6. with the intent to permanently maim, permanently disfigure, permanently disable, or kill [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Malicious Assault of a Child Within 1,000 Feet of a School as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The statute codifying Malicious Assault of a Child within 1,000 feet of a school does not define "school." West Virginia statutory law in other contexts defines school as "the students and teachers assembled in one or more buildings, organized as a unit[.]" W. VA. CODE § 18–1–1 (2016). One legal encyclopedia explains that while "'school' is a generic term with numerous meanings, the common denominator is that a 'school' is a place where instruction is given, generally to the young." 67B Am. Jur. 2d Schools § 1. "[W]hen used in a statute 'school' usually does not include universities, business colleges, or other institutions of higher education unless the intent to include them is clearly indicated." *Id.* *See also* 78 C.J.S. *Schools and School Districts* § 1.

*State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.26 Wanton Endangerment Involving the Use of Fire

Count ___ of the INDICTMENT charges the DEFENDANT with Wanton Endangerment Involving the Use of Fire. You may return one of two verdicts on this Count of the INDICTMENT:

(1) guilty of Wanton Endangerment Involving the Use of Fire; or
(2) not guilty.

Wanton Endangerment Involving the Use of Fire occurs when a person who, during the manufacture of production of an illegal controlled substance, uses fire, the use of which creates substantial risk of death or serious bodily injury to another due to the use of fire.[115]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Wanton Endangerment Involving the Use of Fire, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. during the manufacture or production of an illegal controlled substance,
5. used fire,
6. the use of which created substantial risk of death or serious bodily injury to another
7. due to the use of fire.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged. If you have a reasonable doubt

[115]W. VA. CODE § 61–2–9c (2014).

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of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court of Appeals has never addressed this statute.

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## 7.2.27 Assault in the Commission of a Felony.

Count ___ of the INDICTMENT charges the DEFENDANT with Assault in the Commission of a Felony. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Assault in the Commission of a Felony; or
(2) not guilty.

Assault in the Commission of a Felony occurs when a person in the commission of a felony, or in the attempt to commit a felony, unlawfully shoots, stabs, cuts or wounds another person.[116]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Assault in the Commission of a Felony, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. committed the offense of [*insert* elements of underlying felony]
5. and that in the commission thereof,
6. the DEFENDANT,
7. in [*insert* county] County, West Virginia,
8. did (shoot) (stab) (cut) (wound),
9. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Assault in the Commission of a Felony as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[116]W. VA. CODE § 61–2–10 (2014).

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## COMMENTS

*State v. Lockhart*, 200 W. Va. 479, 490 S.E.2d 298 (1997) (*per curiam*) (use of a weapon is not required to sustain conviction of assault during commission of felony).

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## 7.2.28 Assault in the Attempt to Commit a Felony

Count ___ of the INDICTMENT charges the DEFENDANT with Assault in the Attempt to Commit a Felony. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Assault in the Attempt to Commit a Felony; or
(2) not guilty.

Assault in the Attempt to Commit a Felony occurs when a person in the commission of a felony, or in the attempt to commit a felony unlawfully shoots, stabs, cuts or wounds another person.[117] The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Assault in the Attempt to Commit a Felony, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. in the attempt to commit the offense of [*insert* elements of underlying felony],
8. did (shoot) (stab) (cut) (wound),
9. [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Assault in the Attempt to Commit a Felony as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[117] W. VA. CODE § 61–2–10 (2014).

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## COMMENTS

*State v. Lockhart,* 200 W. Va. 479, 490 S.E.2d 298 (1997) (*per curiam*) (use of a weapon is not required to sustain conviction of assault during commission of felony).

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## 7.2.29 Malicious Assault of (a Government Representative) (a Healthcare Worker) (Emergency Service Personnel) (Utility Worker) (Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) (including lesser offenses)

Count ____ of the INDICTMENT charges the DEFENDANT with Malicious Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel). You may return one of five verdicts under this Count of the INDICTMENT:

(1) guilty of Malicious Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel);[118]

(2) guilty of Unlawful Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel);

(3) guilty of Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel);

(4) guilty of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel), or

(5) not guilty.

A "government representative" means any officer or employee of the state or a political subdivision thereof, or a person under contract with a state agency or political subdivision thereof.[119]

A "health care worker" means any nurse, nurse practitioner, physician, physician assistant, or technician practicing at, and all persons employed by

[118]W. Va. Code § 61–2–10b (2014 & LexisNexis Supp. 2017).

[119]W. Va. Code § 61–2–10b(a)(1) (2014 & LexisNexis Supp. 2017).

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or under contract to a hospital, county or district health department, long-term care facility, physician's office, clinic or outpatient treatment facility.[120]

"Emergency service personnel" means any paid or volunteer firefighter, emergency medical technician, paramedic, or other emergency services personnel employed by or under contract with an emergency medical service provider or a state agency or political subdivision thereof.[121]

A "utility worker" means any individual employed by a public utility or electric cooperative or under contract to a public utility, electric cooperative or interstate pipeline.[122]

A "law enforcement officer" means (the Superintendent of the State Police) (the chief natural resources police officer of the Division of Natural Resources) (the sheriff of any West Virginia county) (an administrative deputy appointed by the chief natural resources police officer of the Division of Natural Resources) (the chief of any West Virginia municipal law-enforcement agency) (any duly authorized member of a law-enforcement agency authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality thereof, other than parking ordinances, including campus police officers at state institutions of higher education, persons employed by the Public Service Commission as motor carrier inspectors and weight enforcement officers charged with enforcing commercial motor vehicle safety and weight restriction laws and persons employed as rangers by resort area districts).[123]

A "correctional employee" means any person employed by the West Virginia Department of Corrections, the West Virginia Regional Jail Authority, and the West Virginia Division of Juvenile Services, or by any entity which is under contract with these agencies and which provide services to incarcerated, detained, or housed persons.[124]

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[120]W. VA. CODE § 61–2–10b(a)(2) (2014 & LexisNexis Supp. 2017).

[121]W. VA. CODE § 61–2–10b(a)(3) (2014 & LexisNexis Supp. 2017).

[122]W. VA. CODE § 61–2–10b(a)(4) (LexisNexis Supp. 2017).

[123]W. VA. CODE § 61–2–10b(a)(5) (LexisNexis Supp. 2017); see also W. Va. Code § 30–29–1 (2014).

[124]W. VA. CODE § 61–2–10b(a)(6) (LexisNexis Supp. 2017).

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Malicious Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) occurs when a person maliciously shoots, stabs, cuts, wounds, or by any means causes bodily injury with the intent to maim, disfigure, disable or kill (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) acting in [his] [her] official capacity and the person committing the malicious assault knows or has reason to know that the (Government Representative) (Health Care Worker) (Emergency Service Personnel) (Utility Worker) (Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) is acting in [his] [her] official capacity.[125] Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[126]

Unlawful Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) occurs when any person unlawfully but not maliciously shoots, stabs, cuts, wounds, or by some other means causes (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) acting in [his] [her] official capacity bodily injury with the intent to maim, disfigure, disable or kill ([him] [her]) and the person committing the unlawful assault knows or has reason to know that the (Government Representative) (Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) is acting in [his] [her] official capacity.[127]

[125]W. VA. CODE § 61–2–10b(b) (2014 & LexisNexis Supp. 2017).

[126]*State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

[127]W. VA. CODE § 61–2–10b(c) (2014 & LexisNexis Supp. 2017).

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Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) occurs when a person unlawfully, knowingly and intentionally makes physical contact of an insulting or provoking nature with (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) or unlawfully and intentionally causes physical harm to (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) acting in such capacity.[128]

Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) occurs when a person unlawfully attempts to commit a violent injury to the person of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) or unlawfully commits an act which places (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) in reasonable apprehension of immediately receiving a violent injury.[129]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Malicious Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel), the State must

[128]W. VA. CODE § 61–2–10b(d) (2014 & LexisNexis Supp. 2017).

[129]W. VA. CODE § 61–2–10b(e) (2014 & LexisNexis Supp. 2017).

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overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and maliciously (cut) (stab) (wound) (shoot) (by any means) cause bodily injury,
6. with the intent to (kill) (maim) (disfigure) (permanently disable),
7. [*insert* name(s) of victim(s)], (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel)
8. acting in [his][her] official capacity,
9. and the DEFENDANT knew or had reason to know that [*insert* name(s) of victim(s)] was acting in [his] [her] official capacity.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Malicious Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty and deliberate on the lesser included offense of Unlawful Assault as hereinafter instructed.

Before the DEFENDANT can be convicted of Unlawful Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel), the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,

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3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully, but not maliciously, (cut) (stab) (wound) (shoot) or (by any means) cause bodily injury
5. to [*insert* name(s) of victim(s)], who was (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) acting in [his] [her] official capacity,
6. with the intent to maim, disfigure, disable, or kill [*insert* name(s) of victim(s)],
7. and the DEFENDANT knew or had reason to know that [*insert* name(s) of victim(s)] was acting in [his] [her] official capacity.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Unlawful Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty and deliberate on the lesser included offense of Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel).

Before the DEFENDANT can be convicted of Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel), the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],

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4. did unlawfully, knowingly and intentionally (make physical contact of an insulting or provoking nature with) (unlawfully and intentionally cause physical harm to)
5. [*insert* name(s) of victim(s)], (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel)
6. who was acting in [his] [her] official capacity.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty and deliberate on the lesser included offense of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel).

Before the DEFENDANT can be convicted of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel), the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to [*insert* name(s) of victim(s)]} {commit an act which placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury},

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5. and [*insert* name(s) of victim(s)] was (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel),
6. acting in [his] [her] official capacity.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.[130]

## COMMENTS

Effective June 10, 2016, the Legislature added "utility workers" and "law enforcement officers" to this statute. W. VA. CODE § 61–2–10b (2014 & LexisNexis Supp. 2017). Effective July 7, 2017, "correctional employees" were added. *Id*. Thus, any attempt by the State to add victims falling into any of these categories for an offense that occurred prior to the effective dates of the amendments to the statute is improper.

*State v. Lobb*, No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington*, No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler*, No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis*, 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright*, 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding

[130]W. VA. CODE § 61–2–10b (2014 & LexisNexis Supp. 2017).

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and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is unnecessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), erroneous to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.30 Unlawful Assault of (a Government Representative) (a Healthcare Worker) (Emergency Service Personnel) (Utility Worker) (Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) (including lesser offenses)

Count ___ of the INDICTMENT charges the DEFENDANT with Unlawful Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel).

You may return one of four verdicts under this Count of the INDICTMENT:

(1) guilty of Unlawful Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel);

(2) guilty of Battery of [*insert* name(s) of victim(s)], (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel);

(3) guilty of Assault of [*insert* name(s) of victim(s)] (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel); or

(4) not guilty.

A "government representative" means any officer or employee of the state or a political subdivision thereof, or a person under contract with a state agency or political subdivision thereof.[131]

A "health care worker" means any nurse, nurse practitioner, physician, physician assistant, or technician practicing at, and all persons employed by or under contract to a hospital, county or district health department, long-term care facility, physician's office, clinic or outpatient treatment facility.[132]

[131]W. VA. CODE § 61–2–10b(a)(1) (2014 & LexisNexis Supp. 2017).

[132]W. VA. CODE § 61–2–10b(a)(2) (2014 & LexisNexis Supp. 2017).

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"Emergency service personnel" means any paid or volunteer firefighter, emergency medical technician, paramedic, or other emergency services personnel employed by or under contract with an emergency medical service provider or a state agency or political subdivision thereof.[133]

A "utility worker" means any individual employed by a public utility or electric cooperative or under contract to a public utility, electric cooperative or interstate pipeline.[134]

A "law enforcement officer" means (the Superintendent of the State Police) (the chief natural resources police officer of the Division of Natural Resources) (the sheriff of any West Virginia county) (an administrative deputy appointed by the chief natural resources police officer of the Division of Natural Resources) (the chief of any West Virginia municipal law-enforcement agency) (any duly authorized member of a law-enforcement agency authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality thereof, other than parking ordinances, including campus police officers at state institutions of higher education, Public Service Commission motor carrier inspectors and weight enforcement officers charged with enforcing commercial motor vehicle safety and weight restriction laws and those persons employed as rangers by resort area districts.[135]

A "correctional employee" means any person employed by the West Virginia Department of Corrections, the West Virginia Regional Jail Authority, and the West Virginia Division of Juvenile Services, or by any entity which is under contract with these agencies and which provide services to incarcerated, detained, or housed persons.[136]

Unlawful Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) occurs when a person unlawfully but not maliciously shoots, stabs, cuts,

[133]W. VA. CODE § 61–2–10b(a)(3) (2014 & LexisNexis Supp. 2017).

[134]W. VA. CODE § 61–2–10b(a)(4) (LexisNexis Supp. 2017).

[135]W. VA. CODE § 61–2–10b(a)(5) (LexisNexis Supp. 2017); *see also* W. VA. CODE § 30–29–1 (2015).

[136]W. VA. CODE § 61–2–10b(a)(6) (LexisNexis Supp. 2017).

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wounds, or by some other means causes (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) acting in [his] [her] official capacity bodily injury with the intent to maim, disfigure, disable or kill [him] [her], and the person committing the unlawful assault knows or has reason to know that (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) is acting in [his] [her] official capacity.[137]

Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) occurs when a person unlawfully, knowingly and intentionally makes physical contact of an insulting or provoking nature with (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) or unlawfully and intentionally causes physical harm to (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) acting in such capacity.[138]

Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) occurs when a person unlawfully attempts to commit a violent injury to the person of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) or unlawfully commits an act which places (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical

[137]W. VA. CODE § 61–2–10b(e) (2014 & LexisNexis Supp. 2017).

[138]W. VA. CODE § 61–2–10b(d) (2014 & LexisNexis Supp. 2017).

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Service Personnel) in reasonable apprehension of immediately receiving a violent injury.[139]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Unlawful Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully but not maliciously (cut) (stab) (wound) (shoot) (by any means) cause bodily injury,
5. to [*insert* name(s) of victim(s)], who was (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel)
6. acting in [his] [her] official capacity,
7. with the intent to (kill) (maim) (disfigure) (disable) [*insert* name(s) of victim(s)],
8. and the DEFENDANT knew or had reason to know that [*insert* name(s) of victim(s)] was acting in [his] [her] official capacity.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Unlawful Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee)

[139]W. VA. CODE § 61–2–10b(e) (2014 & LexisNexis Supp. 2017).

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(Emergency Medical Service Personnel) as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty and deliberate on the lesser included offense of Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel).

Before the DEFENDANT can be convicted of Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel), the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully, knowingly and intentionally (make physical contact of an insulting or provoking nature with) (unlawfully and intentionally cause physical harm to)
5. [*insert* name(s) of victim(s)], (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel)
6. acting in [his] [her] official capacity.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty and deliberate on the lesser included offense of Assault of (a Government Representative) (a Health Care Worker)

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(Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel).

Before the DEFENDANT can be convicted of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel), the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to [*insert* name(s) of victim(s)]} {commit an act which placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury},
5. and [*insert* name(s) of victim(s)] was (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel),
6. who was acting in [his] [her] official capacity.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Effective June 10, 2016, the Legislature added "utility workers" and "law enforcement officers" to this statute. W. VA. CODE § 61–2–10b (2014 & LexisNexis Supp. 2017). Effective July 7, 2017, "correctional employees" were added. *Id*. Thus, any attempt by the State to add victims falling into any of these categories for an offense that occurred prior to the effective dates of the amendments to the statute is improper.

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*State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.31 Battery of (a Government Representative) (a Healthcare Worker) (Emergency Service Personnel) (Utility Worker) (Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) (including lesser offenses)

Count ___ of the INDICTMENT charges the DEFENDANT with Battery of (a Government Representative) (a Health Care Worker) (Emergency Services Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel). You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Battery of (a Government Representative) (a Health Care Worker) (Emergency Services Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel);

(2) guilty of Assault of (a Government Representative) (a Health Care Worker) (Emergency Services Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel), or

(3) not guilty.

A "government representative" means any officer or employee of the state or a political subdivision thereof, or a person under contract with a state agency or political subdivision thereof.[140]

A "health care worker" means any nurse, nurse practitioner, physician, physician assistant, or technician practicing at, and all persons employed by or under contract to a hospital, county or district health department, long-term care facility, physician's office, clinic or outpatient treatment facility.[141]

"Emergency service personnel" means any paid or volunteer firefighter, emergency medical technician, paramedic, or other emergency services personnel employed by or under contract with an emergency medical service provider or a state agency or political subdivision thereof.[142]

[140]W. VA. CODE § 61–2–10b(a)(1) (2014 & LexisNexis Supp. 2017).

[141]W. VA. CODE § 61–2–10b(a)(2) (2014 & LexisNexis Supp. 2017).

[142]W. VA. CODE § 61–2–10b(a)(3) (2014 & LexisNexis Supp. 2017).

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A "utility worker" means any individual employed by a public utility or electric cooperative or under contract to a public utility, electric cooperative or interstate pipeline.[143]

A "law enforcement officer" means (the Superintendent of the State Police) (the chief natural resources police officer of the Division of Natural Resources) (the sheriff of any West Virginia county) (an administrative deputy appointed by the chief natural resources police officer of the Division of Natural Resources) (the chief of any West Virginia municipal law-enforcement agency) (any duly authorized member of a law-enforcement agency authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality thereof, other than parking ordinances, including campus police officers at state institutions of higher education, Public Service Commission motor carrier inspectors and weight enforcement officers charged with enforcing commercial motor vehicle safety and weight restriction laws and those persons employed as rangers by resort area districts.[144]

A "correctional employee" means any person employed by the West Virginia Department of Corrections, the West Virginia Regional Jail Authority, and the West Virginia Division of Juvenile Services, or by any entity which is under contract with these agencies and which provide services to incarcerated, detained, or housed persons.[145]

Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) occurs when a person unlawfully, knowingly and intentionally makes physical contact of an insulting or provoking nature with (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) or unlawfully and intentionally causes physical harm to (a Government Representative) (a Health Care

[143]W. VA. CODE § 61–2–10b(a)(4) (2014 & LexisNexis Supp. 2017).

[144]W. VA. CODE § 61–2–10b(a)(5) (2014 & LexisNexis Supp. 2017); see also W. VA. CODE § 30–29–1 (2015).

[145]W. VA. CODE § 61–2–10b(a)(6) (LexisNexis Supp. 2017).

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Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) acting in such capacity.[146]

Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) occurs when a person unlawfully attempts to commit a violent injury to the person of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) or unlawfully commits an act which places (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) in reasonable apprehension of immediately receiving a violent injury.[147]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with him throughout the entire trial.

Before the DEFENDANT can be convicted of Battery of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel), the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully, knowingly and intentionally (make physical contact of an insulting or provoking nature with) (unlawfully and intentionally cause physical harm to)

[146]W. VA. CODE § 61–2–10b(d) (2014 & LexisNexis Supp. 2017).

[147]W. VA. CODE § 61–2–10b(e) (2014 & LexisNexis Supp. 2017).

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5. [*insert* name(s) of victim(s)], (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel)
6. acting in [his] [her] official capacity.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty and deliberate on the lesser included offense of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel).

Before the DEFENDANT can be convicted of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel), the State must overcome the presumption that the DEFENDANT is innocent and prove a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to [*insert* name(s) of victim(s)]} {commit an act which placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury},
5. and [*insert* name(s) of victim(s)] was (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel),
6. who was acting in [his] [her] official capacity.

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Effective June 10, 2016, the Legislature added "utility workers" and "law enforcement officers" to this statute. W. VA. CODE § 61–2–10b (2014 & LexisNexis Supp. 2017). Effective July 7, 2017, "correctional employees" were added. *Id*. Thus, any attempt by the State to add victims falling into any of these categories for an offense that occurred prior to the effective dates of the amendments to the statute is improper.

*State v. Lobb*, No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.32 Assault of (a Government Representative) (a Healthcare Worker) (Emergency Service Personnel) (Utility Worker) (Law Enforcement Officer) (a Correctional Employee) (Emergency Medical Service Personnel) (including lesser offenses)

Count ___ of the INDICTMENT charges the DEFENDANT with Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel). You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel), or

(2) not guilty.

A "government representative" means any officer or employee of the state or a political subdivision thereof, or a person under contract with a state agency or political subdivision thereof.[148]

A "health care worker" means any nurse, nurse practitioner, physician, physician assistant, or technician practicing at, and all persons employed by or under contract to a hospital, county or district health department, long-term care facility, physician's office, clinic or outpatient treatment facility.[149]

"Emergency service personnel" means any paid or volunteer firefighter, emergency medical technician, paramedic, or other emergency services personnel employed by or under contract with an emergency medical service provider or a state agency or political subdivision thereof.[150]

A "utility worker" means any individual employed by a public utility or electric cooperative or under contract to a public utility, electric cooperative or interstate pipeline.[151]

[148]W. VA. CODE § 61–2–10b(a)(1) (2014 & LexisNexis Supp. 2017).

[149]W. VA. CODE § 61–2–10b(a)(2) (2014 & LexisNexis Supp. 2017).

[150]W. VA. CODE § 61–2–10b(a)(3) (2014 & LexisNexis Supp. 2017).

[151]W. VA. CODE § 61–2–10b(a)(4) (LexisNexis Supp. 2017).

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A "law enforcement officer" means (the Superintendent of the State Police) (the chief natural resources police officer of the Division of Natural Resources) (the sheriff of any West Virginia county) (an administrative deputy appointed by the chief natural resources police officer of the Division of Natural Resources) (the chief of any West Virginia municipal law-enforcement agency) (any duly authorized member of a law-enforcement agency authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality thereof, other than parking ordinances, including campus police officers at state institutions of higher education, Public Service Commission motor carrier inspectors and weight enforcement officers charged with enforcing commercial motor vehicle safety and weight restriction laws and those persons employed as rangers by resort area districts.[152]

A "correctional employee" means any person employed by the West Virginia Department of Corrections, the West Virginia Regional Jail Authority, and the West Virginia Division of Juvenile Services, or by any entity which is under contract with these agencies and which provide services to incarcerated, detained, or housed persons.[153]

Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) occurs when a person unlawfully attempts to commit a violent injury to the person of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) or unlawfully commits an act which places (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel) in reasonable apprehension of immediately receiving a violent injury.

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself]

[152]W. VA. CODE § 61–2–10b(a) (5) (LexisNexis Supp. 2017); *see also* W. VA. CODE § 30–29–1 (2015).

[153]W. VA. CODE § 61–2–10b(a)(6) (LexisNexis Supp. 2017).

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[herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) (Correctional Employee) (Emergency Medical Service Personnel), the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to [*insert* name(s) of victim(s)]} (commit an act which placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury},
5. [*insert* name(s) of victim(s)] being a (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer),
6. acting in [his] [her] official capacity.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Assault of (a Government Representative) (a Health Care Worker) (Emergency Service Personnel) (a Utility Worker) (a Law Enforcement Officer) as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Effective June 10, 2016, the Legislature added "utility workers" and "law enforcement officers" to this statute. W. VA. CODE § 61–2–10b (2014 & LexisNexis Supp. 2017). Effective July 7, 2017, "correctional employees" were added. *Id*. Thus, any attempt by the State to add victims falling into any of these categories for an offense that occurred prior to the effective dates of the amendments to the statute is improper.

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*State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington,* No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler,* No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (Memorandum Decision) (a defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), erroneous to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.33 Unlawful Shooting at Another in Street, Alley, or Public Resort

Count ___ of the INDICTMENT charges the DEFENDANT with Unlawful Shooting at Another in a Street, Alley or Public Resort. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Unlawful Shooting at Another in a Street, Alley or Public Resort; or

(2) not guilty.

Unlawful Shooting at Another in a Street, Alley or Public Resort occurs when a person unlawfully shoots at another person in any street or alley in a city, town or village, or in any place of public resort.[154]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Unlawful Shooting at Another in a Street, Alley or Public Resort, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year]
4. did shoot at another person,
5. in any (street) (alley in a city, town, or village) (place of public resort).

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Unlawful Shooting at Another in a Street, Alley or Public Resort as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[154]W. VA. CODE § 61–2–11 (2014).

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## Comments

Shooting at Another on a Street, Alley or Public Resort does not define the terms street, alley or public resort.

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## *Robbery*

### 7.2.34 First Degree Robbery or Attempted First Degree Robbery

Count ___ of the INDICTMENT charges the DEFENDANT with (First Degree Robbery) (Attempted First Degree Robbery). You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of (First Degree Robbery) (Attempted First Degree Robbery); or

(2) not guilty.

(First Degree Robbery) (Attempted First Degree Robbery) occurs when a person forcibly [takes] [attempts to take] the property of another by committing violence, including, but not limited to, partial strangulation or suffocation, striking, or beating, or threatens deadly force by presenting a firearm or other deadly weapon.[155]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of First Degree Robbery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. [took and carried away] [attempted to take and carry away],
5. property, specifically [*insert* identification of property)
6. {[from the person of] [in the presence of]}[156] [*insert* name(s) of victim(s)],
7. by [committing violence] [threatening deadly force by presenting a firearm or other deadly weapon],

[155]W. VA. CODE § 61–2–12(a) (2014).

[156]*State v. Harless*, 168 W. Va. 707, 285 S.E.2d 461 (1981).

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8. with the intent to permanently deprive [*insert* name(s) of victim(s)] of said property.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of [First Degree Robbery] [Attempted First Degree Robbery] as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The elements of robbery are not completely described by the statute. They are: (1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods. Syl. Pt. 1, *State v. Harless,* 168 W. Va. 707, 285 S.E.2d 461 (1981). The statute supplements the common law definition in that it differentiates between degrees of robbery.

The 2000 amendment changed an element of First Degree Robbery from "*by the threat or presenting* of firearms, or other deadly weapon" to "uses the threat of deadly *force by presenting* of a firearm or other deadly weapon." After this amendment, the Supreme Court reversed a First Degree Robbery conviction because the indictment alleged that the defendant threatened the use of a firearm, and a mere threat of presentment is no longer an element of First Degree Robbery. *State v. Johnson,* 219 W. Va. 697, 639 S.E.2d 789 (2006) (*per curiam*). In *Johnson*, the defendant and his accomplice said they had a gun during a robbery, but neither of them actually presented a gun.

There is a line of cases affirming First Degree Robbery convictions when a person commits a robbery by presenting something that appears to be a firearm, but is not. Since the 2000 amendment, these cases are likely invalid because they rely on the now-defunct "threat" of a firearm statutory language. *See* Syl. Pt. 2, *State v. Phillips,* 199 W. Va. 507, 485 S.E.2d 676 (1997) (air pistol resembled a firearm); Syl. Pt. 3, *State v. Massey,* 178 W. Va. 427, 359 S.E.2d 865 (1987) (toy gun resembled a firearm); *State v. Combs,* 175 W. Va. 765, 338 S.E.2d 365 (1985) (simulation of firearm by gesturing with hand in jacket pocket); Syl. Pt. 1, *State v. Young,* 134 W. Va. 771, 61 S.E.2d 734 (1950) (hand in hip pocket made victim think robber had a gun).

*State v. Wilkerson,* 230 W. Va. 366, 738 S.E.2d 32 (2013) (neither misdemeanor assault nor battery is a lesser included offense of First Degree Robbery); *State v. Woodson,* 222 W. Va. 607, 671 S.E.2d 438 (2008) (defendant was properly convicted of robbery even though a co-defendant received the property and the defendant received none); *State v. Penwell,* 199 W. Va. 111, 483 S.E.2d 240 (1996) (*per curiam*) (assault in commission of felony is not lesser included offense of aggravated robbery); *State v. Satterfield,* 193 W. Va. 503, 457 S.E.2d 440 (1995) (the value of property does not have to be proven); Syl. Pt. 3, *State v. Ruggles,* 183 W. Va. 58, 394 S.E.2d 42 (1990) (larceny is a lesser included offense of robbery); Syl. Pt. 2, *State v. England,* 180 W. Va. 342, 376 S.E.2d 548 (1988) (an intent to steal or to deprive the owner permanently of his property is an

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essential element of robbery); *State v. Breeden,* 174 W. Va. 705, 329 S.E.2d 71 (1985) (*per curiam*) (evidence that defendant dropped victim's wristwatch immediately after taking it, did not attempt to retrieve it from the ground, and made no attempt to flee did not sustain finding of intent to steal necessary to support First Degree Robbery conviction); *State v. Neider,* 170 W. Va. 662, 95 S.E.2d 902 (1982) (larceny is a lesser included offense of robbery); *State v. Coulter,* 169 W. Va. 526, 288 S.E.2d 819 (1982) (*per curiam*) (attempt to commit robbery is a crime in itself); *State v. Winston,* 170 W. Va. 555, 295 S.E.2d 46 (1982) (defendant was not entitled to assert claim of right to regain property taken in satisfaction of a debt); *State v. Harless,* 168 W. Va. 707, 285 S.E.2d 461 (1981) (Second Degree Robbery is accomplished by placing the victim in fear of bodily injury); Syl. Pt. 7, *State v. Demastus,* 165 W. Va. 572, 270 S.E.2d 649 (1980) (unlawful wounding is lesser included offense of armed (First Degree) Robbery).

### 7.2.35 Second Degree Robbery or Attempted Second Degree Robbery

Count ___ of the INDICTMENT charges the DEFENDANT with (Attempted) Second Degree Robbery. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of (Attempted) Second Degree Robbery; or
(2) not guilty.

Second Degree Robbery occurs when a person forcibly takes or attempts to take the property of another by placing the victim in fear of bodily injury or by means designed to temporarily disable the victim, including, but not limited to, the use of a disabling chemical substance or an electronic shock device.[157]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Second Degree Robbery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month, [*insert* year],
4. [took and carried away] [attempted to take and carry away],
5. property, specifically, [*insert* description of property]

[157]W. VA. CODE § 61–2–12(b) (2014).

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6. {[from the person of] [in the presence of]}[158] [*insert* name(s) of victim(s)],
6. {by placing [*insert* name(s) of victim(s)] in fear of bodily injury} {by using means designed to temporarily disable [*insert* name(s) of victim(s)], {[*insert*, if applicable] including but not limited to the use of a disabling chemical substance or an electronic shock device},
7. with the intent to permanently deprive [*insert* name(s) of victim(s)] of said property.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Second Degree Robbery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The Second Degree Robbery statute is a slight alteration to the common law, which did not recognize degrees of robbery. "While there were no degrees or grades of robbery at common law, our Legislature has codified two degrees of robbery—First Degree Robbery and Second Degree Robbery." *State v. Hatley*, 223 W. Va. 747, 753, 679 S.E.2d 579, 585 (2009) (*per curiam*).

[158] *State v. Harless*, 168 W. Va. 707, 285 S.E.2d 461 (1981).

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## 7.2.36 Bank Robbery

Count ___ of the INDICTMENT charges the DEFENDANT with Bank Robbery. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Bank Robbery; or
(2) not guilty.

Bank Robbery occurs when a person by force and violence, or by putting in fear, takes or attempts to take from the person or presence of another any property, money or other thing of value belonging to, or in the care, custody, control, management, or possession of a bank.[159]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Bank Robbery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. by [force and violence] [putting in fear],
5. [took and carried away] [attempted to take and carry away],
6. from the person or presence of another,
7. property, money, or other thing of value belonging to, or in the care, custody, control, management, or possession of a bank,
8. with the intent to permanently deprive the bank of the possession of said property.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Bank Robbery as charged. If you have a

[159]W. VA. CODE § 61–2–12(c)(1) (2014).

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reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Bank robbery is simply a special species of robbery. The federal bank robbery statute is found at 18 U.S.C. § 2113 (2018).

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## 7.2.37 Aggravated Bank Robbery

Count ___ of the INDICTMENT charges the DEFENDANT with Aggravated Bank Robbery. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Aggravated Bank Robbery; or
(2) not guilty.

Aggravated Bank Robbery occurs when a person by force and violence, or by putting in fear, takes or attempts to take from the person or presence of another any property, money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, and while committing or attempting to commit bank robbery assaults a person, or puts in jeopardy the life of another person by the use of a dangerous weapon or device, disabling chemical substance or an electronic shock device.[160]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Aggravated Bank Robbery, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. by [force and violence] [putting another in fear],
5. [took and carried away] [attempted to take and carry away],
6. from the person or presence of another,
7. property, money, or other thing of value belonging to, or in the care, custody, control, management, or possession of, a bank,
8. with the intent to permanently deprive the bank of possession of said property,
9. and in doing so DEFENDANT [assaulted a person] [put in jeopardy the life of any person by the use of a dangerous weapon

[160]W. VA. CODE § 61–2–12(c)(2) (2014).

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or device, disabling chemical substance or an electronic shock device].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Aggravated Bank Robbery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Bank robbery is simply a special species of robbery. The federal bank robbery statute is found at 18 U.S.C. § 2113 (2018).

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## 7.2.38 Extortion or Attempted Extortion

Count ___ of the INDICTMENT charges the DEFENDANT with [Extortion] [Attempted Extortion]. One of two verdicts may be returned by you under this Count of the INDICTMENT:

(1) guilty of [Extortion] [Attempted Extortion]; or
(2) not guilty.

Extortion occurs when a person [threatens injury to the character, person, or property of another person] [threatens injury to the character, person, or property of another person's wife or child] [accuses another person of an offense] and thereby extorts money or a pecuniary benefit, or a bond, note or other evidence of debt.[161]

Attempted extortion occurs when a person [threatens injury to the character, person, or property of another person] [threatens injury to the character, person, or property of another person's wife or child] [accuses another person of an offense] in a failed attempt to extort money, a pecuniary benefit, or any bond, note or other evidence of debt.[162]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Extortion, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. {threatened injury to the character, person, or property of [*insert* name(s) of victim(s)]} {threatened injury to the character, person, or property of [*insert* name(s) of victim(s)]'s wife or child} {accused [*insert* name(s) of victim(s)] of an offense, specifically: [*insert* offense]},

[161]W. VA. CODE § 61–2–13 (2014).

[162]W. VA. CODE § 61–2–13 (2014).

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5. and [thereby extorted money or a pecuniary benefit, or a bond, note or other evidence of debt] [attempted but failed to extort money or a pecuniary benefit, or any bond, note or other evidence of debt].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

*Committee on Legal Ethics v. Printz,* 187 W. Va. 182, 416 S.E.2d 720 (1992) (an offer not to prosecute a crime in exchange for return of funds lost due to the crime is not extortion); *Iden v. Adrian Buckhannon Bank,* 661 F.Supp. 234 (N.D. W. Va. 1987) (the elements of extortion are (1) a threat of injury to the character, persons, or property of the plaintiffs, and (2) by means of that threat, money, property, or pecuniary benefits are extorted); *State v. Keiffer,* 112 W. Va. 74, 163 S.E. 841 (1932) (conduct may constitute a threat just as effectively as spoken words).

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*Kidnapping*

### 7.2.39 Abduction (any person to marry or defile)

Count ___ of the INDICTMENT charges the DEFENDANT with Abduction. One of two verdicts may be returned by you under this Count of the INDICTMENT:

(1) guilty of Abduction; or
(2) not guilty.

Abduction occurs when any person takes away or detains another person against such person's will with the intent to marry or defile such person, or to cause such person to be married or defiled by another person.[163]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Abduction, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,[164]
3. on or about the ___ day of [*insert* month], [*insert* year],
4. {did take away [*insert* name(s) of victim(s)]} {did detain [*insert* name(s) of victim(s)]}
5. against the will of [*insert* name(s) of victim(s)], and
6. the DEFENDANT did so with the intent to: {marry [*insert* name(s) of victim(s)} {defile [*insert* name(s) of victim(s)]} {cause [*insert* name(s) of victim(s)] to be married by another person} {cause [*insert* name(s) of victim(s)] to be defiled by another person}.

[163]W. VA. CODE § 61–2–14(a) (2014).

[164]W. VA. CODE § 61–2–14b (2014).

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Abduction, you may find the DEFENDANT guilty. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

*State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989) (abduction with intent to defile and kidnapping with intent to avoid arrest were separate offenses for double jeopardy purposes); *State v. Hatfield*, 181 W. Va. 106, 380 S.E.2d 670 (1988) (trial for two charges of abduction with intent to defile should have been severed); *State v. Hanna*, 180 W. Va. 598, 378 S.E.2d 640 (1989) (victim's consent no defense to kidnapping or abduction if consent is obtained because victim has reasonable fear of harm or injury if the victim does not consent); *State v. Davis*, 180 W. Va. 357, 376 S.E.2d 563 (1988) (abduction of the victim was merely incidental to the commission of sexual assault).

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## 7.2.40. Abduction (Child Under 16 Years of Age for Improper and Immoral Purpose)

Count ___ of the INDICTMENT charges the DEFENDANT with Abduction. One of two verdicts may be returned by you under this Count of the INDICTMENT:

(1) guilty of Abduction; or
(2) not guilty.

Abduction occurs when a person other than the father or mother illegally or for an unlawful, improper, or immoral purpose seizes, takes, or secretes a child less than 16 years old from the person or persons having lawful charge of such child.[165]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial. Before the DEFENDANT can be convicted of Abduction, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,[166]
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did (seize) (take) (secrete),
5. [*insert* name(s) of victim(s)], from [his] [her] lawful custodian, and
6. [*insert* name(s) of victim(s)] was a child under sixteen (16) years of age,
7. and the DEFENDANT was not the parent of [*insert* name(s) of victim(s)],
9. {for an illegal purpose, specifically, [*insert* purpose]} {for an unlawful purpose, specifically, [*insert* purpose]} {for an improper purpose, specifically, [*insert* purpose]} {for an immoral purpose, specifically [*insert* purpose]}.

[165]W. VA. CODE § 61–2–14(b) (2014).

[166]W. VA. CODE § 61–2–14b (2014).

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Abduction as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

*State v. Williams,* 215 W. Va. 201, 599 S.E.2d 624 (2004) (abduction occurs when a child under the age of 16 is taken or secreted for any unlawful, improper, or immoral purpose; in other words, this offense consists of an act of the accused, i.e., taking away or secreting, combined with a particular intent) (convictions and sentences for abduction and third degree sexual assault did not violate double jeopardy); *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989) (abduction with intent to defile and kidnapping with intent to avoid arrest were separate offenses for double jeopardy purposes); *State v. Hatfield*, 181 W. Va. 106, 380 S.E.2d 670 (1988) (trial for two charges of abduction with intent to defile should have been severed); *State v. Hanna*, 180 W. Va. 598, 378 S.E.2d 640 (1989) (victim's consent no defense to kidnapping or abduction if consent is obtained because victim has reasonable fear of harm or injury if he or she does not consent); *State v. Davis*, 180 W. Va. 357, 376 S.E.2d 563 (1988) (victim's abduction was merely incidental to the commission of sexual assault).

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## 7.2.41 Abduction (Child Under 16 Years of Age for Purpose of Prostitution or Concubinage)

Count ___ of the INDICTMENT charges the DEFENDANT with Abduction. One of two verdicts may be returned by you under this Count of the INDICTMENT:

(1) guilty of Abduction; or

(2) not guilty.

Abduction occurs when any person takes away a child under the age of 16 years from any person having lawful charge of such child for the purpose of prostitution or concubinage.[167]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent—[he] [she] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Abduction, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,[168]
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did take away [*insert* name(s) of victim(s)]
5. from [*insert* parent or custodian],
6. who is [his] [her] [*insert* relationship] and had lawful charge of [*insert* name(s) of victim(s)],
7. that [*insert* name(s) of victim(s)] was under sixteen years of age, and
8. that such taking was with the intent and purpose on the part of the DEFENDANT of subjecting [*insert* name(s) of victim(s)] to [prostitution] [concubinage].

[167]W. VA. CODE § 61–2–14(a) (2014).

[168]W. VA. CODE § 61–2–14b (2014).

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> If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Abduction as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

According to BLACK'S LAW DICTIONARY (10th ed. 2014), concubinage is "[t]he relationship of a man and woman who cohabit without the benefit of marriage."

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## 7.2.42.1 Kidnapping (effective July 2, 2017)

Count __ of the INDICTMENT charges the DEFENDANT with Kidnapping. One of two verdicts may be returned by you under this Count of the INDICTMENT:

(1) guilty of Kidnapping; or

(2) not guilty.

Kidnapping occurs when a person unlawfully takes custody of, conceals, confines, or restrains another person against his or her will, by means of force, threat of force, duress, fraud, deceit, inveiglement, misrepresentation, or enticement, with the intent to [hold that person for ransom, reward, or concession] [transport that person with the intent to inflict bodily injury or to terrorize the victim or another person] [use that person as a shield or hostage].[169]

"To use another as a hostage" means to seize or detain and threaten to kill or injure another in order to compel a third person or a governmental organization to do or abstain from doing any legal act as an explicit or implicit condition for the release of the person detained.[170]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Kidnapping, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,[171]
3. on or about the __ day of [*insert* month], [*insert* year],
4. [took custody of] [concealed] [confined] [restrained]

[169]W. VA. CODE § 61–2–14a(a) (LexisNexis Supp. 2017).

[170]W. VA. CODE § 61–2–14a(c) (2014 and LexisNexis Supp. 2017).

[171]W. VA. CODE § 61–2–14b (2014).

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5. [*insert* name(s) of victim(s)]
6. with the intent to {hold [*insert* name(s) of victim(s)] for ransom, reward, or concession} {transport [*insert* name(s) of victim(s)] with the intent to inflict bodily injury or to terrorize [*insert* name(s) of victim(s)] or another person} {use [*insert* name(s) of victim(s)] as a shield or hostage}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Kidnapping as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

### 7.2.42.2 Kidnapping (pre-July 2, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Kidnapping. One of two verdicts may be returned by you under this Count of the INDICTMENT:

(1) guilty of Kidnapping; or
(2) not guilty.

Kidnapping occurs when a person unlawfully restrains another person with the intent to [hold that person for ransom, reward, or concession] [transport that person with the intent to inflict bodily injury or to terrorize that person or another person] [use that person as a shield or hostage].[172]

"To use another as a hostage" means to seize or detain and threaten to kill or injure another in order to compel a third person or a governmental organization to do or abstain from doing any legal act as an explicit or implicit condition for the release of the person detained.[173]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this

[172]W. VA. CODE § 61–2–14a (2014).

[173]W. VA. CODE § 61–2–14a(c) (2014).

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charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Kidnapping, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. restrained [*insert* name(s) of victim(s)] in order to {hold [*insert* name(s) of victim(s)] for ransom, reward, or concession} {transport [*insert* name(s) of victim(s)] with the intent to inflict bodily injury or to terrorize [*insert* name(s) of victim(s)] or another person} {used [*insert* name(s) of victim(s)] as a shield or hostage}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Kidnapping as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

West Virginia allows trial judges to determine whether a victim is harmed and whether ransom is paid. Syl. Pt. 1, *State v. Farmer,* 193 W. Va. 84, 454 S.E.2d 378 (1994); *State v. Haught,* 218 W. Va. 462, 624 S.E.2d 899 (2005). Despite repeated opportunities to do so, the West Virginia Supreme Court has never retreated from this position. *E.g.*, *State v. Slater*, 222 W. Va. 499, 506, 665 S.E.2d 674, 681 (2008); *State v. Haught*, 218 W. Va. 462, 624 S.E.2d 899 (2005); *Heard v. Plumley*, No. 13-0300, 2014 WL 1302442, at *2 (W. Va. Mar. 31, 2014) (Memorandum Decision); *Slater v. Ballard*, No. 12-0330, 2013 WL 5418574, at *2 (W. Va. Sept. 27, 2013) (Memorandum Decision); *State v. Shultz*, No. 11-1494, 2013 WL 1632517, at *3 (W. Va. Apr. 16, 2013) (Memorandum Decision); *Farmer v. Seifert*, No. 11-1440, 2013 WL 656629, at *1 & n.1 (W. Va. Feb. 22, 2013) (Memorandum Decision). *See also Rabb v. Ballard*, No. CIV. A. 2:09-0159, 2011 WL 1299354, at *6 (S. D. W. Va. Mar. 31, 2011), *appeal dismissed*, 455 Fed. App'x 356 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2725, *rehearing denied*, 133 S. Ct. 94 (2012).

*State v. Slater,* 222 W. Va. 499, 506, 665 S.E.2d 674 (2008) (sufficient evidence of confinement to support kidnapping conviction); *State v. Dennis,* 216 W. Va. 331, 607 S.E.2d 437 (2004) (whether kidnapping occurred in West Virginia is a jurisdictional element that must be

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determined by a jury beyond a reasonable doubt); *State v. Kitchen,* 207 W. Va. 724, 536 S.E.2d 488 (2000) (four elements determine whether kidnapping is incidental to another crime: (1) the length of time victim was held or moved; (2) the distance the victim was forced to move; (3) the location and environment of the place the victim was detained; and (4) the exposure of the victim to an increased risk of harm); *State v. King*, 205 W. Va. 422, 518 S.E.2d 663 (1999) (kidnapping victim was not "returned or permitted to be returned" when victim was not physically harmed and freed only after defendant was stopped at a roadblock and victim knocked the gun out of defendant's hand); *State v. Ferrell,* 184 W. Va. 123, 399 S.E.2d 834 (1990) (kidnapping not incidental to murder); *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989) (for double jeopardy purposes, kidnapping is a separate offense from abduction with intent to defile); *State v. Woodall,* 182 W. Va. 15, 385 S.E.2d 253 (1989) (kidnapping not incidental to sexual assault); *State v. Hanna*, 180 W. Va. 598, 378 S.E.2d 640 (1989) (consent of victim is no defense to kidnapping or abduction where consent is obtained because victim has reasonable fear of harm or injury if he or she does not consent); *State v. Plumley*, 179 W. Va. 356, 368 S.E.2d 801 (1988) (confinement of correctional officers was incidental to crime of escape); *State v. Brumfield*, 178 W. Va. 240, 358 S.E.2d 801 (1987) (movement and confinement of correctional officers was incidental to crime of escape); Syl. Pt. 2, *State v. Miller*, 176 W. Va. 616, 336 S.E.2d 910 (1985) (kidnapping has not been committed when it is incidental to another crime).

### 7.2.43 Kidnapping by a Family Member

Count ___ of the INDICTMENT charges the DEFENDANT with Kidnapping by a Family Member. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Kidnapping by a Family Member; or
(2) not guilty.

Kidnapping by a Family Member occurs when a family member of a minor conceals, takes, removes, or refuses to return the minor, with the belief, mistaken or not, that it is in the child's interest to do so, without motivation by monetary purposes.[174]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Kidnapping, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

[174] W. VA. CODE § 61–2–14a(d) (2014 and LexisNexis Supp. 2017).

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1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. {concealed [*insert* name(s) of victim(s)]} (took [*insert* name(s) of victim(s)]} {removed [*insert* name(s) of victim(s)]} {refused to return [*insert* name(s) of victim(s)]}, who was a minor,
5. in the belief, mistaken or not, that it is in the child's interest to do so,
6. without motivation by monetary purposes.

[*Insert*, if applicable]: The DEFENDANT has put forth a defense that [his] [her] action was necessary to preserve the welfare [*insert* name(s) of victim(s)]. The DEFENDANT must show that:

1. the DEFENDANT'S action was, in fact, necessary to preserve the welfare of [*insert* name(s) of victim(s)]; and
2. the DEFENDANT promptly reported [his] [her] actions to {the lawful custodian of [*insert* name(s) of victim(s)} {law enforcement} {the Child Protective Services Division of the DHHR}.

The evidence introduced by the DEFENDANT on this defense does not need to be substantial; it must only be sufficient to require the State to prove beyond a reasonable doubt that the DEFENDANT did *not* act to preserve the welfare of the child.[175]

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Kidnapping by a Family Member as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[175] *State v. Cook*, 204 W. Va. 591, 515 S.E.2d 127 (1999).

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## COMMENTS

It is a defense to filial kidnapping that the accused's action was necessary to preserve the welfare of the minor child and the accused promptly reported his or her actions to a person with lawful custody of the minor, to law enforcement or to Child Protective Services division of the Department of Health and Human Resources. W. VA. CODE § 61–2–14a(f).

It is important to ensure that the State not directly or indirectly shift the burden of proof when an affirmative defense is asserted. For example, a defendant need not prove self-defense "by a preponderance of the evidence; all that is required is for the defense to produce evidence sufficient to create a reasonable doubt by virtue of the affirmative defense. *State v. Mullins*, 171 W. Va. 542, 301 S.E.2d 173 (1983). It is the State's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense.

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## 7.2.44 Threats to Kidnap (with intent to extort)

Count ___ of the INDICTMENT charges the DEFENDANT with Threats to Kidnap. You may return one of two verdicts under this Count of the INDICTMENT:

(1) Guilty of Threats to Kidnap, or
(2) not guilty.

A threat to Kidnap occurs when a person, with intent to extort from another person any ransom, money, or other thing, or a concession or advantage of any sort, shall, by any means of communication, directly or indirectly threaten to take away forcibly or by stealth, or otherwise to kidnap any person; it is also committed when a person directly or indirectly demands, by any means of communication, any ransom, money or other thing, or a concession or advantage of any sort, by threatening to take away forcibly or by stealth, or otherwise to kidnap any person.[176]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Threats to Kidnap, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia
3. on or about the ___ day of [*insert* month], [insert year],
4. did {orally} {in writing} {by other means, specifically: [*insert* means]}
5. {threaten to take [*insert* name(s) of victim(s)] away forcibly} {threaten to kidnap [*insert* name(s) of victim(s)]}
6. with the intent to extort from [*insert* name(s) of victim(s)]
7. [ransom] [money] [concession] [advantage of any sort] [other thing].

[176]W. VA. CODE § 61–2–14c (2014).

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Threats to Kidnap as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

A threat to kidnap is a triggering or predicate felony for the West Virginia Recidivist Sentencing Statute. *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992).

### 7.2.45 Concealment, Taking, or Removal of a Minor Child from Custodian or from Person Entitled to Visitation in Violation of a Court Order with the Intent to Deprive Another Person of Lawful Custody or Visitation Rights

Count ___ of the INDICTMENT charges the DEFENDANT with Concealment, Taking or Removal of a Minor Child from [a Custodian] [a Person Entitled to Visitation] in Violation of a Court Order with the Intent to Deprive Another Person of Lawful Custody or Visitation Rights. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Concealment, Taking or Removal of a Minor Child from [a Custodian] [a Person Entitled to Visitation] in Violation of a Court Order with the Intent to Deprive Another Person of Lawful Custody or Visitation Rights; or

(2) not guilty.

"Concealment, Taking, or Removal of a Minor Child from [a Custodian] [a Person Entitled to Visitation] in Violation of a Court Order With the Intent to Deprive Another Person of Lawful Custody or Visitation Rights" occurs when a person within this State conceals, takes, or removes a minor child in violation of a court order with the intent to deprive another person of lawful custody or visitation rights as set forth in the court order and without the reasonable belief that such action was necessary to preserve the welfare of the minor child.[177]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself]

[177] W. VA. CODE § 61–2–14d (2014).

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[herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Concealment, Taking or Removal of a Minor Child from [a Custodian] [a Person Entitled to Visitation] in Violation of a Court Order with the Intent to Deprive Another Person of Lawful Custody or Visitation Rights, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did (conceal) (take) (remove),
5. [*insert* name(s) of victim(s)], a minor child,
6. [within the State of West Virginia] [outside the State of West Virginia],
7. in violation of a court order,
8. with the intent to deprive [a custodian] [a person entitled to visitation] of [lawful custody] [visitation rights], and
9. without the reasonable belief that such action was necessary to preserve the welfare of the minor child.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

If the Federal Parental Kidnapping Prevention (PKP) Act and the Uniform Child Custody Jurisdiction (UCCJ) Act do not conflict with each other, then the statutes are complementary; however, when they conflict, Federal PKP Act, under the supremacy clause of Constitution of United States, preempts the UCCJ Act of the respective states. *Sams v. Boston*, 181 W. Va. 706, 384 S.E.2d 151 (1989).

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## 7.2.46 Abduction of a Child Near a School

Count ___ of the INDICTMENT charges the DEFENDANT with Abduction of a Child Near a School. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Abduction of a Child Near a School; or
(2) not guilty.

Abduction of a Child Near a School occurs when a person abducts a child who is 16 years of age or under within 1,000 feet of a school.[178]

For the purposes of this charge, Abduction occurs when a person other than the father or mother takes or secretes a child under 16 years of age from the person or persons having lawful charge of such child.

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Abduction of a Child Near a School, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. abducted [*insert* name of victim], a child aged sixteen or under,
5. within one thousand feet of a school.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[178] W. VA. CODE § 61–2–14f (2014); *see* W. VA. CODE § 61–2–14(b) (2014).

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## COMMENTS

The statute codifying Malicious Assault of a Child within 1,000 feet of a school does not define "school." West Virginia statutory law in other contexts defines school as "the students and teachers assembled in one or more buildings, organized as a unit[.]" W. VA. CODE § 18–1–1. One legal encyclopedia explains that while "'school' is a generic term with numerous meanings, the common denominator is that a 'school' is a place where instruction is given, generally to the young." 67B AM. JUR. 2d *Schools* § 1. "[W]hen used in a statute…school' usually does not include universities, business colleges, or other institutions of higher education unless the intent to include them is clearly indicated." *Id.*

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## 7.2.47 Unlawful Restraint

Count ___ of the INDICTMENT charges the DEFENDANT with Unlawful Restraint. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Unlawful Restraint; or
(2) not guilty.

Unlawful Restraint occurs when a person, without legal authority, intentionally restrains another with the intent that the other person not be allowed to leave the place of restraint, and who does so by physical force or by overt or implied threat of violence or by actual physical restraint, but without the intent to obtain any other concession or advantage.[179]

For the purposes of this charge, "restrain" means to restrict a person's movement without his or her consent.[180]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Unlawful Restraint, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month] [*insert* year],
4. without legal authority to do so,
5. intentionally restrained [*insert* name(s) of victim(s)]
6. by [use of physical force] [an overt or implied threat of violence] [actual physical restraint],
7. with the intent that [*insert* name(s) of victim(s)] not be allowed to leave the place of restraint,

[179]W. VA. CODE § 61–2–14g (2014).

[180]W. VA. CODE § 61–2–14g(c) (2014).

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8. but without the intent to obtain a concession or advantage of any sort.

{[*Insert*, if applicable]: The DEFENDANT has put forth a defense that [he] [she] acted to protect [*insert* name(s) of victim(s)] from imminent physical danger. The DEFENDANT must show that [his] [her] action was reasonable and in good faith, and was done to protect [*insert* name(s) of victim(s)] from imminent physical danger.}

{*Insert*, if applicable]: The DEFENDANT has put forth a defense that [he] [she] had the legal authority to exercise control over [insert name(s) of victim(s)]. The DEFENDANT must show that:

1. [*insert* name(s) of victim(s)] was less than 18 years old; and
2. [(the DEFENDANT was a parent or legal guardian)
3. (the DEFENDANT was acting under authority granted by a parent or legal guardian)
4. (the DEFENDANT was acting under authority granted by a teacher or other school personnel who were themselves legally authorized to exercise control over the minor child)]
5. and [his] [her] sole purpose was to assume control of the minor child.}

The evidence introduced by the DEFENDANT on this defense does not need to be "beyond a reasonable doubt;" it must only be sufficient to require the State to prove beyond a reasonable doubt that [the DEFENDANT did *not* act to protect the minor child from imminent danger] [the DEFENDANT had legal authority to exercise control over the minor child.]}

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

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## COMMENTS

This statute is sometimes referred to as Celena's law.

It is important to ensure that the State not directly or indirectly shift the burden of proof when an affirmative defense is asserted. For example, a defendant need not prove self-defense "by a preponderance of the evidence; all that is required is for the defense to produce evidence sufficient to create a reasonable doubt by virtue of the affirmative defense. *State v. Mullins,* 171 W. Va. 542, 301 S.E.2d 173 (1983). It is the State's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense.

### 7.2.48 Purchase of a Child

Count ___ of the INDICTMENT charges the DEFENDANT with Purchase of a Child. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Purchase of a Child; or

(2) not guilty.

Purchase of a Child occurs when a person or agency offers, gives, or agrees to give to another person money, property, service, or other thing of value in consideration for the recipient's locating, providing, or procuring a minor child for any purpose which entails a transfer of the legal or physical custody or said child, including, but not limited to, adoption or placement.[181]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Purchase of a Child, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. knowingly [offered] [gave] [agreed to give] to another person,

[181] W. VA. CODE § 61–2–14h(a) (2014).

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5. [money] [property] [service] [other thing of value], specifically, [*insert* description],
6. in consideration for the recipient's [locating] [providing] [procuring] a minor child,
7. for any purpose which entails a transfer of the [legal custody] [physical custody] of said child, including but not limited to, adoption or placement.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section does not prohibit the payment or receipt of the following:

(1) Fees paid for reasonable and customary services provided by the department of health and human resources or any licensed or duly authorized adoption or child-placing agency.

(2) Reasonable and customary legal, medical, hospital or other expenses incurred in connection with the pregnancy, birth and adoption proceedings.

(3) Fees and expenses included in any agreement in which a woman agrees to become a surrogate mother.

(4) Any fees or charges authorized by law or approved by a court in a proceeding relating to the placement plan, prospective placement, or placement of a minor child for adoption.

W. VA. CODE § 61–2–14h(e) (2014).

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## 7.2.49 Sale of a Child

Count ___ of the INDICTMENT charges the DEFENDANT with Sale of a Child. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Sale of a Child; or
(2) not guilty.

Sale of a Child occurs when a person knowingly receives, accepts or offers to accept money, property, service, or other thing of value to locate, provide, or procure a minor child for any purpose which entails a transfer of the legal or physical custody of said child, including but not limited to adoption or placement.[182]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Sale of a Child, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [insert county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. knowingly [received] [accepted] [offered] to accept [money] [property] [service] [other thing of value], specifically [*insert* description],
5. to [locate] [provide] [procure] a minor child
6. for a purpose that entailed a transfer of the [legal custody] [physical custody] of said child, including but not limited to adoption or placement.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you

[182]W. VA. CODE § 61–2–14h(b) (2014).

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may find DEFENDANT guilty of Sale of a Child as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section does not prohibit the payment or receipt of the following:

(1) Fees paid for reasonable and customary services provided by the department of health and human resources or any licensed or duly authorized adoption or child-placing agency.

(2) Reasonable and customary legal, medical, hospital or other expenses incurred in connection with the pregnancy, birth and adoption proceedings.

(3) Fees and expenses included in any agreement in which a woman agrees to become a surrogate mother.

(4) Any fees or charges authorized by law or approved by a court in a proceeding relating to the placement plan, prospective placement or placement of a minor child for adoption.

W. VA. CODE § 61–2–14h(e) (2014).

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## 7.2.50 Battery on a School Employee (including lesser offenses)

Count ___ of the INDICTMENT charges the DEFENDANT with Battery on a School Employee.

You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Battery on a School Employee;
(2) guilty of Assault on a School Employee or
(3) not guilty.

Battery on a School Employee occurs when (1) a person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of a school employee while the employee is engaged in the performance of official duties, or while commuting to or from his or her place of employment, and when the motive for the battery is retaliation for some action taken by the employee to supervise or discipline one or more pupils in accordance with the law; or (2) a person unlawfully and intentionally causes physical harm to a school employee while the employee is engaged in the performance of official duties, or while commuting to or from his or her place of employment, and the motive for the battery is retaliation for some action taken by the employee to supervise or discipline one or more pupils in accordance with law.[183]

Assault on a School Employee occurs when (1) a person unlawfully attempts to commit a violent injury to the person of a school employee while the employee is engaged in the performance of official duties, or while commuting to or from the employee's place of employment, and the motive for the assault is retaliation for some action taken by the employee to supervise or discipline one or more pupils in accordance with law; or (2) when a person unlawfully commits an act which places a school employee in reasonable apprehension of immediately receiving a violent injury while the employee is engaged in the performance of his or her duties, or is commuting to or from his or her place of employment, and the motive for the assault is retaliation for some action taken by the employee to supervise or discipline one or more pupils in accordance with law.[184]

[183]W. VA. CODE § 61–2–15(b) (2014).

[184]W. VA. CODE § 61–2–15(a) (2014).

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"School Employee" means a person employed by a county board of education whether employed on a regular full time basis, an hourly basis or otherwise and includes a student teacher.[185]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Battery on a School Employee, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally,
5. (make physical contact of an insulting or provoking nature with the person of) (cause physical harm to),
6. [*insert* name(s) of victim(s)], a school employee
7. {while [*insert* name(s) of victim(s)] was engaged in the performance of his/her duties} {while [*insert* name(s) of victim(s)] was commuting to or from [his] [her] place of employment},
8. and the motive for the battery was retaliation for action taken by [*insert* name(s) of victim(s)] to supervise or discipline one or more pupils in accordance with law.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty (and deliberate on the lesser included offense of Assault on a School Employee as instructed).

[185]W. VA. CODE § 61–2–15(c) (2014).

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Before the DEFENDANT can be convicted of Assault of a School Employee, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to the person of [*insert* name(s) of victim(s)], a school employee} {commit an act which placed [*insert* name(s) of victim(s)], a school employee, in reasonable apprehension of immediately receiving a violent injury},
5. {while [*insert* name(s) of victim(s)] was engaged in the performance of [his] [her] duties} {while [*insert* name(s) of victim(s)] was commuting to or from [his] [her] place of employment}
6. and the motive for the assault was retaliation for action taken by [*insert* name(s) of victim(s)] to supervise or discipline one or more pupils in accordance with law.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Assault on a School Employee, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has never construed this statute in a criminal case.

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## 7.2.51 Battery of a School Employee

Count ___ of the INDICTMENT charges the DEFENDANT with Battery on a School Employee. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Battery on a School Employee; or

(2) not guilty.

Battery on a School Employee occurs (1) when a person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of a school employee while the employee is engaged in the performance of official duties or while commuting to or from his or her place of employment, and the motive for the battery is retaliation for some action taken by the employee to supervise or discipline one or more pupils in accordance with the law; or (2) when any person unlawfully and intentionally causes physical harm to a school employee while the employee is engaged in the performance of official duties or while commuting to or from his or her place of employment, and the motive for the battery is retaliation for some action taken by the employee to supervise or discipline one or more pupils in accordance with law.[186]

"School Employee" means a person employed by a county board of education whether employed on a regular full time basis, an hourly basis or otherwise, and includes a student teacher.[187]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Battery on a School Employee, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,

[186]W. VA. CODE § 61–2–15(b) (2014).

[187]W. VA. CODE § 61–2–15(c) (2014).

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2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally,
5. [make physical contact of an insulting or provoking nature with the person of] [cause physical harm to]
6. [*insert* name(s) of victim(s)], a school employee,
7. {while [*insert* name(s) of victim(s)] was engaged in the performance of [his] [her] duties} {while [*insert* name(s) of victim(s)] was commuting to or from [his] [her] place of employment}
8. and the motive for the battery was retaliation for action taken by [*insert* name(s) of victim(s)] to supervise or discipline one or more pupils in accordance with law.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has never construed this statute in a criminal case.

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## 7.2.52 Assault of a School Employee

Count ___ of the INDICTMENT charges the DEFENDANT with Assault of a School Employee. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Assault of a School Employee; or
(2) not guilty.

Assault on a School Employee occurs when (1) a person unlawfully attempts to commit a violent injury to the person of a school employee while the employee is engaged in the performance of official duties, or while commuting to or from the employee's place of employment, and the motive for the assault is retaliation for some action taken by the employee to supervise or discipline one or more pupils in accordance with law; or (2) when a person unlawfully commits an act which places a school employee in reasonable apprehension of immediately receiving a violent injury while the employee is engaged in the performance of his or her duties, or is commuting to or from his or her place of employment, and the motive for the assault is retaliation for some action taken by the employee to supervise or discipline one or more pupils in accordance with law.[188]

"School Employee" means a person employed by a county board of education whether employed on a regular full time basis, an hourly basis, or otherwise, if at the time of the commission of the offense such person is engaged in the performance of his or her duties or is commuting to and from his place of employment. For purposes of this charge, a "school employee" shall be deemed to include a student teacher.[189]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

[188]W. VA. CODE § 61–2–15(a) (2014).

[189]W. VA. CODE § 61–2–15(c) (2014).

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Before the DEFENDANT can be convicted of Assault of a School Employee, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to the person of [*insert* name(s) of victim(s)], a school employee} {commit an act which placed [*insert* name(s) of victim(s)], a school employee, in reasonable apprehension of immediately receiving a violent injury},
6. {while [*insert* name(s) of victim(s)] was engaged in the performance of [his] [her]his/her duties} {while [*insert* name(s) of victim(s)] was commuting to or from his/her place of employment}
7. and the motive for the assault was retaliation for action taken by [*insert* name(s) of victim(s)] to supervise or discipline one or more pupils in accordance with law}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Assault on a School Employee, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has never construed this statute in a criminal case.

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## 7.2.53 Battery of an Athletic Official (including lesser offenses)

Count ___ of the INDICTMENT charges the DEFENDANT with Battery of an Athletic Official. You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Battery of an Athletic Official;
(2) guilty of Assault of an Athletic Official or
(3) not guilty.

Battery of an Athletic Official occurs when a person unlawfully and intentionally makes physical contact of an insulting or provoking nature with an athletic official or unlawfully and intentionally causes physical harm to an athletic official.[190]

Assault of an Athletic Official occurs when a person unlawfully attempts to commit a violent injury to an athletic official or places such person in reasonable apprehension of immediately receiving a violent injury.[191]

An "athletic official" is a person at a sports event who enforces the rules of that event, such as an umpire or referee or a person who supervises the participants, such as a coach.[192]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Battery of an Athletic Official, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],

[190]W. VA. CODE § 61–2–15a(b) (2014); *see* W. VA. CODE § 61–2–9(c) (LexisNexis Supp. 2017).

[191]W. VA. CODE § 61–2–15a(a) (2014); *see* W. VA. CODE § 61–2–9(b) (LexisNexis Supp. 2017).

[192]W. VA. CODE § 61–2–15a(c) (2014).

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4. did unlawfully and intentionally make physical contact of an insulting or provoking nature, or unlawfully and intentionally caused physical harm to [*insert* name(s) of victim(s)],
5. who was acting as an athletic official at the time of the battery.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty (and deliberate on the lesser included offense of Assault of an Athletic Official as instructed).

Before the DEFENDANT can be convicted of Assault of an Athletic Official, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully attempt to commit a violent injury to [*insert* name(s) of victim(s)], or placed such person in reasonable apprehension of immediately receiving a violent injury, and
5. [*insert* name(s) of victim(s)] was acting as an athletic official at the time of the assault.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

For offenses occurring before June 29, 2017, the descriptions of "assault" and "battery" will need to be changed. The West Virginia Supreme Court of Appeals has never addressed this statute.

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## 7.2.54 Battery of an Athletic Official

Count ___ of the INDICTMENT charges the DEFENDANT with Battery of an Athletic Official. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Battery of an Athletic Official; or
(2) not guilty.

Battery of an Athletic Official occurs when a person unlawfully and intentionally makes physical contact of an insulting or provoking nature with another person, or unlawfully and intentionally causes physical harm to an athletic official.[193]

An "athletic official" is a person at a sports event who enforces the rules of that event, such as an umpire or referee or a person who supervises the participants, such as a coach.[194]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Battery of an Athletic Official, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally make physical contact of an insulting or provoking nature, or unlawfully and intentionally caused physical harm to [*insert* name(s) of victim(s)],
5. who was acting as an athletic official at the time of the battery.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a

[193]W. VA. CODE § 61–2–15a(b) (2014) *see* W. VA. CODE § 61–2–9(c) (LexisNexis Supp. 2017).

[194]W. VA. CODE § 61–2–15a(c) (2014).

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reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

For offenses occurring before June 29, 2017, the description of "battery" will need to be changed. The West Virginia Supreme Court has never construed this statute in a criminal case.

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## 7.2.55 Assault of an Athletic Official

Count ___ of the INDICTMENT charges the DEFENDANT with Assault of an Athletic Official. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Assault of an Athletic Official; or
(2) not guilty.

Assault of an Athletic Official occurs when a person unlawfully attempts to commit a violent injury to an athletic official or places such person in reasonable apprehension of immediately receiving a violent injury.[195]

An "athletic official" is a person at a sports event who enforces the rules of that event, such as an umpire or referee or a person who supervises the participants, such as a coach.[196]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Assault of an Athletic Official, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully attempt to commit a violent injury to [*insert* name(s) of victim(s)], or placed such person in reasonable apprehension of immediately receiving a violent injury, and
5. [*insert* name(s) of victim(s)] was acting as an athletic official at the time of the assault.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a

[195]W. VA. CODE § 61–2–15a(a) (2014); *see* W. VA. CODE § 61–2–9(b) (LexisNexis Supp. 2017).

[196]W. VA. CODE § 61–2–15(c) (2014).

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reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Assault of an Athletic Official as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

For offenses occurring before June 29, 2017, the description of "assault" will need to be changed. The West Virginia Supreme Court has never construed this statute in a criminal case.

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## 7.2.56 Injury to Passenger by Person in Charge of Public Conveyance or Boat

Count ___ of the INDICTMENT charges the DEFENDANT with Injury to a Passenger by a Person in Charge of a Public Conveyance or Boat. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Injury to a Passenger by a Person in Charge of a Public Conveyance or Boat; or

(2) not guilty.

Injury to a Passenger by a Person in Charge of a Public Conveyance or Boat occurs when the driver, conductor, motorman, captain, or other person in charge of a vehicle or boat, driven by steam, electricity, gasoline, or other motive power, and used for public conveyance, while in the management of such vehicle or boat, willfully or negligently inflicts bodily injury on another person.[197]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Injury to a Passenger by a Person in Charge of a Public Conveyance or Boat, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. was a (driver) (conductor) (motorman) (captain) (person in charge of a vehicle or boat), which was
5. driven by (steam) (electricity) (gasoline) (other motive power),
6. and which was used for public conveyance,
7. [willfully] [negligently] inflicted bodily injury on another person.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a

[197]W. VA. CODE § 61–2–16 (2014).

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reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has never construed this statute in a criminal case.

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## 7.2.57 Malicious Assault of a Driver, Motorman, Conductor, Captain Pilot, or Other Person in Charge of a Vehicle Used for Public Conveyance (including lesser offenses)

Count ___ of the INDICTMENT charges the DEFENDANT with Malicious Assault of a Driver, Motorman, Conductor, Captain, Pilot, or Other Person in Charge of any Vehicle or Boat Used for Public Conveyance. Where the alleged victim operates such vehicle or boat, I shall refer to him or her as the "Operator of a Public Conveyance," or simply "Operator."

You may return one of five verdicts under this Count of the INDICTMENT:

(1) guilty of Malicious Assault of the Operator of a Public Conveyance;
(2) guilty of Unlawful Assault of the Operator;
(3) guilty of Battery of the Operator;
(4) guilty of Assault of the Operator; or
(5) not guilty.

*Malicious Assault* of an Operator of a Public Conveyance occurs when a person maliciously shoots, stabs, cuts or wounds, or by any means causes bodily injury, with the intent to permanently maim, permanently disfigure, permanently disable, or kill any Operator acting in his or her official capacity, and the DEFENDANT knew or had reason to know that the person was the Operator of a public conveyance acting in his or her official capacity.[198] Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with the intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.

*Unlawful Assault* of the Operator of a Public Conveyance occurs when a person unlawfully, but not maliciously, shoots, stabs, cuts, wounds, or by any means causes bodily injury to another with intent to permanently maim, permanently disfigure, permanently disable or kill the Operator of a public conveyance acting in his or her official capacity, and the DEFENDANT knew

[198] W. VA. CODE § 61–2–16a(a) (2014).

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or had reason to know that the person was an Operator acting in an official capacity.[199]

*Battery* of the Operator of a Public Conveyance occurs when a person unlawfully, knowingly and intentionally makes physical contact of an insulting or provoking nature with, or unlawfully and intentionally causes physical harm to the Operator of a public conveyance acting in his or her official capacity, and the DEFENDANT knew or had reason to know that the person was an Operator of a public conveyance.[200]

*Assault* of the Operator of a Public Conveyance occurs when a person unlawfully attempts to commit a violent injury to an Operator, or commits an act which places an Operator acting in his or her official capacity in reasonable apprehension of immediately receiving a violent injury, and the person committing the assault knew or had reason to know that the person was an Operator of a public conveyance.[201]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of *Malicious Assault* of an Operator of a Public Conveyance, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and maliciously (cut) (stab) (wound) (shoot) {by [*insert* other means]} and cause bodily injury to
5. [*insert* name(s) of victim(s)],
6. with the intent to permanently maim, permanently disfigure, permanently disable, or kill

[199]W. VA. CODE § 61–2–16a(b) (2014).

[200]W. VA. CODE § 61–2–16a(c) (2014).

[201]W. VA. CODE § 61–2–16a(d) (2014).

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7. [*insert* name(s) of victim(s)], who was acting in an official capacity as an Operator of a Public Conveyance;
8. and the DEFENDANT had reason to know that [*insert* name(s) of victim(s)] was an Operator of a Public Conveyance.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Malicious Assault, you may find DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements of Malicious Assault, you shall find the DEFENDANT not guilty of Malicious Assault (and deliberate on the lesser included offense of Unlawful Assault of an Operator as instructed).

Before the DEFENDANT can be convicted of *Unlawful Assault* of an Operator of a Public Conveyance, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully but not maliciously (cut) (stab) (wound) (shoot) or by [*insert* other means] cause bodily injury to
5. [*insert* name(s) of victim(s)],
6. with the intent to (kill) (permanently maim) (permanently disfigure) (permanently disable),
7. [*insert* name(s) of victim(s)], who was acting in an official capacity as an Operator of a Public Conveyance,
8. and the DEFENDANT had reason to know that [*insert* name(s) of victim(s)] was the Operator.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Unlawful Assault, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements of Unlawful Assault, you shall find the DEFENDANT not guilty of

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Unlawful Assault of an Operator (and deliberate on the lesser included offense of Battery as instructed).

Before the DEFENDANT can be convicted of *Battery* of an Operator of a Public Conveyance, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally make physical contact of an insulting or provoking nature,
5. with the person of [*insert* name(s) of victim(s)], who was acting in an official capacity as an Operator of a Public Conveyance,
8. and the DEFENDANT had reason to know that [*insert* name(s) of victim(s)] was an Operator of a Public Conveyance.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Battery, you may find the DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty (and deliberate on the lesser included offense of Assault of an Operator as instructed).

Before the DEFENDANT can be convicted of *Assault* of a Driver, Motorman, Conductor, Captain, Pilot, or Other Person in Charge of any Vehicle Used for Public Conveyance, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [insert county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did {attempt to commit a violent injury to [insert name(s) of victim(s)]} {place [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury},
5. and [*insert* name(s) of victim(s)] was an Operator of a Public Conveyance,
6. who was acting in an official capacity as an Operator,

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7. and the DEFENDANT had reason to know that [*insert* name(s) of victim(s)] was an Operator of a Public Conveyance.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Assault, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements of Assault of an Operator, you shall find the DEFENDANT not guilty.

## COMMENTS

*State v. Lobb*, No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense domestic violence is not a lesser included offense of malicious assault); *State v. Washington*, No. 11-0849, 2012 WL 3079178 (W. Va. Apr. 16, 2012) (Memorandum Decision) (brandishing a deadly weapon is a lesser included offense of attempted malicious assault); *State v. Butler*, No. 11-1191, 2012 WL 4054108 (W. Va. Sept. 7, 2012) (defendant need not use a weapon to be convicted of malicious assault); *State v. Lewis,* 207 W. Va. 544, 534 S.E.2d 740 (2000) (malice and intent can be inferred from defendant's use of a deadly weapon); *State v. Wright,* 200 W. Va. 549, 490 S.E.2d (1997) (wanton endangerment is a lesser included offense of malicious assault where both charges are predicated on a single act involving a single gunshot); *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (malicious assault and attempted first-degree murder are separate offenses for double jeopardy purposes); *State v. Stalnaker*, 138 W. Va. 30, 76 S.E.2d (1953) (to constitute a "wound," there must be a complete parting or solution of external or internal skin) (intent to produce a permanent disability or disfiguration is the essence of malicious wounding and unlawful wounding); *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) (misdemeanor assault and battery are lesser included offenses of malicious assault); *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928) (intent to produce a permanent disability or disfiguration is required to sustain a conviction for unlawful wounding (assault)); *State v. Scaggs*, 99 W. Va. 689, 129 S.E. 705 (1925) (it is not necessary to state the weapon with which the assault was made in an indictment for malicious wounding (assault)); *State v. Meadows*, 18 W. Va. 658 (1881) (in a trial for malicious or unlawful wounding (assault), it is error to instruct the jury that mere intent to cause bodily injury is sufficient to convict).

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## 7.2.58 Human Trafficking (for acts occurring prior to June 15, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Human Trafficking. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Human Trafficking; or
(2) not guilty.

Human trafficking occurs when a person knowingly and willfully engages in labor trafficking, sex trafficking, debt bondage, or forced labor or services.[202]

"Human trafficking" means the labor trafficking or sex trafficking involving adults or minors where two or more persons are trafficked within any one year period.[203]

"Labor trafficking" means the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining or receipt of a person by any means, whether a United States citizen or foreign national, for the purpose of debt bondage, or forced labor or services; or slavery or practices similar to slavery.[204]

"Debt bondage" means the status or condition of a debtor arising from a pledge by the debtor of the debtor's personal services or those of a person under the debtor's control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.[205]

"Forced labor or services" means labor or services that are performed or provided by another person and are obtained or maintained through (1) a threat, either implicit or explicit, deception or fraud, scheme, plan, or pattern, or other action intended to cause a person to believe that, if the person did not perform or provide the labor or services, then that person or another person would suffer serious bodily harm or physical restraint. This does not include work or services provided by a minor to the minor's parent or legal guardian

[202]W. VA. CODE § 61–2–17 (2014). This section was repealed, effective June 15, 2017. (LexisNexis Supp. 2017).

[203]W. VA. CODE § 61–2–17(a)(3) (2014).

[204]W. VA. CODE § 61–2–17(a)(4) (2014).

[205]W. VA. CODE § 61–2–17(a)(1) (2014).

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so long as the legal guardianship or custody of the minor was not obtained for the purpose of compelling the minor to participate in commercial sex acts or sexually explicit performance, or perform forced labor or services; (2) physically restraining or threatening to physically restrain a person; (3) abuse or threatened abuse of the legal process; or (4) knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person.[206]

"Forced labor or services" does not mean labor or services required to be performed by a person in compliance with a court order or as a required condition of probation, parole, or imprisonment.[207]

"Sex trafficking of minors" means the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining or receipt of a person under the age of eighteen by any means, whether a United States citizen or foreign national, for the purpose of causing the minor to engage in sexual acts, or in sexual conduct that constitutes a violation of W. VA. CODE § 61–8–5(b) (2014).[208]

"Sex trafficking of adults" means the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining, receipt of a person eighteen years of age or older, whether a United States citizen or foreign national for the purposes of engaging in prostitution by means of force, threat, coercion, deception, abuse or threatened abuse of the legal process, or any scheme, plan, pattern, or other action intended to cause a person to believe that, if the person did not engage in a violation of W. VA. CODE § 61–8–5(b) (2014), then that person or another person would suffer serious bodily harm or physical restraint.[209]

W. VA. CODE § 61–8–5(b) (2014) prohibits a person from engaging in prostitution, lewdness, or assignation, or soliciting, inducing, enticing, or procuring another to commit an act of prostitution, lewdness, or assignation;

[206]W. VA. CODE § 61–2–17(a)(2) (2014).

[207]W. VA. CODE § 61–2–17(a)(2) (2014).

[208]W. VA. CODE § 61–2–17(a)(5) (2014).

[209]W. VA. CODE § 61–2–17(a)(6) (2014).

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or residing in, entering, or remaining in any house, place, building, hotel, tourist camp, or other structure, or entering or remaining in any vehicle, trailer, or other conveyance for the purpose of prostitution, lewdness, or assignation; or aiding, abetting, or participating in the doing of any of such prohibited acts.

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Human Trafficking, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia
3. on or about the ___ day of [*insert* month], [*insert* year], which is prior to June 15, 2017,
4. knowingly and willfully engaged in [Sex Trafficking of Minors] [Sex Trafficking of Adults] [Debt Bondage] [Forced Labor or Services] [Labor Trafficking].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Human Trafficking as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The human trafficking code section has been repealed, effective June 15, 2017. W. VA. CODE § 61–2–17 (LexisNexis Supp. 2017).

The West Virginia Supreme Court has never substantively construed this statute in a criminal case.

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## 7.2.59.1 Domestic Battery (effective June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Domestic Battery. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Domestic Battery; or
(2) not guilty.

Domestic Battery occurs when any family or household member unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member, or unlawfully and intentionally causes physical harm to a family or household member.[210]

"Family member" or "Household member" means a current or former spouse, current or former sexual or intimate partner, a person with whom the defendant has a child in common, a person with whom the DEFENDANT cohabits or has cohabited, a parent or guardian, the DEFENDANT'S child or ward, or a member of the DEFENDANT'S household at the time of the offense.[211]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Domestic Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally

[210]W. VA. CODE § 61–2–28(a) (LexisNexis Supp. 2017)

[211]W. VA. CODE §§ 61–2–28(3) (LexisNexis Supp. 2017) and 48–27–204 (2014).

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5. {made physical contact of an insulting or provoking nature with [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]},
6. who was a family or household member,
7. of which family or household the DEFENDANT was also a member.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Domestic Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

*State v. Lobb,* No. 14-0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense Domestic Violence and Malicious Assault are distinct offenses for double jeopardy purposes).

The Domestic Battery section was re-written in 2017 to add "contact of an insulting or provoking nature" to the conduct constituting "battery." W. VA. CODE § 61–2–28 (2014 and LexisNexis Supp. 2017).

The definition of "family or household member" is taken from Article 27, "The Prevention and Treatment of Domestic Violence," of W. Va. Code Chap. 48 ("Domestic Relations"). The 2017 revisions did not affect the reference to § 48–27–204 or the definitions found therein. The relationships are as follows: parent, stepparent, brother or sister, half-sibling, step-sibling, father-in-law, mother-in-law, child, step-child, daughter-in law, son-in law, stepdaughter-in law, stepson-in-law, grandparent, step grandparent, aunt, step aunt, aunt-in-law, uncle, uncle-in-law, step uncle, niece, nephew, first or second cousin. W. Va. Code § 48–27–204 (2014).

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## 7.2.59.2 Domestic Battery (pre-June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Domestic Battery. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Domestic Battery; or
(2) not guilty.

Domestic Battery occurs when any family or household member unlawfully and intentionally makes physical contact with force capable of causing physical pain or injury to a family or household member, or unlawfully and intentionally causes physical harm to a family or household member.[212]

"Family member" or "Household member" means a current or former spouse, current or former sexual or intimate partner, a person with whom the defendant has a child in common, a person with whom the DEFENDANT cohabits or has cohabited, a parent or guardian, the DEFENDANT'S child or ward, or a member of the DEFENDANT'S household at the time of the offense.[213]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Domestic Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally

[212]W. VA. CODE § 61–2–28(a) (2014).

[213]W. VA. CODE §§ 61–2–28(e) (2014) and 48–27–204 (2014).

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5. {made physical contact with force capable of causing physical pain or injury to [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]},
6. who was a family or household member
7. of which family or household the DEFENDANT was also a member.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Domestic Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

*State v. Lobb,* No. 14-0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (third offense Domestic Violence and Malicious Assault are distinct offenses for double jeopardy purposes).

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## 7.2.60.1 Domestic Assault (effective June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Domestic Assault. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Domestic Assault; or
(2) not guilty.

Domestic Assault occurs when a person unlawfully attempts to commit a violent injury to another family or household member, or unlawfully commits an act which places the family or household member in reasonable apprehension of immediately receiving a violent injury.[214]

"Family member" or "Household member" means a current or former spouse, a current or former sexual or intimate partner, a person with whom the defendant has a child in common, a person with whom the defendant cohabits or has cohabited, a parent or guardian, the DEFENDANT'S child or ward, or a member of the DEFENDANT'S household at the time of the offense.[215]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Domestic Assault the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully {attempted to commit a violent injury to [*insert* name(s) of victim(s)], who was a family or household member} {committed an act which placed [*insert* name(s) of victim(s)], a

[214]W. VA. CODE § 61–2–28(b) (LexisNexis Supp. 2017).

[215]W. VA. CODE §§ 61–2–28(e) (LexisNexis Supp. 2017) and 48–27–204 (2014).

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family or household member, in reasonable apprehension of immediately receiving a violent injury},

6. of which family or household the DEFENDANT was also a member.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Domestic Assault you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

It remains to be seen whether the 2017 revision, from "attempts to use force capable of causing physical pain or injury" to "attempts to commit a violent injury" (whatever that is—how one "commits an injury" is unclear at best) carries with it any meaningful distinction. Presumably, the newer version still means to address the nature of the act (violent) rather than the injury as the fact in which criminality inheres.

### 7.2.60.2 Domestic Assault (pre-June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Domestic Assault. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Domestic Assault; or

(2) not guilty.

Domestic Assault occurs when a person unlawfully attempts to use force capable of causing physical pain or injury to another family or household member, or unlawfully commits an act which places the family or household member in reasonable apprehension of immediately suffering physical pain or injury.[216]

"Family member" or "Household member" means a current or former spouse, a current or former sexual or intimate partner, a person with whom the defendant has a child in common, a person with whom the defendant cohabits or has cohabited, a parent or guardian, the DEFENDANT'S child or

[216]W. VA. CODE § 61–2–28(b) (2014).

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ward, or a member of the DEFENDANT'S household at the time of the offense.[217]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Domestic Assault the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to use force capable of causing physical pain or injury to [*insert* name(s) of victim(s)], who was a family or household member} {commit an act which places [*insert* name(s) of victim(s)], a family or household member, in reasonable apprehension of immediately suffering physical pain or injury},
6. of which family or household the DEFENDANT was also a member.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Domestic Assault you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

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[217]W. VA. CODE §§ 61–2–28(e) (2014) and 48–27–204 (2014).

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### 7.2.61.1 Second Offense Domestic Violence (with Domestic Battery as lesser included offense) (effective June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Second Offense Domestic Violence.

You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Second Offense Domestic Violence;
(2) guilty of Domestic Battery; or
(3) not guilty.

Second Offense Domestic Violence occurs when a family or household member commits either Domestic Assault or Domestic Battery, having been previously convicted of either Domestic Assault or Domestic Battery or other predicate offense, [*insert* predicate offense under W. VA. CODE §§ 61–2–9(b), 61–2–9(c), or 61–2–14g(a), where the victim was a family or household member], specifically, [*insert* description of offense]; or having previously been granted a period of pretrial diversion [pursuant to W. VA. CODE § 61–11–22] [for a violation of W. VA. CODE §§ 61–2–28(a), 61–2–28(b), 61–2–9(b) or (c), or 61–2–14g(a)], specifically, [*insert* particular offense at issue].[218]

Domestic Battery occurs when a family or household member unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member, or unlawfully and intentionally causes physical harm to another family or household member.[219]

Domestic Assault occurs when a person unlawfully attempts to commit a violent injury to another family or household member, or unlawfully commits an act which places the family or household member in reasonable apprehension of immediately receiving a violent injury.[220]

"Family member" or "Household member" means a current or former spouse, a current or former sexual or intimate partner, a person with whom the DEFENDANT has a child in common, a person with whom the DEFENDANT cohabits or has cohabited, a parent or guardian, the

[218]W. VA. CODE § 61–2–28(c) (LexisNexis Supp. 2017).

[219]W. VA. CODE § 61–2–28(a) (LexisNexis Supp. 2017).

[220]W. VA. CODE § 61–2–28(b) (LexisNexis Supp. 2017).

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DEFENDANT'S child or ward, or a member of the DEFENDANT'S household at the time of the offense.[221]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Second Offense Domestic Violence the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally
5. {made physical contact of an insulting or provoking nature with the person of [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]},
6. who was a family or household member,
7. of which family or household the DEFENDANT was also a member,
8. and the DEFENDANT was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [*insert* other predicate offense[222]]} on the ___ day of [*insert* month], [*insert* year].
9. and the victim in that case was a family or household member.

If, after impartially considering, weighing and comparing all the evidence, (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Second Offense Domestic Violence you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one

[221]W. VA. CODE §§ 61–2–28(e) (2014 and LexisNexis Supp. 2017) and 48–27–204 (2014).

[222]W. VA. CODE § 61–2–28(c) (LexisNexis Supp. 2017).

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or more of these elements, you shall find the DEFENDANT not guilty of Second Offense Domestic Violence (and deliberate on the lesser included offense of Domestic Battery).

Before the DEFENDANT can be convicted of Domestic Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally,
5. {made physical contact of an insulting or provoking nature with the person of [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]},
6. who was a family or household member,
7. of which family or household the DEFENDANT was also a member.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Domestic Battery, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

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## 7.2.61.2 Second Offense Domestic Violence (with Domestic Battery as lesser included offense) (pre-June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Second Offense Domestic Violence.

You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Second Offense Domestic Violence;
(2) guilty of Domestic Battery; or
(3) not guilty.

Second Offense Domestic Violence occurs when a family or household member commits either Domestic Assault or Domestic Battery, having been previously convicted of either Domestic Assault or Domestic Battery or other predicate offense, [*insert* predicate offense under W. VA. CODE §§ 61–2–9(b), 61–2–9(c), or 61–2–14g(a), where the victim was a family or household member], specifically, [*insert* description of offense]; or having previously been granted a period of pretrial diversion [pursuant to W. VA. CODE § 61–11–22] [for a violation of W. VA. CODE §§ 61–2–28(a), 61–2–28(b), 61–2–9(b) or (c), or 61–2–14g(a)], specifically, [*insert* particular offense at issue].[223]

Domestic Battery occurs when a family or household member unlawfully and intentionally makes physical contact with force capable of causing physical pain or injury to another family or household member, or unlawfully and intentionally causes physical harm to another family or household member.[224]

Domestic Assault occurs when a family or household member unlawfully attempts to use force capable of causing physical pain or injury against another family or household member or unlawfully commits an act which places another family or household member in reasonable apprehension of immediately suffering physical pain or injury.[225]

"Family member" or "Household member" means a current or former spouse, a current or former sexual or intimate partner, a person with whom the DEFENDANT has a child in common, a person with whom the DEFENDANT cohabits or has cohabited, a parent or guardian, the

[223]W. VA. CODE § 61–2–28(c) (2014).

[224]W. VA. CODE § 61–2–28(a) (2014).

[225]W. VA. CODE § 61–2–28(b) (2014).

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DEFENDANT'S child or ward, or a member of the DEFENDANT'S household at the time of the offense.[226]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Second Offense Domestic Violence the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally
5. {made physical contact with force capable of causing physical pain or injury to the person of [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]},
6. who was a family or household member,
7. of which family or household the DEFENDANT was also a member,
8. and the DEFENDANT was previously convicted of Domestic {Battery} {Assault} {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [*insert* other predicate offense[227]]} on the ___ day of [*insert* month], [*insert* year].

If, after impartially considering, weighing and comparing all the evidence, (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find

[226]W. VA. CODE §§ 61–2–28(e) (2014) and 48–27–204 (2014).

[227]W. VA. CODE § 61–2–28(c) (LexisNexis Supp. 2017).

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the DEFENDANT not guilty of Second Offense Domestic Violence (and deliberate on the lesser included offense of Domestic Battery).

Before the DEFENDANT can be convicted of Domestic Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally,
5. {made physical contact capable of causing physical pain or injury to the person of [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]},
6. who was a family or household member,
7. of which family or household the DEFENDANT was also a member.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Domestic Battery, you may find DEFENDANT guilty as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

*State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (Third Offense Domestic violence is not a lesser included offense of Malicious Wounding).

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## 7.2.62.1 Third Offense Domestic Violence (with Domestic Battery as lesser included offense) (effective June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Third Offense Domestic Violence.

You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Third Offense Domestic Violence;
(2) guilty of Domestic Battery or
(3) not guilty.

Third Offense Domestic Violence occurs when a family or household member commits either Domestic Assault or Domestic Battery, having been previously twice convicted of Domestic Assault or Domestic Battery or other predicate offense, [*insert* predicate offense under W. VA. CODE §§ 61–2–9(b), 61–2–9(c), or 61–2–14g(a), where the victim was a family or household member], specifically, [*insert* description of offense]; or having previously been granted a period of pretrial diversion pursuant to W. VA. CODE § 61–11–22 for a violation of W. VA. CODE §§ 61–2–28(a), 61–2–28(b), 61–2–9(b) or (c), or 61–2–14g(a)], specifically, [*insert* particular offense at issue], [228] where such third Domestic Assault or Domestic Battery occurs within ten years of the prior convictions.[229]

Domestic Battery occurs when a family or household member unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member, or unlawfully and intentionally causes physical harm to another family or household member.[230]

Domestic Assault occurs when a person unlawfully attempts to commit a violent injury to another family or household member, or unlawfully commits an act which places the family or household member in reasonable apprehension of immediately receiving a violent injury.[231]

"Family member" or "Household member" means a current or former spouse, a current or former sexual or intimate partner, a person with whom

[228]W. VA. CODE § 61–2–28(d) (LexisNexis Supp. 2017).

[229]W. VA. CODE § 61–2–28(d) (LexisNexis Supp. 2017).

[230]W. VA. CODE § 61–2–28(a) (LexisNexis Supp. 2017).

[231]W. VA. CODE § 61–2–28(b) (LexisNexis Supp. 2017).

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the defendant has a child in common, a person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward, or a member of the DEFENDANT'S household at the time of the offense.[232]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Third Offense Domestic Violence the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally,
5. either
   a. {made physical contact of an insulting or provoking nature with [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]}, or
   b. {attempted to commit a violent injury against [*insert* name(s) of victim(s)]} {committed an act that placed [*insert* name(s) of victim(s)] in reasonable apprehension of immediately receiving a violent injury}
6. and [*insert* name(s) of victim(s)] was a family or household member,
7. of which family or household the DEFENDANT was also a member,
8. and on the ___ day of [*insert* month], [*insert* year],
9. the DEFENDANT was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of

[232]W. VA. CODE §§ 61–2–28(e) (2014 and LexisNexis Supp. 2017) and 48–27–204 (2014).

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[Domestic Battery] [Domestic Assault] [*insert* other predicate offense[233]]}

10. and on the ___ day of [*insert* month], [*insert* year],
11. the DEFENDANT was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [*insert* other predicate offense[234]]} on the ___ day of [*insert* month], [*insert* year],
12. and the previous convictions were within ten (10) years of the current violation.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Third Offense Domestic Violence as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty (and deliberate on the lesser included offense of Domestic Battery).

Before the DEFENDANT can be convicted of Domestic Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove to your satisfaction beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally
5. {made physical contact of an insulting or provoking nature with [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]}, or
6. and [*insert* name(s) of victim(s)] was a family or household member,
7. of which family or household the DEFENDANT was also a member.

[233]W. VA. CODE § 61–2–28(d) (LexisNexis Supp. 2017).

[234]W. VA. CODE § 61–2–28(d) (LexisNexis Supp. 2017).

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Domestic Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.[235]

[235]W. VA. CODE § 61–2–28(d) (2014).

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### 7.2.62.2 Third Offense Domestic Violence (with Domestic Battery as lesser included offense) (Pre-June 29, 2017)

Count ___ of the INDICTMENT charges the DEFENDANT with Third Offense Domestic Violence.

You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Third Offense Domestic Violence;
(2) guilty of Domestic Battery or
(3) not guilty.

Third Offense Domestic Violence occurs when a family or household member commits either Domestic Assault or Domestic Battery, having been previously twice convicted of Domestic Assault or Domestic Battery or other predicate offense, [*insert* predicate offense under W. VA. CODE §§ 61–2–9(b), 61–2–9(c), or 61–2–14g(a), where the victim was a family or household member], specifically, [*insert* description of offense]; or having previously been granted a period of pretrial diversion pursuant to W. VA. CODE § 61–11–22 for a violation of W. VA. CODE §§ 61–2–28(a), 61–2–28(b), 61–2–9(b) or (c), or 61–2–14g(a)], specifically, [*insert* particular offense at issue],[236] where such third Domestic Assault or Domestic Battery occurs within ten years of the prior convictions.[237]

Domestic Battery occurs when a family or household member unlawfully and intentionally makes physical contact with force capable of causing physical pain or injury to another family or household member, or unlawfully and intentionally causes physical harm to another family or household member.[238]

Domestic Assault occurs when a family or household member unlawfully attempts to use force capable of causing physical pain or injury against another family or household member or unlawfully commits an act which places another family or household member in reasonable apprehension of immediately suffering physical pain or injury.[239]

[236]W. VA. CODE § 61–2–28(d) (2014).

[237]W. VA. CODE § 61–2–28(d) (2014).

[238]W. VA. CODE § 61–2–28(a) (2014).

[239]W. VA. CODE § 61–2–28(b) (2014).

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"Family member" or "Household member" means a current or former spouse, a current or former sexual or intimate partner, a person with whom the defendant has a child in common, a person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward, or a member of the DEFENDANT'S household at the time of the offense.[240]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Third Offense Domestic Violence the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT, -
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally,
5. {made physical contact with force capable of causing physical pain or injury to the person of [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]}
6. who was a family or household member,
7. of which family or household the DEFENDANT was also a member,
8. and on the ___ day of [*insert* month], [*insert* year],
9. the DEFENDANT was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [*insert* other predicate offense[241]]}
10. and on the ___ day of [*insert* month], [*insert* year],

[240]W. VA. CODE § 61–2–28(e) (2014).

[241]W. VA. CODE § 61–2–28(d) (2014).

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11. the DEFENDANT was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [*insert* other predicate offense[242]]} on the ___ day of [*insert* month], [*insert* year],

12. and the previous convictions were within ten (10) years of the current violation.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty of Third Offense Domestic Violence as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty (and deliberate on the lesser included offense of Domestic Battery).

Before the DEFENDANT can be convicted of Domestic Battery, the State must overcome the presumption that the DEFENDANT is innocent and prove to your satisfaction beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. unlawfully and intentionally
5. {made physical contact capable of causing physical pain or injury to the person of [*insert* name(s) of victim(s)]} {caused physical harm to the person of [*insert* name(s) of victim(s)]},
6. who was a family or household member,
7. of which family or household the DEFENDANT was also a member.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find DEFENDANT guilty of Domestic Battery as charged. If you have a

[242]W. VA. CODE § 61–2–28(d) (2014).

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reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

*State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Third Offense Domestic violence is not a lesser included offense of Malicious Wounding).

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## 7.2.63 Third Offense Domestic Violence (with Domestic Assault as lesser included offense)

Count ___ of the INDICTMENT charges the DEFENDANT with Third Offense Domestic Violence.

You may return one of three verdicts under this Count of the INDICTMENT:

(1) guilty of Third Offense Domestic Violence;
(2) guilty of Domestic Assault or
(3) not guilty.

Domestic Battery occurs when a family or household member unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member, or unlawfully and intentionally causes physical harm to another family or household member.[243]

Domestic Assault occurs when a person unlawfully attempts to commit a violent injury to another family or household member, or unlawfully commits an act which places the family or household member in reasonable apprehension of immediately receiving a violent injury.[244]

Third Offense Domestic Violence occurs when a family or household member commits either Domestic Assault or Domestic Battery, having been previously twice convicted of Domestic Assault or Domestic Battery or other predicate offense, [*insert* predicate offense under W. VA. CODE §§ 61–2–9(b), 61–2–9(c), or 61–2–14g(a), where the victim was a family or household member], specifically, [*insert* description of offense]; or having previously been granted a period of pretrial diversion pursuant to W. VA. CODE § 61–11–22 for a violation of W. VA. CODE §§ 61–2–28(a), 61–2–28(b), 61–2–9(a) or (b) or (c), or 61–2–14g(a)], specifically, [*insert* particular offense at issue],[245] where such third Domestic Assault or Domestic Battery occurs within ten years of the prior convictions.[246]

[243]W. VA. CODE § 61–2–28(a) (LexisNexis Supp. 2017).

[244]W. VA. CODE § 61–2–28(b) (LexisNexis Supp. 2017).

[245]W. VA. CODE § 61–2–28(d) (LexisNexis Supp. 2017).

[246]W. VA. CODE § 61–2–28(d) (LexisNexis Supp. 2017).

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"Family member' or "Household member" means a current or former spouse, a current or former sexual or intimate partner, a person with whom the DEFENDANT has a child in common, a person with whom the defendant cohabits or has cohabited, a parent or guardian, the DEFENDANT'S child or ward, or a member of the DEFENDANT'S household at the time of the offense.[247]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Third Offense Domestic Violence, the State must overcome the presumption that the DEFENDANT is innocent and prove to your satisfaction beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully and intentionally
5. {attempt to use force capable of causing physical pain or injury to [*insert* name(s) of victim(s)], being a family or household member} {commit an act which placed [*insert* name(s) of victim(s)], being a family or household member, in reasonable apprehension of immediately suffering physical pain or injury),
6. [*insert* name(s) of victim(s)] being a family or household member,
7. of which family or household the DEFENDANT is also a member,
8. and on the ___ day of [*insert* month], [*insert* year],
9. the DEFENDANT was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(a)] [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [*insert* other predicate offense[248]]}

[247]W. VA. CODE § 61–2–28(e) (LexisNexis Supp. 2017).

[248]W. VA. CODE § 61–2–28(d) (LexisNexis Supp. 2017).

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10. and on the ___ day of [*insert* month], [*insert* year],
11. the DEFENDANT was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [*insert* other predicate offense[249]]} on the ___ day of [*insert* month], [*insert* year],
12. and said convictions were within ten (10) years of the current violation.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Third Offense Domestic Violence you may find the DEFENDANT guilty of Third Offense Domestic Violence as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements of Third Offense Domestic Violence you shall find the DEFENDANT not guilty of Third Offense Domestic Violence (and deliberate on the lesser included offense of Domestic Assault).

Before the DEFENDANT can be convicted of Domestic Assault, the State must overcome the presumption that the DEFENDANT is innocent and prove to your satisfaction beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],
4. did unlawfully {attempt to commit a violent injury to [*insert* name(s) of victim(s)], being a family or household member} {commit an act which placed [*insert* name(s) of victim(s)], being a family or household member, in reasonable apprehension of immediately receiving a violent injury},
6. of which family or household the DEFENDANT is also a member.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a

[249]W. VA. CODE § 61–2–28(d) (LexisNexis Supp. 2017). Change the language to incorporate pre-June 29, 2017, language.

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reasonable doubt of the truth of the charge as to each of these elements of Domestic Assault, you may find the DEFENDANT guilty of Domestic Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements of Domestic Assault, you shall find the DEFENDANT not guilty.[250]

## COMMENTS

*State v. Lobb,* No. 14–0198, 2015 WL 135036 (W. Va. Jan. 9, 2015) (Memorandum Decision) (Third Offense Domestic Violence is not a lesser included offense of Malicious Wounding).

Counsel could use any of the predicate offenses as lesser included offenses under the "Second Offense" and "Third Offense" charges.

[250]W. VA. CODE § 61–2–28(d) (LexisNexis Supp. 2017).

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## 7.2.64 Neglect of an Incapacitated Adult by a Caregiver

Count ___ of the INDICTMENT charges the DEFENDANT with Neglect of an Incapacitated Adult by a Caregiver.

You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Neglect of an Incapacitated Adult by a Caregiver; or
(2) not guilty.

Neglect of an Incapacitated Adult by a Caregiver occurs when a caregiver neglects or knowingly permits another person to neglect an incapacitated adult.[251]

"Caregiver" means a person who has assumed the legal responsibility or a contractual obligation for the care of an incapacitated adult, or has voluntarily assumed responsibility for the care of an incapacitated adult. This includes facilities operated by any public or private agency, organization, or institution which provide services to, and have assumed responsibility for, the care of an incapacitated adult.[252]

"Incapacitated Adult" means any person 18 years of age or older who by reason of advanced age, physical, mental or other infirmity is unable to carry on the daily activities of life necessary to sustaining life and reasonable health.[253]

"Neglect" means the unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult.[254]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

[251]W. VA. CODE § 61–2–29(b) (2014).

[252]W. VA. CODE § 61–2–29(a)(3) (2014).

[253]W. VA. CODE § 61–2–29(a)(4) (2014).

[254]W. VA. CODE § 61–2–29(a)(5) (2014).

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Before the DEFENDANT can be convicted of Neglect of an Incapacitated Adult by a Caregiver, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year], through the ___ day of [*insert* month], [*insert* year],
4. [neglected] [knowingly permitted another person to neglect]
5. [*insert* name(s) of victim(s)], who was an incapacitated adult.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section shall not be construed to mean an adult is abused or neglected for the sole reason that his or her independent decision is to rely upon treatment by spiritual means in accordance with the tenets and practices of a recognized church or religious denomination or organization in lieu of medical treatment. W. VA. CODE § 61–2–29(f) (2014).

This section shall not be construed to mean an incapacitated adult is abused or neglected if deprivation of life-sustaining treatment or other act has been provided for by the West Virginia Health Care Decisions Act, pursuant to article 30, chapter 16 of the West Virginia Code. W. VA. CODE § 61–2–29(g) (2014).

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## 7.2.65 Abuse of an Incapacitated Adult by a Caregiver

Count __ of the INDICTMENT charges the DEFENDANT with Abuse of an Incapacitated Adult by a Caregiver.

You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Abuse of an Incapacitated Adult by a Caregiver; or
(2) not guilty.

Abuse of an Incapacitated Adult by a Caregiver occurs when a caregiver abuses or knowingly permits another person to abuse an incapacitated adult.[255]

"Abuse" means the intentional infliction of bodily injury on an incapacitated adult.[256]

"Bodily injury" means substantial physical pain, illness or any impairment of physical condition.[257]

"Caregiver" means any person who has assumed the legal responsibility or a contractual obligation for the care of an incapacitated adult, or has voluntarily assumed responsibility for the care of an incapacitated adult. This includes facilities operated by any public or private agency, organization, or institution which provide services to, and have assumed responsibility for the care of an incapacitated adult.[258]

"Incapacitated Adult" means any person eighteen years of age or older who by reason of advanced age, physical, mental or other infirmity is unable to carry on the daily activities of life necessary to sustaining life and reasonable health.[259]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this

[255]W. VA. CODE § 61–2–29(c) (2014).

[256]W. VA. CODE § 61–2–29(a)(1) (2014).

[257]W. VA. CODE § 61–2–29(a)(2) (2014).

[258]W. VA. CODE § 61–2–29(a)(3) (2014).

[259]W. VA. CODE § 61–2–29(a)(4) (2014).

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charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Abuse of an Incapacitated Adult by a Caregiver, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year], through the ___ day of [*insert* month], [*insert* year],
4. [abused] [knowingly permitted another person to abuse]
5. [*insert* name(s) of victim(s)], who was an incapacitated adult.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section shall not be construed to mean an adult is abused or neglected for the sole reason that his or her independent decision is to rely upon treatment by spiritual means in accordance with the tenets and practices of a recognized church or religious denomination or organization in lieu of medical treatment. W. VA. CODE § 61–2–29(f) (2014).

This section shall not be construed to mean an incapacitated adult is abused or neglected if deprivation of life-sustaining treatment or other act has been provided for by the West Virginia Health Care Decisions Act, pursuant to article 30, chapter 16 of the West Virginia Code. W. VA. CODE § 61–2–29(g) (2014).

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## 7.2.66 Intentional and Malicious Abuse or Neglect of an Incapacitated Adult by a Caregiver Causing Bodily Injury

Count ___ of the INDICTMENT charges the DEFENDANT with Intentional and Malicious Abuse or Neglect of an Incapacitated Adult by a Caregiver Causing Bodily Injury. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Intentional and Malicious [abuse] [neglect] of an Incapacitated Adult by a Caregiver Causing Bodily Injury; or

(2) not guilty.

"Intentional and Malicious Abuse or Neglect" in this context occurs when a caregiver intentionally and maliciously abuses or neglects an incapacitated adult and causes that adult a bodily injury.[260]

"Abuse" means the intentional infliction of bodily injury on an incapacitated adult.[261]

"Neglect" means the unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult.[262]

"Bodily injury" means substantial physical pain, illness or any impairment of physical condition.[263]

"Caregiver" means any person who has assumed the legal responsibility or a contractual obligation for the care of an incapacitated adult, or has voluntarily assumed responsibility for the care of an incapacitated adult. This includes facilities operated by any public or private agency, organization, or institution which provide services to, and have assumed responsibility for, the care of an incapacitated adult.[264]

"Incapacitated Adult" means any person 18 years of age or older who by reason of advanced age, physical, mental or other infirmity is unable to carry

[260]W. VA. CODE § 61–2–29(d) (2014).

[261]W. VA. CODE § 61–2–29(a)(1) (2014).

[262]W. VA. CODE § 61–2–29(a)(5) (2014).

[263]W. VA. CODE § 61–2–29(a)(2) (2014).

[264]W. VA. CODE § 61–2–29(a)(3) (2014).

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on the daily activities of life necessary to sustaining life and reasonable health.[265]

Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[266]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Intentional and Malicious [abuse] [neglect] of an Incapacitated Adult by a Caregiver Causing Bodily Injury, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year], through the ___ day of [*insert* month], [*insert* year],
4. intentionally and maliciously [neglected] [abused]
5. [*insert* name(s) of victim(s)], who was an incapacitated adult,
6. causing bodily injury.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[265]W. VA. CODE § 61–2–29(a)(4) (2014).

[266]*State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

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## COMMENTS

An adult is not abused or neglected for the sole reason that his or her independent decision is to rely upon treatment by spiritual means in accordance with the tenets and practices of a recognized church or religious denomination or organization in lieu of medical treatment. W. VA. CODE § 61–2–29(f) (2014).

An incapacitated adult is not abused or neglected if deprivation of life-sustaining treatment or other act has been provided for by the West Virginia Health Care Decisions Act, pursuant to article 30, chapter 16 of the West Virginia Code. W. VA. CODE § 61–2–29(g) (2014).

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## 7.2.67 Intentional and Malicious Abuse or Neglect of an Incapacitated Adult by a Caregiver Causing Serious Bodily Injury

Count ___ of the INDICTMENT charges the DEFENDANT with Intentional and Malicious Abuse or Neglect of an Incapacitated Adult by a Caregiver Causing Serious Bodily Injury. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Intentional and Malicious [abuse] [neglect] of an Incapacitated Adult by a Caregiver Causing Serious Bodily Injury; or

(2) not guilty.

"Intentional and Malicious Abuse or Neglect" in this context occurs when a caregiver intentionally and maliciously abuses or neglects an incapacitated adult and causes that adult serious bodily injury.[267]

"Abuse" means the intentional infliction of bodily injury on an incapacitated adult.[268]

"Neglect" means the unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult.[269]

"Serious bodily injury" means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.[270]

"Caregiver" means any person who has assumed the legal responsibility or a contractual obligation for the care of an incapacitated adult, or has voluntarily assumed responsibility for the care of an incapacitated adult. This includes facilities operated by any public or private agency, organization, or institution which provide services to, and have assumed responsibility for, the care of an incapacitated adult.[271]

[267]W. VA. CODE § 61–2–29(e) (2014).

[268]W. VA. CODE § 61–2–29(a)(1) (2014).

[269]W. VA. CODE § 61–2–29(a)(5) (2014).

[270]W. VA. CODE § 61–2–29(a)(6) (2014).

[271]W. VA. CODE § 61–2–29(a)(3) (2014).

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"Incapacitated Adult" means any person eighteen years of age or older who by reason of advanced age, physical, mental or other infirmity is unable to carry on the daily activities of life necessary to sustaining life and reasonable health.[272]

"Neglect" means the unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult.[273]

Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[274]

It is the State's burden to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Intentional and Malicious Abuse or Neglect of an Incapacitated Adult by a Caregiver Causing Serious Bodily Injury, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year], through the ___ day of [*insert* month], [*insert* year],
4. intentionally and maliciously [neglected] [abused]
5. [*insert* name(s) of victim(s)], who was an incapacitated adult,
6. causing serious bodily injury.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the

[272]W. VA. CODE § 61–2–29(a)(4) (2014).

[273]W. VA. CODE § 61–2–29(a)(5) (2014).

[274]*State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

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INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section shall not be construed to mean an adult is abused or neglected for the sole reason that his or her independent decision is to rely upon treatment by spiritual means in accordance with the tenets and practices of a recognized church or religious denomination or organization in lieu of medical treatment, W. VA. CODE § 61–2–29(f) (2014), nor shall it "be construed to mean an incapacitated adult is abused or neglected if deprivation of life-sustaining treatment or other act has been provided for by the West Virginia Health Care Decisions Act, pursuant to article 30, chapter 16 of the West Virginia Code." W. VA. CODE § 61–2–29(g) (2014).

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## 7.2.68 Intentional and Malicious Neglect of an Incapacitated Adult by a Caregiver Causing Death

Count ___ of the INDICTMENT charges the DEFENDANT with Intentional and Malicious Neglect of an Incapacitated Adult by a Caregiver Causing Death. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Intentional and Malicious Neglect of an Incapacitated Adult by a Caregiver Causing Death; or

(2) not guilty.

"Intentional and Malicious Neglect" in this context occurs when a caregiver intentionally and maliciously neglects an incapacitated adult and causes that adult's death.[275]

"Caregiver" means any person who has assumed the legal responsibility or a contractual obligation for the care of an incapacitated adult, or has voluntarily assumed responsibility for the care of an incapacitated adult. This include facilities operated by any public or private agency, organization, or institution which provide services to, and have assumed responsibility for, the care of an incapacitated adult.[276]

"Incapacitated Adult" means any person eighteen years of age or older who by reason of advanced age, physical, mental or other infirmity is unable to carry on the daily activities of life necessary to sustaining life and reasonable health.[277]

"Neglect" means the unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult.[278]

Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[279]

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[275] W. VA. CODE § 61–2–29a(a) (2014).

[276] W. VA. CODE § 61–2–29(a)(3) (2014).

[277] W. VA. CODE § 61–2–29(a)(4) (2014).

[278] W. VA. CODE § 61–2–29(a)(5) (2014).

[279] *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

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The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Intentional and Malicious Neglect of an Incapacitated Adult by a Caregiver Causing Death, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year], through the ___ day of [*insert* month], [*insert* year],
4. intentionally and maliciously neglected
5. [*insert* name(s) of victim(s)], who was an incapacitated adult,
6. causing death.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section does not apply to any caregiver or health care provider who, without malice, fails or refuses, or allows another person to, without malice, fail or refuse to supply an incapacitated adult with necessary medical care when the medical care conflicts with the tenets and practices of a recognized religious denomination or order of which the incapacitated adult is an adherent member. W. VA. CODE § 61–2–29a(f) (2014).

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## 7.2.69 Caregiver Knowingly Allowing Another to Intentionally or Maliciously Neglect an Incapacitated Adult Causing Death

Count ___ of the INDICTMENT charges the DEFENDANT with Caregiver Knowingly Allowing Another to Intentionally or Maliciously Neglect an Incapacitated Adult Causing Death. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Caregiver Knowingly Allowing Another to Intentionally or Maliciously Neglect an Incapacitated Adult Causing Death; or

(2) not guilty.

"Intentional and Malicious Neglect" in this context occurs when a caregiver intentionally and maliciously neglects an incapacitated adult and causes that adult a bodily injury.[280]

"Caregiver" means any person who has assumed the legal responsibility or a contractual obligation for the care of an incapacitated adult, or has voluntarily assumed responsibility for the care of an incapacitated adult. This includes facilities operated by any public or private agency, organization, or institution which provide services to, and have assumed responsibility for, the care of an incapacitated adult.[281]

"Incapacitated Adult" means any person eighteen years of age or older who by reason of advanced age, physical, mental or other infirmity is unable to carry on the daily activities of life necessary to sustaining life and reasonable health.[282]

"Neglect" means the unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult.[283]

Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[284]

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[280] W. VA. CODE § 61–2–29a(b) (2014).

[281] W. VA. CODE § 61–2–29(a)(3) (2014).

[282] W. VA. CODE § 61–2–29(a)(4) (2014).

[283] W. VA. CODE § 61–2–29(a)(5) (2014).

[284] *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

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The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of being a Caregiver Knowingly Allowing Another to Intentionally or Maliciously Neglect an Incapacitated Adult Causing Death, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year], through the ___ day of [*insert* month], [*insert* year],
4. knowingly allowed another person to intentionally and maliciously neglect
5. [insert name(s) of victim(s)], who was an incapacitated adult,
6. causing death.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section does not apply to any caregiver or health care provider who, without malice, fails or refuses, or allows another person to, without malice, fail or refuse to supply an incapacitated adult with necessary medical care when the medical care conflicts with the tenets and practices of a recognized religious denomination or order of which the incapacitated adult is an adherent member. W. VA. CODE § 61–2–29a(f) (2014).

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## 7.2.70 Intentional and Malicious Abuse of an Incapacitated Adult by a Caregiver Causing Death

Count ___ of the INDICTMENT charges the DEFENDANT with Intentional and Malicious Abuse of an Incapacitated Adult by a Caregiver Causing Death.[285] You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Intentional and Malicious Abuse of an Incapacitated Adult by a Caregiver Causing Death; or

(2) not guilty.

"Abuse" means the intentional infliction of bodily injury on an incapacitated adult.[286]

"Caregiver" means any person who has assumed the legal responsibility or a contractual obligation for the care of an incapacitated adult, or has voluntarily assumed responsibility for the care of an incapacitated adult. This includes facilities operated by any public or private agency, organization, or institution which provide services to, and have assumed responsibility for, the care of an incapacitated adult.[287]

"Incapacitated Adult" means any person eighteen years of age or older who by reason of advanced age, physical, mental or other infirmity is unable to carry on the daily activities of life necessary to sustaining life and reasonable health.[288]

Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[289]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this

[285] W. VA. CODE § 61–2–29a(c) (2014).

[286] W. VA. CODE § 61–2–29(a)(1) (2014).

[287] W. VA. CODE § 61–2–29(a)(3) (2014).

[288] W. VA. CODE § 61–2–29(a)(4) (2014).

[289] *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

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charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Intentional and Malicious Abuse of an Incapacitated Adult by a Caregiver Causing Death, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year], through the ___ day of [*insert* month], [*insert* year],
4. intentionally and maliciously abused
5. [*insert* name(s) of victim(s)], who was an incapacitated adult,
6. causing [*insert* name(s) of victim(s)]'s death.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section does not apply to any caregiver or health care provider who, without malice, fails or refuses, or allows another person to, without malice, fail or refuse to supply an incapacitated adult with necessary medical care when the medical care conflicts with the tenets and practices of a recognized religious denomination or order of which the incapacitated adult is an adherent member. W. VA. CODE § 61–2–29a(f) (2014).

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## 7.2.71 Caregiver Causing Death by Knowingly Allowing Another to Intentionally or Maliciously Abuse an Incapacitated Adult

Count ___ of the INDICTMENT charges the DEFENDANT with Caregiver Causing Death by Knowingly Allowing Another to Intentionally or Maliciously Abuse an Incapacitated Adult. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Caregiver Knowingly Allowing another to Intentionally or Maliciously Abuse an Incapacitated Adult Causing Death; or

(2) not guilty.

This offense occurs when a caregiver causes the death of an incapacitated adult by knowingly allowing another to intentionally and maliciously abuse that incapacitated adult.[290]

"Abuse" means the intentional infliction of bodily injury on an incapacitated adult.[291]

"Caregiver" means any person who has assumed the legal responsibility or a contractual obligation for the care of an incapacitated adult, or has voluntarily assumed responsibility for the care of an incapacitated adult. This includes facilities operated by any public or private agency, organization, or institution which provide services to, and have assumed responsibility for, the care of an incapacitated adult.[292]

"Incapacitated Adult" means any person eighteen years of age or older who by reason of advanced age, physical, mental or other infirmity is unable to carry on the daily activities of life necessary to sustaining life and reasonable health.[293]

Malice is a legal term of art. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will infer an evil intent, a condition of the mind showing a heart regardless of social duty and fatally bent on mischief.[294]

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[290] W. VA. CODE § 61–2–29a(d) (2014).

[291] W. VA. CODE § 61–2–29(a)(1) (2014).

[292] W. VA. CODE § 61–2–29(a)(3) (2014).

[293] W. VA. CODE § 61–2–29(a)(4) (2014).

[294] *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999).

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The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

Before the DEFENDANT can be convicted of Caregiver Knowingly Allowing Another to Intentionally or Maliciously Abuse an Incapacitated Adult Causing Death, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year], through the ___ day of [*insert* month], [*insert* year],
4. caused the death
5. of [*insert* name(s) of victim(s)], who was an incapacitated adult,
6. by knowingly allowing another person to intentionally and maliciously abuse [him] [her].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section does not apply to any caregiver or health care provider who, without malice, fails or refuses, or allows another person to, without malice, fail or refuse to supply an incapacitated adult with necessary medical care when the medical care conflicts with the tenets and practices of a recognized religious denomination or order of which the incapacitated adult is an adherent member. W. VA. CODE § 61–2–29a(f) (2014).

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## 7.2.72 Financial Exploitation of an Elderly Person, Protected Person, or Incapacitated Adult

Count ___ of the INDICTMENT charges the DEFENDANT with Financial Exploitation of an Elderly Person, Protected Person, or Incapacitated Adult. You may return one of two verdicts under this Count of the INDICTMENT:

(1) guilty of Financial Exploitation of [an Elderly Person] [a Protected Person] [an Incapacitated Adult]; or

(2) not guilty.

Financial Exploitation of an Elderly Person, a Protected Person, or an Incapacitated Adult occurs when a person financially exploits an an Elderly Person, a Protected Person, or an Incapacitated Adult.[295]

"Elderly Person" means a person who is sixty-five years or older.[296]

"Incapacitated Adult" means any person who by reason of physical, mental or other infirmity is unable to physically carry on the daily activities of life necessary to sustaining life and reasonable health.[297]

"Protected person" means an adult individual, 18 years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate INFORMATION effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity to: (1) meet the essential requirements for [his] [her] health, care safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (2) manage property or financial affairs or to provide for [his] [her] support or for the support of legal dependents without the assistance or protection of a conservator.[298]

"Financial exploitation or financially exploit" means the intentional misappropriation or misuse of funds or assets of an elderly person, a protected person, or an incapacitated adult, but shall not apply to a transaction or disposition of funds or assets where the accused made a good-faith effort to

[295]W. VA. CODE § 61–2–29b (LexisNexis Supp. 2017).

[296]W. VA. CODE § 61–2–29b(h)(2) (LexisNexis Supp. 2017).

[297]W. VA. CODE §§ 61–2–29b(h)(1) (LexisNexis Supp. 2017) and 61–2–29(a)(4) (2014).

[298]W. VA. CODE §§ 61–2–29b(h)(4) (LexisNexis Supp. 2017) and 44A–1–4(13) (2014).

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assist the elderly person, protected person or incapacitated adult with the management of [his] [her] money or other things of value.[299]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt and the DEFENDANT is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with the DEFENDANT throughout this trial.

To prove the DEFENDANT guilty of Financial Exploitation of an [Elderly Person] [Protected Person] [Incapacitated Adult], the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year], through the ___ day of [*insert* month], [*insert* year],
4. financially exploited,
5. [*insert* name(s) of victim(s)], {[an incapacitated adult] [an elderly person] [a protected person]}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The Legislature rewrote this section in 2016 (effective June 10, 2016) to remove the reference to Larceny and the dependence of the elements of the crime on the larceny statute. W. Va. Code § 61–3–13 (2014). It also changed the penalties.

The West Virginia Supreme Court has never construed this statute; however, a "protected person" is subject to the protections of Chapter 44A or 44C of the West Virginia Code.

[299] W. VA. CODE § 61–2–29b(h)(3) (LexisNexis Supp. 2017).

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## 7.3 SEXUAL OFFENSES

### 7.3.1. First Degree Sexual Assault

Count ___ of the INDICTMENT charges the DEFENDANT with First Degree Sexual Assault.

First Degree Sexual Assault occurs when a person engages in sexual intercourse or sexual intrusion with another person without the other person's consent and, during the act, either causes serious bodily injury upon that person or uses a deadly weapon.[300]

To understand this instruction, the definitions of sexual intercourse and sexual intrusion are:

"Sexual intercourse" is any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.[301]

"Sexual intrusion" is any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[302]

"Penetration" is the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice. Penetration is more than mere touching.[303]

Additionally, the Court instructs you:

"Serious bodily injury" is bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.[304]

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[300]W. VA. CODE § 61–8B–3 (2014).

[301]W. VA. CODE § 61–8B–1(7) (2014).

[302]W. VA. CODE § 61–8B–1(8) (2014).

[303]BLACK'S LAW DICTIONARY (10th ed. 2014).

[304]W. VA. CODE § 61–8B–1(10) (2014).

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"Deadly weapon" is an instrument which is designed to be used to produce serious bodily injury or death or is readily adaptable to such use.[305]

Additionally, the Court instructs you that consent means agreement, approval, or permission regarding some act or purpose.[306]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the DEFENDANT'S presumption of innocence and prove each of the following elements beyond a reasonable doubt:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia;
4. engaged in
    a. sexual intercourse, or
    b. sexual intrusion
5. with [*insert* name(s) of victim(s)]
6. without the consent of [*insert* name(s) of victim(s)],
7. and in so doing
    a. inflicted serious bodily injury upon [*insert* name(s) of victim(s)] or
    b. employed a deadly weapon in the commission of the act.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[305]W. VA. CODE § 61–8B–1(11) (2014).

[306]BLACK'S LAW DICTIONARY (10th ed. 2014).

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## COMMENTS

Sexual intercourse can be established under the sexual assault statute if there is contact between the sex organs of one person and the mouth of the other; penetration is unnecessary. *State v. D.E.G.*, 194 W. Va. 411, 460 S.E.2d 657 (1995).

Statutory language identifying the victim of First Degree Sexual Assault as a person "who is eleven years old or less" applied to persons who were eleven years old but who had not reached their twelfth birthdays; thus, evidence that victims of sexual assaults were aged eleven years, eight months supported defendants' convictions for First Degree Sexual Assault. *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995).

Where a defendant commits separate acts of different types of "sexual intercourse" as statutorily defined, each act may be prosecuted and punished as a separate offense. *State v. Carter*, 168 W. Va. 90, 282 S.E.2d 277 (1981).

A sex offense conviction can be based solely on a victim's uncorroborated testimony unless it is inherently incredible. *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). Inherent incredibility means testimony that defies physical laws. *State v. McPherson*, 179 W. Va. 612, 617, 371 S.E.2d 333, 338 (1988).

A psychological injury is not serious bodily injury. *State v. Hartshorn*, 175 W. Va. 274, 332 S.E.2d 574 (1985).

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## 7.3.2. First Degree Sexual Assault (Forcible Compulsion)

Count ___ of the INDICTMENT charges the DEFENDANT with First Degree Sexual Assault.

First Degree Sexual Assault occurs when a person commits an act of sexual intercourse or of sexual intrusion without the alleged victim's consent.[307]

Sexual intercourse means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.[308]

Penetration is the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice. Penetration is more than mere touching.[309]

Sexual intrusion means any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[310]

Penetration is the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice. Penetration is more than mere touching.[311]

Additionally, the Court instructs you that consent means agreement, approval, or permission regarding some act or purpose.[312]

In this case, the State alleges that the lack of consent is the result of forcible compulsion by the DEFENDANT against the alleged victim.

[307]W. VA. CODE § 61–8B–3 (2014).

[308]W. VA. CODE § 61–8B–1(7) (2014).

[309]BLACK'S LAW DICTIONARY (10th ed. 2014).

[310]W. VA. CODE § 61–8B–1(8) (2014).

[311]BLACK'S LAW DICTIONARY (10th ed. 2014).

[312]BLACK'S LAW DICTIONARY (10th ed. 2014).

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Forcible compulsion requires an act or acts of significant violence performed or threatened to be performed against the alleged victim or another person.[313]

This violence is achieved through:

(a) physical force strong enough to overtake or otherwise control the alleged victim who is resisting, or

(b) a threat or intimidation, expressed or implied, placing the alleged victim in fear of immediate death or bodily injury to [himself] [herself] or herself or another person or of kidnapping to either the alleged victim or another person.

For the purpose of this instruction, acts of resistance may include either physical resistance or any clear communication of the alleged victim's lack of consent.

If the alleged victim was 16 years old or less at the time of the alleged crime, forcible compulsion also can occur by intimidation, expressed or implied, by a perpetrator who is at least four years older than the alleged victim.[314]

## COMMENTS

A psychological injury is not serious bodily injury. *State v. Hartshorn*, 175 W. Va. 274, 332 S.E.2d 574 (1985).

In West Virginia, a defendant must use physical force that overcomes "earnest resistance as might reasonably be expected under the circumstances" to prove the victim did not consent due to the defendant's use of "forcible compulsion" for the crimes of Second- and Third Degree Sexual Assault and First-, Second-, and Third-Degree sexual abuse. For the purpose of determining whether the victim of a sexual assault exercised "earnest resistance," age and mental and physical conditions of the alleged victim as well as those of defendant, together with circumstances leading up to and surrounding the assault, should be considered. *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985). Earnest resistance does not mean resistance to the utmost extent possible, but only a genuine and reasonable effort to resist. *Id.*

[313]W. VA. CODE § 61–8B–1(1) (2014).

[314]W. VA. CODE § 61–8B–1(1)(c) (2014).

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## 7.3.3. First Degree Sexual Assault (By Infliction of Serious Bodily Injury or Use of Deadly Weapon) (Lack of Consent Based upon Incapacity to Consent)

Count ___ of the INDICTMENT charges the DEFENDANT with First Degree Sexual Assault.

First Degree Sexual Assault occurs when a person commits sexual intercourse or sexual intrusion without the victim's consent.

In this case, the State has charged that the lack of consent resulted from the incapacity on the part of the alleged victim to consent to [sexual intercourse] [sexual intrusion].

"Sexual intercourse" is any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.[315]

"Penetration" is the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice. Penetration is more than mere touching.[316]

"Sexual intrusion" is any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[317]

Additionally, the Court instructs you that consent means agreement, approval, or permission regarding some act or purpose.[318]

The specific groups of people who are unable to consent are:[319]

1. persons less than sixteen years old;
2. persons who are diagnosed with a mental illness and, because of that illness, are incapable of evaluating the nature of their conduct;
3. persons who are under the influence of a controlled or

[315]W. VA. CODE § 61–8B–1(7) (2014).

[316]BLACK'S LAW DICTIONARY (10th ed. 2014).

[317]W. VA. CODE § 61–8B–1(8) (2014).

[318]BLACK'S LAW DICTIONARY (10th ed. 2014).

[319]W. VA. CODE § 61–8B–2 (c) (2014).

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intoxicating substance that the person did not choose to ingest and, because of being under the influence, are temporarily unable to evaluate or to control their conduct;

4. persons who are physically helpless as evidenced by being unconscious or for any other reason rendered incapable of stating their unwillingness to an act;

5. persons who are subject to confinement or supervision by a state or local government entity, when the actor is a person prohibited from having sexual intercourse or causing sexual intrusion or sexual contact.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

A psychological injury is not serious bodily injury. *State v. Hartshorn*, 175 W. Va. 274, 332 S.E.2d 574 (1985).

In West Virginia, the defendant must use physical force that overcomes "earnest resistance as might reasonably be expected under the circumstances" to prove the victim did not consent due to a defendant's use of "forcible compulsion" for the crimes of Second and Third Degree Sexual Assault and First, Second, and Third degree sexual abuse. For the purpose of determining whether victim of sexual assault exercised "earnest resistance", the alleged victim's age and mental and physical conditions as well as the defendant's, together with circumstances leading up to and surrounding the assault, should be considered. *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985). Earnest resistance does not mean resistance to the utmost extent possible, but only a genuine and reasonable effort to resist. *Id*.

### 7.3.4. Definition of "Sexual Intrusion"

The term "sexual intrusion" means any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[320]

[320] W. VA. CODE § 61–8B–1(8) (2014).

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"Penetration" is the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice. Penetration is more than mere touching.[321]

### 7.3.5. Definition of "Sexual Intercourse"

The term "sexual intercourse" means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.[322]

## COMMENTS

Sexual intercourse can be established under the sexual assault statute if there is contact between the sex organs of one person and the mouth of the other; penetration is not necessary. *State v. D.E.G.*, 194 W. Va. 411, 460 S.E.2d 657 (1995).

If a defendant commits separate acts of different types of "sexual intercourse" as statutorily defined, each act may be prosecuted and punished as separate offense. W. VA. CODE § 61–8B–1(7) (2014); *State v. Koon*, 190 W. Va. 632, 440 S.E.2d 442 (1993); *State v. Carter*, 239 W. Va. 90, 282 S.E.2d 277 (1981).

There need not be any physical evidence of the penetration to prove this offense.

"However slight" is a broad phrase. *State v. McPherson*, 179 W. Va. 612, 615, 371 S.E.2d 333, 336 (1988).

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim; unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. Pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981). It can be testimony from the victim regardless of age of the victim; therefore, it is important to ask for *in camera* examinations and/or psychological examinations of victims where the attorney questions the victim's competency.

Inherent incredibility is defined as "more than contradiction and lack of corroboration." *State v. McPherson,* 179 W. Va. 612, 617, 371 S.E.2d 333, 338 (1988). Inherent incredibility thus requires "a showing of 'complete untrustworthiness'…[testimony which] defies physical laws." *Id.*

[321] BLACK'S LAW DICTIONARY (10th ed. 2014).

[322] W. VA. CODE § 61–8B–1(7) (2014).

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### 7.3.6. Definition of "Serious Bodily Injury"

"Serious bodily injury" is bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.[323]

To "prolong" is to lengthen in time or to lengthen in extent, scope or range.[324]

"Disfigurement" is impairment or injury to the appearance of a person.[325]

"Impairment" is the quality, state, or condition of being damaged, weakened, or diminished, specifically, a condition in which a part of a person's mind or body is damaged or does not work well.[326]

## COMMENTS

A psychological injury is not a "serious bodily injury." *State v. Hartshorn*, 175 W. Va. 274, 332 S.E.2d 574 (1985).

### 7.3.7. Definition of "Deadly Weapon"

A "Deadly Weapon" is any firearm or other device, instrument, material, or substance that, from the manner in which it is used or is intended to be used, is designed or likely to produce death or serious bodily injury.[327]

[323]W. VA. CODE § 61–8B–1(10) (2014).

[324]MERRIAM-WEBSTER DICTIONARY.

[325]BLACK'S LAW DICTIONARY (10th ed. 2014).

[326]BLACK'S LAW DICTIONARY (10th ed. 2014).

[327]W. VA. CODE § 61–8B–1(11) (2014).

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## 7.3.8. First Degree Sexual Assault (based on difference in age)

First Degree Sexual Assault may be based on the age difference between the parties. Specifically, when any person is 14 years old or older, and the other party is 11 years old or younger, and the two are not married, the age difference between the two parties is sufficient for First Degree Sexual Assault.[328]

The other elements of First Degree Sexual Assault also must be proven beyond a reasonable doubt. Specifically, the State must prove that the person 14 years or older engaged in either sexual intercourse or sexual intrusion with the person 11 years or younger.

Therefore, for you to find the DEFENDANT guilty, you must be convinced that the State has overcome the DEFENDANT'S presumption of innocence and has proven beyond a reasonable doubt that:

1. on or about the ___ day of [*insert* month], [*insert* year],
2. in [*insert* county] County, West Virginia;
3. the DEFENDANT,
4. being fourteen 14 years of age or older;
5. engaged in
   a. sexual intercourse or
   b. sexual intrusion
6. with [*insert* name(s) of victim(s)]
7. who was 11 years old or less,
8. and the DEFENDANT was not married to [*insert* name(s) of victim(s)]

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[328] W. VA. CODE § 61–8B–3(a)(2) (2014).

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## COMMENTS

Counsel will need to provide a separate jury instruction on the definitions of sexual intercourse and sexual intrusion. See Instructions 7.3.5 and 7.3.4.

The affirmative defense set forth in W. VA. CODE § 61–8B–12(a) (2014), involving the defendant's knowledge regarding the incapacity, is not available in a prosecution for this offense.

"In analyzing the crime of first degree sexual assault herein, a conviction may be obtained by first proving two different age-related elements, demonstrating that *a person, being fourteen years old or more,* engaged in sexual intercourse or intrusion with *another person who is eleven years old or less*. A third element, that the two are *not married,* must also be proven. In comparison, a conviction for incest must be achieved by proving a separate and additional fact, sexual intercourse or intrusion *between those of a proscribed relationship*." *State v. Ray*, 221 W. Va. 364, 371-72, 655 S.E.2d 110, 117-18 (2007).

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## 7.3.9. Second Degree Sexual Assault (by forcible compulsion)

Count ___ of the INDICTMENT charges the DEFENDANT with Second Degree Sexual Assault.

Second Degree Sexual Assault occurs when a person engages in sexual intercourse or sexual intrusion with another person without the person's consent, and the lack of consent results from forcible compulsion;[329]

The Court instructs you that consent means agreement, approval, or permission regarding some act or purpose.[330]

Forcible compulsion means either:

(1) Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

(2) A threat or intimidation, either express or implied, which either places the victim in fear of immediate death or bodily injury to himself or herself or another person or places the victim in fear that he or she or another person will be kidnapped.[331]

For you to find DEFENDANT guilty, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia;
4. engaged in
   a. sexual intercourse
   b. sexual intrusion
5. with [*insert* name(s) of victim(s)],
6. without the consent of [*insert* name(s) of victim(s)],
7. and the lack of consent was the result of forcible compulsion.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a

[329]W. VA. CODE § 61–8B–4(a)(1) (2014).

[330]BLACK'S LAW DICTIONARY (10th ed. 2014).

[331]W. VA. CODE § 61–8B–1(1) (2014).

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reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Separate instructions for sexual intrusion and sexual intercourse are necessary. See Instructions 7.3.4 and 7.3.5

The instructions regarding forcible compulsion are incorporated into the jury instruction.

In *State v. Carter,* 168 W. Va. 90, 282 S.E.2d 277 (1981), the West Virginia Supreme Court stated the use of the word "or" in the definition of sexual intercourse "expresses the legislative intent that sexual intercourse can be committed in each of the various alternative ways, with each type of prohibited contact constituting a separate offense." Where, however, the sexual contact immediately preceding sexual intercourse is preparatory to and ancillary to one act of sexual intercourse, only "one continuing sexual offense" has occurred. *State v. Reed,* 166 W. Va. 558, 276 S.E.2d 313 (1981).

In West Virginia, a defendant must use physical force that overcomes "earnest resistance as might reasonably be expected under the circumstances" to prove the victim did not consent due to the defendant's use of "forcible compulsion" for the crimes of Second- and Third Degree Sexual Assault and First-, Second-, and Third-Degree sexual abuse. For the purpose of determining whether the victim of a sexual assault exercised **"**earnest resistance,**"** age and mental and physical conditions of the alleged victim as well as those of defendant, together with circumstances leading up to and surrounding the assault, should be considered. *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985). Earnest resistance does not mean resistance to the utmost extent possible, but only a genuine and reasonable effort to resist. *Id*.

Where evidence before the trial court indicated one continuing sexual offense transpiring over the course of approximately fifteen minutes and culminating in one act of sexual intercourse, the provision of a verdict form permitting defendant to be found guilty of multiple counts of various sex crimes was reversible error, as the sexual contact demonstrated at trial was ancillary to one act of sexual intercourse. *State v. Reed*, 166 W. Va. 558, 276 S.E.2d 313 (1981).

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## 7.3.10 Second Degree Sexual Assault (physically helpless victim)

Count ___ of the INDICTMENT charges the DEFENDANT with Second Degree Sexual Assault.

Second Degree Sexual Assault occurs when a person engages in [sexual intercourse] [sexual intrusion] with another person who is physically helpless.[332]

"Physically helpless" means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.[333]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia;
4. engaged in
   a. sexual intercourse
   b. sexual intrusion
5. with [*insert* name(s) of victim(s)],
6. who was physically helpless at the time the act occurred.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Separate instructions for sexual intercourse and sexual intrusion will be necessary. See Instructions 7.3.5 and 7.3.4.

This charge is subject to an affirmative defense:

> (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally

[332]W. VA. CODE § 61–8B–4(a)(2) (2014).

[333]W. VA. CODE § 61–8B–1(5) (2014).

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> incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct constituting the offense did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.
>
> (b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three, and under subdivision (3), subsection (a), section seven of this article.

W. VA. CODE § 61–8B–12 (2014).

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## 7.3.11 Third Degree Sexual Assault (Mentally Defective or Mentally Incapacitated)

Count ___ of the INDICTMENT charges the DEFENDANT with Third Degree Sexual Assault.

Third Degree Sexual Assault occurs when a person engages in [sexual intercourse] [sexual intrusion] with another person who is mentally defective or mentally incapacitated.[334]

Therefore, for you to find the DEFENDANT guilty, you must be convinced that the State has overcome the DEFENDANT'S presumption of innocence and has proven the following beyond a reasonable doubt:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia;
4. engaged in
   a. sexual intercourse
   b. sexual intrusion
5. with [*insert* name(s) of victim(s)],
6. who was incapable of carefully evaluating the risk or of controlling [his] [her] conduct at the time the act occurred.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Separate instructions for sexual intrusion and sexual intercourse will be necessary. See Instructions 7.3.4 and 7.3.5.

This charge is subject to an affirmative defense. The statute provides:

> (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct

[334] W. VA. CODE § 61–8B–5(a)(1) (2014).

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> constituting the offense did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.
>
> (b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three, and under subdivision (3), subsection (a), section seven of this article.

W. VA. CODE § 61–8B–12 (2014).

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## 7.3.12 Definitions of "Mentally Defective" and "Mentally Incapacitated"

One of the essential elements of Third Degree Sexual Assault is that the act must have occurred while the alleged victim, [*insert* name(s) of victim(s)], was mentally defective or mentally incapacitated.

"Mentally defective," for purposes of this case, means the alleged victim was unable to understand the distinctively sexual nature of the conduct or was unable to understand or exercise the right to refuse to participate in the sex act because of a marked intellectual disability, or mental illness, incompetency, condition, or disease.[335]

"Mentally incapacitated", for purposes of this case, means the alleged victim was unable to understand the distinctively sexual nature of the conduct or was unable to understand or exercise the right to refuse to participate in the sex act because of intoxication where the intoxicating substance was forcibly administered to that person in some manner.[336]

[335]W. VA. CODE § 61–8B–1(3) (2014).

[336]W. VA. CODE § 61–8B–1(4) (2014).

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## 7.3.13 Third Degree Sexual Assault (based on age difference)

Count ___ of the INDICTMENT charges the DEFENDANT with Third Degree Sexual Assault.

Third Degree Sexual Assault occurs when a person, being sixteen years old or more, engages in [sexual intercourse] [sexual intrusion] with another person who is: (1) both less than 16 years old and is at 4 years younger than the DEFENDANT, and (2) is not married to the DEFENDANT.[337]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the DEFENDANT's presumption of innocence and prove beyond a reasonable doubt that:

1. on or about the ___ day of [*insert* month], [*insert* year],
2. in [*insert* county] County, West Virginia,
3. the DEFENDANT,
4. who was sixteen years old or older,
5. engaged in
    a. sexual intercourse
    b. sexual intrusion
6. with [*insert* name(s) of victim(s)],
7. who was less than sixteen years of age,
8. and who was at least 4 years younger than the DEFENDANT,
9. and who was not married to the DEFENDANT.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

### COMMENTS

This offense is commonly known as statutory rape. *State v. Sayre*, 183 W. Va. 376, 395 S.E.2d 799 (1990).

Separate instructions for sexual intrusion and sexual intercourse is necessary. See Instructions 7.3.4 and 7.3.5

[337] W. VA. CODE § 61–8B–5(a)(2) (2014).

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A separate instruction on the definition of mentally defective and mentally incapacitated is necessary. See Instruction 7.3.12.

This charge is subject to an affirmative defense. The statute provides:

> (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct constituting the offense did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.
>
> (b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three, and under subdivision (3), subsection (a), section seven of this article.

W. VA. CODE § 61–8B–12 (2014).

"We conclude that where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but that there must be some additional evidence suggesting the defendant's age." *State v. Richey*, 171 W. Va. 342, 351, 298 S.E.2d 879, 888 (1982).

Second Degree Sexual Assault and Third Degree Sexual Assault each contain an element the other does not; therefore, conviction for both does not offend double jeopardy. To convict for Second Degree Sexual Assault, the jury must find forcible compulsion, which is not an element of Third Degree Sexual Assault. However, to convict for Third Degree Sexual Assault, the jury must find a specific age difference, which is not required for Second Degree Sexual Assault. *State v. Sayre*, 183 W. Va. 376, 395 S.E.2d 799 (1990).

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## 7.3.14 First Degree Sexual Abuse (lack of consent resulting from forcible compulsion)

Count __ of the INDICTMENT charges the DEFENDANT with First Degree Sexual Abuse.

First Degree Sexual Abuse occurs when a person subjects another person to sexual contact without that person's consent and the lack of consent results from forcible compulsion exerted on the alleged victim.[338]

"Sexual contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of the alleged victim, or intentional touching of any part of the complainant's body by the actor's sex organs, where the alleged victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.[339]

The Court instructs you that consent means agreement, approval, or permission regarding some act or purpose.[340]

"Forcible compulsion" means:

(1) Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

(2) A threat or intimidation, either express or implied, placing the alleged victim in fear of immediate death or bodily injury to himself or herself or another person or in fear that he or she or another person will be kidnapped; or,

(3) Fear by a person under sixteen years of age caused by intimidation, expressed or implied, by another person who is at least four years older than the victim. [341]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,

[338]W. VA. CODE § 61–8B–7(a)(1) (2014).

[339]W. VA. CODE § 61–8B–1(6) (2014).

[340]BLACK'S LAW DICTIONARY (10th ed. 2014).

[341]W. VA. CODE § 61–8B–1(1) (2014).

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2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia;
4. subjected [*insert* name(s) of victim(s)],
5. to sexual contact,
6. without the consent of [*insert* name(s) of victim(s)],
7. and that said lack of consent was the result of forcible compulsion.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Each separate and distinguishable touch is a separate count/crime. *State v. Rummer*, 183 W. Va. 369, 432 S.E.2d 39 (1993).

In West Virginia, a defendant must use physical force that overcomes "earnest resistance as might reasonably be expected under the circumstances" to prove the victim did not consent due to the defendant's use of "forcible compulsion" for the crimes of Second- and Third Degree Sexual Assault and First-, Second-, and Third-Degree sexual abuse. For the purpose of determining whether the victim of a sexual assault exercised **"**earnest resistance,**"** age and mental and physical conditions of the alleged victim as well as those of defendant, together with circumstances leading up to and surrounding the assault, should be considered. *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985). Earnest resistance does not mean resistance to the utmost extent possible, but only a genuine and reasonable effort to resist. *Id.*

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## 7.3.15. First Degree Sexual Abuse ("Physically helpless victim")

Count ___ of the INDICTMENT charges the DEFENDANT with First Degree Sexual Abuse.

First Degree Sexual Abuse occurs when a person subjects another person, who is physically helpless, to sexual contact.[342]

"Physically helpless" means that a person is unconscious or for any reason is physically unable to state his or her denial of consent.[343]

"Sexual contact," for the purposes of this case, means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of the alleged victim, or intentional touching of any part of the complainant's body by the actor's sex organs, where the alleged victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.[344]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia;
4. subjected [*insert* name(s) of victim(s)]
5. to sexual contact,
6. while [*insert* name(s) of victim(s)] was physically helpless.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[342]W. VA. CODE § 61–8B–7(a)(2) (2014).

[343]W. VA. CODE § 61–8B–1(5) (2014).

[344]W. VA. CODE § 61–8B–1(6) (2014).

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## COMMENTS

This charge is subject to an affirmative defense. The statute provides:

> (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct constituting the offense did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.
>
> (b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three, and under subdivision (3), subsection (a), section seven of this article.

W. VA. CODE § 61–8B–12 (2014).

### 7.3.16 First Degree Sexual Abuse (Definition of "Sexual Contact")

"Sexual Contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of complainant, or intentional touching of any part of the complainant's body by the actor's sex organs, where the complainant is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party. [345]

## COMMENTS

A sex organ or primary sexual characteristic, as narrowly defined, is any anatomical part of the body involved in *sexual reproduction* and constituting the *reproductive system* in a complex organism, especially the external *sex* organs; the external sex organs are also commonly referred to as the genitalia or genitals.

[345] W. VA. CODE § 61–8B–1(6) (2014).

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## 7.3.17 First Degree Sexual Abuse (based upon difference in age)

Count ___ of the INDICTMENT charges the DEFENDANT with First Degree Sexual Abuse

First Degree Sexual Abuse occurs when a person, being 14 years old or more, subjects another person to sexual contact and that person is younger than 12 years old.[346]

"Sexual contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where that person is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.[347]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. on or about the ___ day of [*insert* month], [*insert* year],
2. in [*insert* county] County, West Virginia,
3. the DEFENDANT,
4. being fourteen years of age or more,
5. subjected [*insert* name(s) of victim(s)],
6. who was twelve years of age or less,
7. to sexual contact.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[346]W. VA. CODE § 61–8B–7(a)(3) (2014).

[347]W. VA. CODE § 61–8B–1(6) (2014).

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## COMMENTS

The affirmative defense provided in W. VA. CODE § 61–8B–12(a) (2014) does not apply in the context of a prosecution under W. VA. CODE § 61–8B–7(a)(3) (2014). Essentially, a defendant cannot use ignorance of age as an affirmative defense.

Statutory language identifying the victim of First Degree Sexual Assault as a person "who is eleven years old or less" applied to persons who were 11 years old, but who had not reached twelfth birthdays; thus, evidence that victims of sexual assaults were aged 11 years, 8 months supported defendants' convictions for First Degree Sexual Assault. *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995).

Proof of penetration is not required for conviction of the offense of sexual abuse in the first degree. *State v. Brown*, 177 W. Va. 633, 355 S.E.2d 614 (1987).

### 7.3.18 Second Degree Sexual Abuse

Count ____ of the INDICTMENT charges the DEFENDANT with Second Degree Sexual Abuse.

Second Degree Sexual Abuse occurs when a person subjects a person who is mentally defective or mentally incapacitated to sexual contact.[348]

"Sexual contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where that person is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.[349]

"Mentally defective" means the alleged victim was unable to understand the distinctively sexual nature of the conduct or was unable to understand or exercise the right to refuse to participate in the sex act as a result of marked intellectual disability, or mental illness, incompetency, condition, or disease.[350]

"Mentally incapacitated" means the alleged victim was temporarily unable to understand the distinctively sexual nature of the conduct or was unable to understand or exercise the right to refuse to participate in the sex act as a result of intoxication where the intoxicating substance was forcibly

[348]W. VA. CODE § 61–8B–8 (2014).

[349]W. VA. CODE § 61–8B–1(6) (2014).

[350]W. VA. CODE § 61–8B–1(3) (2014).

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administered to that person without his or her consent, or as a result of some other act committed upon that person without his or her consent.[351]

Additionally, the Court instructs you that consent means agreement, approval, or permission regarding some act or purpose.[352]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. subjected [*insert* name(s) of victim(s)]
5. to sexual contact,
6. while [*insert* name(s) of victim(s)] was [mentally defective] [mentally incapacitated].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This charge is subject to an affirmative defense. The statute provides:

> (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct constituting the offense did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.
>
> (b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three, and under subdivision (3), subsection (a), section seven of this article.

W. VA. CODE § 61–8B–12 (2014).

[351]W. VA. CODE § 61–8B–1(4) (2014).

[352]BLACK'S LAW DICTIONARY (10th ed. 2014).

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### 7.3.19 Affirmative Defense Based on Lack of Knowledge

The defendant has asserted an affirmative defense in this case. The defendant does not have the burden of proof in this case; that burden remains with the State. The defendant must only provide sufficient proof that it creates a reasonable doubt in your mind, specifically, that

1. the defendant,
2. at the time of the incident(s) alleged in the indictment,
3. did not know of the facts or conditions responsible for [insert name(s) of victim(s)]'s incapacity to consent, and
4. the defendant was not reckless in failing to know about such facts or conditions.

If the evidence on these matters is enough to raise a reasonable doubt in your mind, then, in addition to proving the elements of the offense, the State must prove beyond a reasonable doubt that the elements of the affirmative defense are untrue. If the State has failed to prove that the defense is untrue beyond a reasonable doubt, your verdict must be not guilty.

## COMMENTS

This affirmative defense is available in certain sexual offenses relating to the incapacity to consent. Specifically, see Instructions Nos. 7.3.**10**; 7.3.**11**; 7.3.**13**; 7.3.**15**; and 7.3.**18**.

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## 7.3.20 Third Degree Sexual Abuse

Count ____ of the INDICTMENT charges the DEFENDANT with Third Degree Sexual Abuse. Third Degree Sexual Abuse occurs when a person subjects another person who is less than 16 years old to sexual contact.[353]

"Sexual contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of the alleged victim, or intentional touching of any part of the complainant's body by the actor's sex organs, where the alleged victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party. [354]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the presumption of innocence and prove a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. subjected [*insert* name(s) of victim(s)],
5. who was less than sixteen years of age,
6. to sexual contact.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The statute provides two affirmative defenses to this offense: (1) the defendant was less than sixteen years old; and, (2) the defendant was less than four years older than the victim. W. Va. Code § 61–8B–9(b) (2014).

The age of the person represents that person's physical age; age under these statutes does not incorporate the idea of functional age, specifically, that a person can be more than sixteen years of age but have the functional capacity of a person who is eight years of age due to cognitive limitations

[353]W. VA. CODE § 61–8B–9 (2014).

[354]W. VA. CODE § 61–8B–1(6) (2014).

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or brain abnormalities. Developmental age is relevant, according to the United States Supreme Court. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Florida v. Graham*, 560 U.S. 48 (2010).

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## 7.3.21 Incest

Count ____ of the INDICTMENT charged the DEFENDANT with Incest.

"Incest" occurs when a person engages in sexual intercourse or sexual intrusion with his or her father, mother, brother, sister, daughter, son, grandfather, grandmother, grandson, granddaughter, nephew, niece, uncle or aunt.[355]

"Sexual intercourse" is any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.[356]

"Penetration" is the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice. Penetration is more than mere touching.[357]

"Sexual intrusion" is any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[358]

Penetration is the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice. Penetration is more than mere touching.[359]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. on or about the ___ day of [*insert* month], [*insert* year],
2. in [*insert* county] County, West Virginia;
3. the DEFENDANT
4. engaged in

[355]W. VA. CODE § 61–8–12(b) (2014). Definitions for each type of relative identified are provided at W. VA. CODE § 61–8–12(a) (2014).

[356]W. VA. CODE § 61–8B–1(7) (2014).

[357]BLACK'S LAW DICTIONARY (10th ed. 2014).

[358]W. VA. CODE § 61–8B–1(8) (2014).

[359]BLACK'S LAW DICTIONARY (10th ed. 2014).

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a. sexual intercourse

b. sexual intrusion

5. with [*insert* name(s) of victim(s)],

6. who was the [*insert* nature of relationship] of the DEFENDANT.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Even though "W. VA. CODE § 61–8–12(b) (1994) … does not require a showing of consanguinity," Syl. Pt. 7, in part, *State v. Ray*, 221 W. Va. 364, 655 S.E.2d 110 (2007), an attorney still must be alert as to whether the appropriate relationship has been shown.

It is unclear whether two people living together as husband and wife without being married and any relevant offspring or children living in the same household automatically qualify under the relationship parameters in this statute.

W. VA. CODE § 61–8–13 (2014) permits limits on the number of times a child age 11 or younger may be interviewed. Notably, subsection (b) allows a child to use anatomically correct dolls, mannequins or drawings to assist the child in testifying. The general standard is that children should not be permitted to use anatomically correct aids until after the child has made a disclosure of abuse so as to reduce the likelihood of suggestion.

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## PRACTICE TIPS

First, it is important that both the interviewer and the child are capable of using the dolls. For the interviewer, this means having the necessary training to use the dolls. Training should include the reading of relevant research, hands on practice and feedback, and adherence to professional guidelines. For the child, this means being able to make a representational shift. This is nothing more than the cognitive ability, generally developed between the ages of 3 and 4, to understand that the doll is going to represent the child or another actual person, and is not an instrument for play.

Second, it is improper to use the dolls exclusively, that is, without a verbal statement, to make a finding that a child has been sexually abused. This use would be considered a *diagnostic test,* and is an inappropriate use of the dolls. The child's demonstration with the dolls is but one part of the forensic interview just as the forensic interview is but one part of the investigation. The child's words and affect, the presence of corroborating evidence, and the statements of the alleged perpetrator all determine the outcome of an investigation. Holmes, Lori S., *Using Anatomical Dolls in Child Sexual Abuse Forensic Interviews*, Cornerhouse Update, Vol. 13, No. 8 (2000), *available at* www.cornerhousemn.org/images/using_anatomical_dolls_in_interviews.PDF.

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## 7.3.22 Sexual Abuse by a Parent, Guardian, or Custodian

Count __ of the INDICTMENT charges the DEFENDANT with Sexual Abuse by a Parent, Guardian or Custodian.

"Sexual Abuse by a Parent, Guardian or Custodian" occurs when a person who is a parent, guardian, custodian, or any other person in a position of trust in relation to a child under his or her care, custody or control, engages in or attempts to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control.[360]

"Parent" means the biological father or mother of a child, or the adoptive mother or father of a child.[361]

"Guardian" means a person who has care and custody of a child as the result of any contract, agreement or legal proceeding.[362]

"Custodian" means a person over the age of 14 years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding. "Custodian" includes, but is not limited to, the spouse of a parent, guardian or custodian, or a person cohabiting with a parent, guardian or custodian in the relationship of husband and wife, where such spouse or other person shares actual physical possession or care and custody of a child with the parent, guardian or custodian.[363]

"Sexual exploitation" means an act in which either

A parent, custodian, guardian or other person in a position of trust to a child, persuades, induces, entices, or coerces a child to engage in sexually explicit conduct, whether it is for financial gain or not; or

A parent, guardian, custodian, or other person in a position of trust to a child, persuades, induces, entices, or coerces the child to display his or her sex organs either for the sexual gratification of that parent, guardian, custodian,

[360]W. VA. CODE § 61–8D–5 (2014).

[361]W. VA. CODE § 61–8D–1(8) (2014).

[362]W. VA. CODE § 61–8D–1(5) (2014).

[363]W. VA. CODE § 61–8D–1(4) (2014).

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or person in a position of trust, or that of another person; or under circumstances in which that person knows the display is likely to be observed by others who would be affronted or alarmed.[364]

A "person in a position of trust in relation to a child" refers to any person who is acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning the child, or someone responsible for the general supervision of the child's welfare, or a person who by occupation or position is charged with any duty or responsibility for the health, education, welfare, or supervision of the child.[365]

Therefore, for you to find the DEFENDANT guilty, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. on or about the ___ day of [*insert* month], [*insert* year],
2. in [*insert* county] County, West Virginia,
3. the DEFENDANT,
4. who was: [a parent] [a guardian] [a custodian] [in a position of trust in relation to the child],
5. engaged in, or attempted to engage in, [sexual exploitation of] [sexual intercourse with] [sexual intrusion of] [sexual contact with]
6. [*insert* name(s) of victim(s)], a child under [his] [her] care, custody or control.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Separate definitional instructions will be needed to explain "sexual intercourse," "sexual intrusion," and "sexual contact." See Instructions 7.3.5; 7.3.4; and 7.3.16.

[364]W. VA. CODE § 61–8D–1(10) (2014).

[365]W. VA. CODE § 61–8D–1(13) (2014).

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Sexual intercourse means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person. W. VA. CODE § 61–8B–1(7) (2014). Penetration is the act of going through or into. "Penetration" is more than mere touching. BLACK'S LAW DICTIONARY (10th ed. 2014).

Sexual intrusion means any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party. W. VA. CODE § 61–8B–1(8). Penetration is the act of going through or into, it is more than mere touching. BLACK'S LAW DICTIONARY (10th ed. 2014).

Sexual Contact means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of the complainant, or intentional touching of any part of the complainant's body by the actor's sex organs, where the complainant is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party. W. VA. CODE § 61–8B–1(6) (2014).

Under West Virginia law, sexual exploitation is defined as an act whereby:

> (A) A parent, custodian, guardian or other person in a position of trust to a child, whether for financial gain or not, persuades, induces, entices or coerces the child to engage in sexually explicit conduct as that term is defined in section one, article eight-c, chapter sixty-one of this code; or
>
> (B) A parent, guardian, custodian or other person in a position of trust in relation to a child persuades, induces, entices or coerces the child to display [his] [her] sex organs for the sexual gratification of the parent, guardian, custodian, person in a position of trust or a third person, or to display [his] [her] sex organs under circumstances in which the parent, guardian, custodian or other person in a position of trust knows such display is likely to be observed by others who would be affronted or alarmed.

W. VA. CODE § 61–8D–1 (2014).

A defendant's status when charged with sexual abuse by a parent, custodian, or a person in a position of trust is a jury issue. *State ex rel. Harris v. Hatcher*, 236 W. Va. 599, 760 S.E.2d 847 (2014).

The Sexual Abuse by Custodian statute provides that it is a separate and distinct offense if a parent or custodian engages in sexual intercourse with a child; thus, the legislature clearly and unequivocally declared its intention that sexual abuse involving parents, custodians, or guardians is a separate and distinct crime from general sexual offenses for purposes of punishment and double jeopardy. *State v. Cecil*, 221 W. Va. 495, 655 S.E.2d 517 (2007).

"Custodian" means a person over the age of 14 years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding. "Custodian" includes, but is not limited to, the spouse of a parent, guardian or custodian, or a person cohabiting with a parent, guardian or custodian in the relationship of husband and wife, where such spouse or other person shares actual physical possession or care and custody of a child with the parent, guardian or custodian. W. VA. CODE § 61–8D–1(4) (2014).

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Defendant was not a "custodian" of 12-year-old alleged victim of sexual abuse, although he was her uncle, the only adult in the room with her at the time of the incident, and the victim's older sister, who the victim's mother had placed in charge of the victim and her sister, was asleep when the defendant arrived at the victim's house; the older sister was in charge of her sisters, the defendant never had actual physical possession or care and custody of the victim, and he arrived at the victim's house to respond to a request for help in finding an escaped hamster, not to watch the children. *State v. Longerbeam*, 226 W. Va. 535, 703 S.E.2d 307 (2010).

"Guardian" means a person who has care and custody of a child as the result of any contract, agreement or legal proceeding. W. VA. CODE § 61–8D–1(5) (2014).

"Parent" means the biological father or mother of a child, or the adoptive mother or father of a child. W. VA. CODE § 61–8D–1(8) (2014).

A "person in a position of trust in relation to a child" refers to any person who is acting in the place of a parent and charged with any of a parent's rights, duties or responsibilities concerning a child or someone responsible for the general supervision of a child's welfare, or any person who by virtue of occupation or position is charged with any duty or responsibility for the health, education, welfare, or supervision of the child. W. VA. CODE § 61–8D–1(13) (2014).

Defendant was not in a "position of trust" over an alleged 12-year-old victim of sexual abuse, although he was victim's uncle and had prior incidents of supervision of victim and her sisters; previous incidents of supervision did not establish that he was acting in that capacity on the date in question, and the relationship between defendant and victim did not play a part in the alleged incident. *State v. Longerbeam*, 226 W. Va. 535, 703 S.E.2d 307 (2010).

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## 7.3.23 Failure to Register as a Sexual Offender

Count ___ charges the DEFENDANT with Failure to Register as a Sexual Offender.

Failure to Register as a Sexual Offender occurs when a person, who is required to register as a sexual offender under West Virginia law, knowingly provides false information, or refuses to provide accurate information as required by law, or knowingly fails to register as required by law, or knowingly fails to provide a change of information as required by law.[366]

To find the DEFENDANT guilty, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. on the ___ day of [*insert* month], [*insert* year],
2. in [*insert* county] County, West Virginia;
3. the DEFENDANT
4. did knowingly
5. [provide false information regarding [his] [her] status] [refuse to provide accurate information when required to do so] [fail to register] [fail to provide a change of required information],
7. while the DEFENDANT was required to provide accurate information regarding [his] [her]status according to law.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[366]W. VA. CODE § 15–12–8 (2014).

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## COMMENTS

Each time a person has a change in any of the registration information as required by this article and knowingly fails to register the change or changes, each failure to register each separate item of information changed shall constitute a separate offense under this section. W. VA. CODE § 15–12–8(a) (2014).

"Under the Sex Offender Registration Act, W. VA. CODE §§ 15–12–1–10 (2014), a sex offender may have multiple addresses and is required to register each one." *State v. Beegle*, Syl. Pt. 1, 237 W. Va. 692, 790 S.E.2d 528 (2016)

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## 7.3.24 Distribution and Display to a Minor of Obscene Matter

Count ___ of the INDICTMENT charges the DEFENDANT with Distribution and Display to a Minor of Obscene Matter.

Distribution and Display to a Minor of Obscene Matter occurs when an adult, knowing the character of the material, knowingly and intentionally distributes, offers to distribute, or displays obscene material to a minor.[367]

For purposes of this Count, "display" means to show, exhibit or expose material, in a manner visible to the general or invited public, including minors.[368]

For purposes of this Count, "distribute" means to transfer possession, transport, transmit, sell or rent, with or without some kind of payment.[369]

For purposes of this charge, obscene matter means matter that:

(1) An average person, applying community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest; or

(2) An average person, applying community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct; and

(3) A reasonable person would find, taken as a whole, lacks serious literary, artistic, political or scientific value.[370]

"Prurient" means characterized by, exhibiting, or arousing inappropriate, inordinate, or unusual sexual desire; or having or showing too much interest in sex.[371]

[367]W. VA. CODE § 61–8A–2 (2014).

[368]W. VA. CODE § 61–8A–1(d) (2014). Additionally, "display" includes placing or exhibiting material on or in a billboard, viewing screen, theater, marquee, newsstand, display rack, window, showcase, display case or similar public place.

[369]W. VA. CODE § 61–8A–1(e) (2014).

[370]W. VA. CODE § 61–8A–1(k) (2014).

[371]BLACK'S LAW DICTIONARY (10th ed. 2014).

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Therefore, for you to find the DEFENDANT guilty, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. on or about the ___ day of [*insert* month], [*insert* year],
2. in [*insert* county] County, West Virginia,
3. the DEFENDANT
4. knowingly and intentionally,
5. distributed, offered to distribute, or displayed obscene material
6. to a minor, that is, a person younger than eighteen,
7. and the DEFENDANT knew the obscene character of the material.

{[*Insert*, if applicable]: The DEFENDANT has asserted an affirmative defense, to the effect that the obscene material was [concealed from minors' view] [displayed after the DEFENDANT took reasonable steps to ascertain the age of the minor]. The DEFENDANT must show that:

1. The obscene material was displayed in an area from which minors are physically excluded and when the material is displayed there, it cannot be viewed by a minor from nonrestricted areas; or
2. The obscene material was covered by a device, commonly known as a "blinder rack," such that the lower two thirds of the cover of the material is not exposed to view; or
3. The obscene material was enclosed in an opaque wrapper such that the lower two thirds of the cover of the material was not exposed to view, or;
4. The obscene material was displayed or distributed after taking reasonable steps to receive, obtain or check an adult identification card, such as a driver's license or other technically or reasonably feasible means of verification of age.

If the evidence on these matters is enough to raise a reasonable doubt in your mind, then, in addition to proving the elements of the offense, the State must prove beyond a reasonable doubt that the elements of the affirmative defense are untrue. If the State has failed to prove that the defense is untrue beyond a reasonable doubt, your verdict must be not guilty.}

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The statute provides the following affirmative defenses:

> The obscene material was displayed in an area from which minors are physically excluded and when the material is displayed there, it cannot be viewed by a minor from nonrestricted areas;
>
> The obscene material was covered by a device, commonly known as a "blinder rack," such that the lower two thirds of the cover of the material is not exposed to view;
>
> The obscene material was enclosed in an opaque wrapper such that the lower two thirds of the cover of the material was not exposed to view;
>
> The obscene material was displayed or distributed after taking reasonable steps to receive, obtain or check an adult identification card, such as a driver's license or other technically or reasonably feasible means of verification of age.

W. VA. CODE § 61–8A–2 (2014).

The statute also provides it is a defense to an alleged violation under this section that a parent had taken reasonable steps to limit the minor's access to the obscene matter. *Id*.

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## 7.3.25 Employment or Use of Minor to Produce Obscene Matter or Assist in Doing Sexually Explicit Conduct

Count ___ of the INDICTMENT charges the DEFENDANT with Employment or Use of a Minor to Produce Obscene Matter or Assist in Doing Sexually Explicit Conduct.

Employment or Use of a Minor to Produce Obscene Matter or Assist in Doing Sexually Explicit Conduct occurs when an adult, who knows the victim is a minor or fails to exercise reasonable care in determining the age of a minor: hires, employs or uses such minor to produce obscene material, or has the minor do or assist in doing any sexually explicit conduct.[372]

For purposes of this charge, "obscene matter" means matter that:

(1) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest; or

(2) An average person, applying community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct; and that

(3) A reasonable person would find, taken as a whole, lacks serious literary, artistic, political or scientific value.[373]

"Prurient" means characterized by, exhibiting, or arousing inappropriate, inordinate, or unusual sexual desire; or having or showing too much interest in sex.[374]

For the purposes of this charge, "sexually explicit conduct" means an ultimate sexual act, normal or perverted, actual or simulated, including sexual intercourse, sodomy, oral copulation, sexual bestiality, sexual sadism and masochism, masturbation, excretory functions and lewd exhibition of the genitals.[375]

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[372]W. VA. CODE § 61–8A–5 (2014).

[373]W. VA. CODE § 61–8A–1(k) (2014).

[374]BLACK'S LAW DICTIONARY (10th ed. 2014).

[375]W. VA. CODE § 61–8A–1(n) (2014).

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To find the DEFENDANT guilty, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. on or about the ___ day of [*insert* month], [*insert* year],
2. in [*insert* county] County, West Virginia,
3. the DEFENDANT, who was an adult,
4. while knowing the alleged victim was a minor or failing to exercise reasonable care in determining the age of a minor,
5. either:
    a. hired, employed or used such minor to produce obscene material; or,
    b. had the minor do or assist in doing sexually explicit conduct.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

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## 7.3.26 Use of Obscene Matter with Intent to Seduce a Minor

Count ___ of the INDICTMENT has charged the DEFENDANT with Use of Obscene Matter with Intent to Seduce a Minor.

"Use of Obscene Matter with Intent to Seduce a Minor" occurs when an adult, having knowledge of the character of the matter, who knows or believes that a person is a minor at least four years younger than the adult, distributes, offers to distribute, or displays by any means any obscene matter to the person who is known or believed to be a minor at least four years younger than the adult, and such distribution, offer to distribute, or display is undertaken with the intent or for the purpose of facilitating the sexual seduction or abuse of the minor.[376]

For purposes of this charge, "obscene matter" means matter that:

(1) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest; or

(2) An average person, applying community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct; and

(3) A reasonable person would find, taken as a whole, lacks serious literary, artistic, political or scientific value.[377]

Prurient means characterized by, exhibiting, or arousing inappropriate, inordinate, or unusual sexual desire; or having or showing too much interest in sex.[378]

To find the DEFENDANT guilty, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. on or about the ___ day of [*insert* month], [*insert* year],
2. in [*insert* county] County, West Virginia,

[376]W. VA. CODE § 61–8A–4.

[377]W. VA. CODE § 61–8A–1(k).

[378]BLACK'S LAW DICTIONARY (10th ed. 2014).

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3. the DEFENDANT
4. was an adult,
5. having knowledge of the character of the obscene matter,
6. who knew or believed that [*insert* name(s) of victim(s)] was a minor at least four years younger than the DEFENDANT, and
7. distributed, offered to distribute, or displayed by any means the obscene matter,
8. to [*insert* name(s) of victim(s)], who the DEFENDANT knew or believed to be a minor at least four years younger than the DEFENDANT,
9. and such distribution, offer to distribute, or display was undertaken with the intent or for the purpose of facilitating the sexual seduction or abuse of the minor.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The display of the human body can constitute obscene matter for the purposes of this crime. *State v. Simons,* No. 11-0917, 2012 WL 3079097, at *2 (W. Va. Apr. 16, 2012) (Memorandum Decision).

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## 7.4 DRUG OFFENSES

### 7.4.1. Possession of a Controlled Substance

The offense of "Possession of a Controlled Substance" is committed when a person knowingly or intentionally possesses a controlled substance, when the controlled substance was not obtained directly from, or pursuant to, a valid prescription or order of a practitioner acting in the course of his or her professional practice.[379]

In order to prove the commission of this, the State must prove the guilt of the DEFENDANT beyond a reasonable doubt. The DEFENDANT is presumed by law to be not guilty of this charge and this presumption remains with [him] [her] throughout the trial. Therefore, the State of West Virginia must prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___day of [*insert* month], {*insert* year],
3. in [*insert* county] County, West Virginia;
4. knowingly or intentionally
5. possessed
6. a controlled substance, specifically, [*insert* substance], a Schedule [*insert*] Controlled Substance,
7. without a valid prescription or order of a practitioner acting in the course of his or her professional practice.

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Possession of a Controlled Substance, you may find the DEFENDANT guilty of as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to any of these elements, you shall find the DEFENDANT not guilty.

[379] W. VA. CODE § 60A–4–401(C) (2014).

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## COMMENTS

It is crucial for practitioners to be aware of and inform clients of W. VA. CODE § 60A–4–408 (2014), which allows the State to seek a term of up to twice the term otherwise authorized, request a fine amounting to twice that otherwise authorized, or both, on a second or subsequent conviction under this Chapter. Unlike the recidivist statute, the State does not have any notice obligations with regard to its intent to rely on this enhancement section. Moreover, an offense is considered a second or subsequent offense if the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs.

### 7.4.2. Constructive Possession

"Possession" includes "Constructive Possession;" however, mere proximity to illegal drugs is not sufficient to convict a DEFENDANT of possession. To prove constructive possession, the State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was subject to defendant's dominion and control.[380]

In determining whether the State of West Virginia has proven beyond a reasonable doubt that the DEFENDANT was in constructive possession of the controlled substance, you may consider such factors as whether the DEFENDANT was the owner or lessee of the premises in which the controlled substances were found; whether the DEFENDANT had exclusive control over the area *within* the premises where the controlled substances were found; the DEFENDANT'S proximity to the controlled substances at the time of the arrest; the number of other people, if any, present at the time the controlled substances were found; the DEFENDANT'S relationship or association with any other people present at the time the controlled substances were found; and the DEFENDANT'S conduct at the time the controlled substances were found.

[380] *See State v. Ducick*, 158 W. Va. 629, 213 S.E.2d 458 (1975); *State v. Patton*, 171 W. Va. 419, 299 S.E.2d 31 (1982); *State v. Williams,* 198 W. Va. 274, 480 S.E.2d 162 (1996).

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### 7.4.3 Possession with Intent to Deliver a Controlled Substance

Possession with the Intent to Deliver a Controlled Substance is committed when a person knowingly and intentionally possesses a controlled substance with the intention of delivering the controlled substance to another person. In order to prove this offense, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia;
4. knowingly and intentionally
5. possessed
6. a controlled substance, specifically, [*insert* controlled substance], a Schedule [*insert*] Controlled Substance,
7. with the intent to deliver the controlled substance to another person.[381]

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Possession with Intent to Deliver a Controlled Substance, then you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

[Reserved]

[381]W. VA. CODE § 60A–4–401(a) (2014)

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## 7.4.4. Possession with Intent to Deliver a Counterfeit Substance

Possession with the Intent to Deliver a Counterfeit Substance is committed when a person knowingly and intentionally possesses a counterfeit substance with the intention of delivering the controlled substance to another person.[382] In order to prove this offense, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia;
4. knowingly and intentionally
5. possessed
6. a counterfeit substance, specifically, [*insert* controlled substance], a Schedule [*insert*] Counterfeit Substance,
7. with the intent to deliver the counterfeit substance to another person.

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Possession with Intent to Deliver a Counterfeit Substance, then you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to any one or more of these elements, you shall find the DEFENDANT not guilty.

### COMMENT

It will be necessary to define "counterfeit substance." See Instruction No. 7.4.9.

[382] W. VA. CODE § 60A–1–401(b) (2014).

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### 7.4.5 Possession with Intent to Deliver an Imitation Controlled Substance

Possession with the Intent to Deliver an Imitation Controlled Substance is committed when a person knowingly and intentionally possesses an imitation controlled substance with the intention of delivering the imitation controlled substance to another person.[383] In order to prove this offense, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia;
4. knowingly and intentionally
5. possessed
6. an imitation controlled substance, specifically, [*insert* description of imitation controlled substance], an Imitation Controlled Substance,
7. with the intent to deliver the imitation controlled substance to another person.[384]

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Possession with Intent to Deliver an Imitation Controlled Substance, then you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENT

It will be necessary to define "imitation controlled substance." See Instruction No. 7.4.10.

[383]W. VA. CODE § 60A–4–401(d) (2014).

[384]W. VA. CODE § 60A–4–401(a) (2014)

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## 7.4.6. Delivery of a Controlled Substance

"Delivery of a Controlled Substance" is committed when a person knowingly and unlawfully delivers a controlled substance to another person.[385]

"Delivery," as it is used in these instructions, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.[386]

"Constructive transfer" is the transfer of a controlled substance belonging to an individual or under his or her control, by some other person or agency at the instance or direction of the accused.[387]

In order to prove the commission of the offense of "Delivery of a Controlled Substance," the State of West Virginia must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly
5. delivered a Schedule [*insert*] Controlled Substance, specifically, [*insert* controlled substance]
6. to another person.

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Delivery of a Controlled Substance, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to one or more of these elements, you shall find the DEFENDANT not guilty.

[385]W. VA. CODE § 60A–4–401(a) (2014).

[386]W. VA. CODE § 60A–1–101(h) (2014).

[387]*See* Syl. Pt. 4, *State v. Ellis*, 161 W. Va. 40, 239 S.E.2d 670 (1977).

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## COMMENTS

W. VA. CODE § 60A–4–402(c) (2014) mandates that any first-offense conviction for delivery of less than fifteen (15) grams of marijuana without remuneration shall be disposed of under the mandatory probation provisions of W. VA. CODE § 60A-4-407 (2014). In State v. Nicastro, 181 W. Va. 556, 383 S.E.2d 521 (1989), the Court expanded upon the provisions of this section by noting that, "prior to imposition of a sentence of incarceration for a defendant convicted of delivery of less than 15 grams of marijuana in violation of W. VA. CODE § 60A–4–401(a) (2014), as amended, who, although not within the 'without remuneration' exception of W. VA. CODE § 60A-4-402(c) (2014), as amended, has no prior criminal record, a trial court must consider: (1) whether the defendant has a history of involvement with illegal drugs; (2) whether the defendant is a reasonably good prospect for rehabilitation; (3) whether incarceration would serve a useful purpose; and (4) whether available alternatives to incarceration, such as probation conditioned upon community service, would be more appropriate."

### 7.4.7. Delivery of a Counterfeit Substance

"Delivery of a Counterfeit Substance" is committed when a person knowingly and unlawfully delivers a counterfeit substance to another person.[388]

"Delivery," as it is used in these instructions, means the actual, constructive or attempted transfer from one person to another of a counterfeit substance, whether or not there is an agency relationship.[389]

"Constructive transfer" is the transfer of a counterfeit substance belonging to an individual or under his or her control, by some other person or agency at the instance or direction of the accused.[390]

In order to prove the commission of the offense of "Delivery of a Counterfeit Substance," the State of West Virginia must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly

[388] W. VA. CODE § 60A–4–401(b) (2014).

[389] W. VA. CODE § 60A–1–101(h) (2014).

[390] *See* Syl. Pt. 4, *State v. Ellis*, 161 W.Va. 40, 239 S.E.2d 670 (1977).

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5. delivered a Schedule [*insert*] Counterfeit Substance, specifically, [*insert* controlled substance]
6. to another person.

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Delivery of a Counterfeit Substance, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENT

It will be necessary to define "counterfeit substance." See Instruction No. 7.4.9.

### 7.4.8. Delivery of an Imitation Controlled Substance

"Delivery of an Imitation Controlled Substance" is committed when a person knowingly and unlawfully delivers an imitation controlled substance to another person.[391]

"Delivery," as it is used in these instructions, means the actual, constructive or attempted transfer from one person to another of an imitation controlled substance, whether or not there is an agency relationship.[392]

"Constructive transfer" is the transfer of an imitation controlled substance belonging to an individual or under his or her control, by some other person or agency at the instance or direction of the accused.[393]

In order to prove the commission of the offense of "Delivery of an Imitation Controlled Substance," the State of West Virginia must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly

[391]W. VA. CODE § 60A–4–401(d) (2014).

[392]W. VA. CODE § 60A–1–101(h) (2014).

[393]*See* Syl. Pt. 4, *State v. Ellis*, 161 W. Va. 40, 239 S.E.2d 670 (1977).

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5. delivered a Schedule [*insert*] Imitation Controlled Substance, specifically, [*insert* controlled substance],
6. to another person.

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Delivery of an Imitation Controlled Substance, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENT

It will be necessary to define "imitation controlled substance." See Instruction No. 7.4.10.

### 7.4.9. Definition of Counterfeit substance

"Counterfeit substance" is

1. a controlled substance
2. which itself bears, or bears on its container or label,
3. the trademark or other identifier, including the likeness of the substance,
4. of a manufacturer or distributor other than the person who in fact manufactured or distributed the substance,
5. and the actual manufacturer or distributor did not authorize it.[394]

## COMMENT

The actual language is:

> "Counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the substance.

W. Va. Code § 60A–1–101(f) (LexisNexis Supp. 2017).

[394]W. VA. CODE § 60A–1–101(f) (LexisNexis Supp. 2017). While it may be clear to the legal practitioner, the definition as statutorily set forth is opaque when read out loud to a lay jury. See Comments under this section for the language.

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### 7.4.10. Definition of Imitation Controlled Substance

"Imitation controlled substance" means: (1) A controlled substance which is falsely represented to be a different controlled substance; (2) a drug or substance which is not a controlled substance but which is falsely represented to be a controlled substance; or (3) a controlled substance or other drug or substance or a combination thereof which is shaped, sized, colored, marked, imprinted, numbered, labeled, packaged, distributed or priced so as to cause a reasonable person to believe that it is a controlled substance.[395]

## COMMENTS

**[This section is reserved]**

### 7.4.11. Manufacturing a Controlled Substance

Count ___ of the INDICTMENT charges the DEFENDANT with Manufacturing a Controlled Substance. This offense is committed when a person knowingly and unlawfully manufactures a controlled substance. In order to prove the commission of the offense of "Manufacturing a Controlled Substance", the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly and unlawfully
5. manufactured a Schedule [*insert*] Controlled Substance, specifically, [*insert* controlled substance].[396]

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Manufacturing a Controlled Substance, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a

[395]W. VA. CODE § 60A–1–101(g) (LexisNexis Supp. 2017).

[396]W. VA. CODE § 60A–4–401(a) (2014).

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reasonable doubt as to one or more of these elements, you shall find the DEFENDANT not guilty.

### 7.4.12. Manufacturing a Controlled Substance—Definition of "Manufacture"

"Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance; one can "manufacture" a controlled substance either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.[397]

## COMMENTS

"Manufacture" does not include the preparation or compounding of a controlled substance by an individual for his or her own use or the preparation, compounding, packaging or labeling of a controlled substance (1) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or (2) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale. W. Va. Code § 60A–1–101(q) (LexisNexis Supp. 2017).

The prohibition against manufacture of a controlled substance under W. VA. CODE § 60A–4–401(d) (2014) includes a prohibition against the growing of marijuana since "production" is a defined term of manufacture and "production" under W. VA. CODE § 60A–1–101(z) (LexisNexis Supp. 2017) is defined to include planting, cultivating and growing. See Syl. Pt. 2, *State v. Underwood*, 168 W.Va. 52, 281 S.E.2d 491 (1981).

[397]W. VA. CODE § 60A–1–101(n) (LexisNexis Supp. 2017)

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### 7.4.13. Manufacturing a Controlled Substance—Definition of "Knowingly"

A person acts "knowingly" with respect to a material element of an offense when (1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (2) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.[398]

### 7.4.14. Operating or Attempting to Operate Clandestine Drug Laboratories

The offense of "Operating or Attempting to Operate a Clandestine Drug Laboratory" is committed when a person knowingly and intentionally operates or attempts to operate a clandestine drug laboratory.[399]

A "clandestine drug laboratory" means any property, real or personal, on or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine, methylenedioxymethamphetamine or lysergic acid diethylamide.[400]

In order to prove the offense of "Operating or Attempting to Operate a Clandestine Drug Laboratory", the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [insert county] County, West Virginia,
4. knowingly and intentionally
5. [operated] [attempted to operate]
6. a clandestine drug laboratory.

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all the elements of Operating or Attempting to Operate a Clandestine Drug Laboratory, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to any one or more of these elements, you shall find the DEFENDANT not guilty.

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[398] *Syl. Pt. 1, State v. Wyatt*, 198 W. Va. 530, 482 S.E.2d 147 (1996).

[399] W. VA. CODE § 60A–4–411(a) (2014).

[400] W. VA. CODE § 60A–4–411(b) (2014).

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## 7.4.15. Creating a Counterfeit Substance

Count ___ of the INDICTMENT charges the DEFENDANT with Creating a Counterfeit Substance. This offense is committed when a person knowingly and unlawfully manufactures a counterfeit substance. In order to prove the commission of the offense of "Creating a Counterfeit Substance", the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly and unlawfully
5. created a Schedule [*insert*] Counterfeit Substance, specifically, [*insert* counterfeit substance].[401]

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Creating a Counterfeit Substance, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to one or more of these elements, you shall find the DEFENDANT not guilty.

### COMMENT

It will be necessary to define "counterfeit substance." See Instruction No. 7.4.9.

[401] W. VA. CODE § 60A–4–401(a) (2014).

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## 7.4.16. Creating an Imitation Controlled Substance

Count ___ of the INDICTMENT charges the DEFENDANT with Creating an Imitation Controlled Substance. This offense is committed when a person knowingly and unlawfully creates an imitation controlled substance. In order to prove the commission of the offense of "Creating an Imitation Controlled Substance", the State must overcome the presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly and unlawfully
5. created an Imitation Controlled Substance, specifically, [*insert* description of imitation controlled substance].[402]

After consideration of all the evidence, if each of you is convinced beyond a reasonable doubt that the State has proven all these elements of Creating an Imitation Controlled Substance, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. However, if any of you has a reasonable doubt as to one or more of these elements, you shall find the DEFENDANT not guilty.

### COMMENT

It will be necessary to define "imitation controlled substance." See Instruction No. 7.4.10.

[402] W. VA. CODE § 60A–4–401(d) (2014).

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## 7.5 CRIMES AGAINST PROPERTY

### 7.5.1. First Degree Arson

Count ___ of the INDICTMENT charges the DEFENDANT with First Degree Arson.

First Degree Arson occurs when a person willfully and maliciously sets fire to or burns, or causes to be burned, or aids, counsels, procures, persuades, incites, entices or solicits another person to burn a dwelling, whether occupied, unoccupied, or vacant, or any outbuilding, whether his or her property or that of another.[403]

"Willfully and maliciously" means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.[404]

"Dwelling" means any building or structure intended for habitation or lodging, in whole or in part, regularly or occasionally. It shall include, but not be limited to, any house, apartment, hotel, dormitory, hospital, nursing home, jail, prison, mobile home, house trailer, modular home, factory-built home or self-propelled motor home;[405]

"Outbuilding" means any building or structure which adjoins, is part of, belongs to, or is used in connection with a dwelling, and includes, but is not limited to, any garage, shop, shed, barn or stable.[406]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent—[he] [she] is presumed by the law to be innocent of this charge and this presumption remains with the DEFENDANT throughout this trial. To prove the DEFENDANT guilty of First Degree Arson, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,

[403]W. VA. CODE § 61–3–1 (2014).

[404]*State v. Davis*, 178 W. Va. 87, 357 S.E.2d 769, 770 (1987), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994).

[405]W. VA. CODE § 61–3–1(b)(1) (2014).

[406]W. VA. CODE § 61–3–1(b)(2) (2014).

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2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. willfully and maliciously
5. [set fire to or burned] [caused to be burned] [aided, counseled, procured, persuaded, incited, enticed, or solicited another person to burn]
6. a dwelling or outbuilding,

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of First Degree Arson, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Historically, the crime of arson is against the security of habitation—not the safety of property.

"To sustain a conviction of arson, when the evidence offered at trial is circumstantial, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime." Syl. Pt. 5, *State v. Mullins,* 181 W. Va. 415, 383 S.E.2d 47 (1989).

Smoke damage, paint damage, damage to light fixtures, and possible damage to metal bunk beds were sufficient to show that a burning occurred. *State v. Jones*, 174 W. Va. 700, 329 S.E.2d 65, n.6 (1985).

This instruction will have to be modified where lesser included offenses are required to be included.

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## 7.5.2 Second Degree Arson

Count ___ of the INDICTMENT charges the DEFENDANT with Second Degree Arson.

Second Degree Arson occurs when a person willfully and maliciously sets fire to or burns, or who causes to be burned, or who aids, counsels, procures, persuades, incites, entices, or solicits any person to burn a building or structure of any class or character that is not a dwelling house or outbuilding, whether his or her property or that of another. [407]

"Willfully and maliciously" means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.[408]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent—[he] [she] is presumed by the law to be innocent of this charge and this presumption remains with the DEFENDANT throughout this trial. To prove the DEFENDANT guilty of Second Degree Arson, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. willfully and maliciously
5. [set fire to or burned] [caused to be burned] [aided, counseled, procured, persuaded, incited, enticed or solicited a person to burn]
6. a building or structure other than a dwelling house or associated outbuilding.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Second Degree Arson, you may find the DEFENDANT guilty as charged in

[407] W. VA. CODE § 61–3–2 (2014).

[408] *State v. Davis*, 178 W. Va. 87, 357 S.E.2d 769, 770 (1987), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994).

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Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Convictions for First Degree and Second Degree Arson violate Double Jeopardy. *Damron v. Haines*, 223 W. Va. 135, 145, 672 S.E.2d 271, 281 (2008) (*per curiam*).

"To sustain a conviction of arson, when the evidence offered at trial is circumstantial, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime." Syl. Pt. 5, *State v. Mullins,* 181 W. Va. 415, 383 S.E.2d 47 (1989).

Evidence of smoke damage, damage to paint and light fixtures and possible damage to metal bunk beds was sufficient to show a burning occurred. *State v. Jones*, 174 W. Va. 700, 329 S.E.2d 65, n.6 (1985).

### 7.5.3. Third Degree Arson

Count ___ of the INDICTMENT charges the DEFENDANT with Third Degree Arson.

Third Degree Arson occurs when a person willfully and maliciously sets fire to or burns, or who causes to be burned, or who aids, counsels, procures, persuades, incites, entices, or solicits another person to burn, any personal property of any class or character, which is worth at least five hundred dollars, and which is the property of another person.[409]

"Willfully and maliciously" means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.[410]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent—[he] [she] is presumed by the law to be innocent of this charge and this presumption remains with the DEFENDANT throughout this trial. To prove the DEFENDANT guilty of Third Degree Arson, the State must

[409] W. VA. CODE § 61–3–3 (2014).

[410] *State v. Davis*, 178 W. Va. 87, 357 S.E.2d 769, 770 (1987), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994).

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overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. willfully and maliciously
5. [set fire to or burned] [caused to be burned] [aided, counseled, procured, persuaded, incited, enticed, or solicited another person to burn]
6. personal property, which is
7. valued at five hundred dollars or more, and,
8. which is the property of another person, in this case [*insert* name(s) of victim(s)].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of Third Degree Arson, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Third Degree Arson is a lesser included offense of First Degree Arson. Syl. Pt. 2, in part, *State v. Jones*, 174 W. Va. 700, 329 S.E.2d 65 (1985).

"To sustain a conviction of arson, when the evidence offered at trial is circumstantial, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime." Syl. Pt. 5, *State v. Mullins,* 181 W. Va. 415, 383 S.E.2d 47 (1989).

Evidence of smoke damage, damage to paint and light fixtures and possible damage to metal bunk beds was sufficient to show that a burning occurred. *State v. Jones*, 174 W. Va. 700, 329 S.E.2d 65, n.6 (1985).

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## 7.5.4 Fourth Degree Arson

Count ___ of the INDICTMENT charges the DEFENDANT with Fourth Degree Arson.

Fourth Degree Arson occurs when a person willfully and maliciously attempts to set fire to or burn, or attempts to cause to be burned, or attempts to aid, counsel, procure, persuade, incite, entice, or solicit another person to burn a building or structure, whether a dwelling, an outbuilding, or not, and whether occupied, unoccupied, or vacant, and regardless of ownership, or personal property of any class or character, which is valued at $500 or more, and which is the property of another person; or when one commits any act preliminary to or in furtherance of such conduct. [411]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent—[he] [she] is presumed by the law to be innocent of this charge and this presumption remains with the DEFENDANT throughout this trial. To prove the DEFENDANT guilty of Fourth Degree Arson, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. willfully and maliciously,
5. [attempted to set fire to or burn] [attempted to cause to be burned] [attempted to aid, counsel, procure, persuade, incite, entice or solicit to burn],
6. [a building or structure,] [personal property of any kind which had a value of $500.00 or more, and which belonged to another person, in this case [*insert* name(s) of victim(s)];
7. or committed an act preliminary to or in furtherance of such conduct.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a

[411] W. VA. CODE § 61–3–4(a) (2014).

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reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

"The property distinctions that are relevant to determine the degree of other arson charges are irrelevant under our attempted arson statute, W. Va. Code § 61-3-4 (2014), which specifically incorporates 'any of the buildings or property mentioned in the foregoing sections.' Thus, attempted arson is not confined to a dwelling." Syl. Pt. 6, *State v. Davis*, 178 W. Va. 87, 357 S.E.2d 769 (1987), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994).

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## 7.5.5. Fourth Degree Arson (Placing of Materials or Explosives)

Count ___ of the INDICTMENT charges the DEFENDANT with Fourth Degree Arson, Placing Materials or Explosives.

Fourth Degree Arson (Placing Materials or Explosives) occurs when a person places or distributes a flammable, explosive, or combustible material or substance in

a. a building or structure, whether a dwelling, an outbuilding, or not, and whether occupied, unoccupied, or vacant, and regardless of ownership;
b. personal property of any class or character, which is valued at $500 or more and which is the property of another person

in an arrangement or preparation with intent to eventually willfully and maliciously set fire to or burn, or caused to be burned, or to aid, counsel, procure, persuade, incite, entice, or solicit the setting fire to or burning of any such building or of personal property worth more than $500.00. [412]

"Willfully and maliciously" means an intentional as distinguished from an accidental burning. It also means without lawful reason, cause, or excuse.

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent—[he] [she] is presumed by the law to be innocent of this charge and this presumption remains with the DEFENDANT throughout this trial. To prove the DEFENDANT guilty of Fourth Degree Arson, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. placed or distributed flammable, explosive, or combustible material, or substance, or device,
5. [in a building or structure of any class or character, regardless of who owned it, and regardless of whether a dwelling place or

[412] W. VA. CODE § 61–3–4(b) (2014).

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associated outbuilding] [in personal property which is worth $500.00 or more and which is owned by another].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The property distinctions that are relevant to determine the degree of other arson charges are irrelevant under our attempted arson statute, which specifically incorporates "any of the buildings or property mentioned in the foregoing sections." Thus, attempted arson is not confined to a dwelling. *State v. Davis*, 178 W. Va. 87, 88–89, 357 S.E.2d 769, 770–71 (1987), *overruled on other grounds by State ex rel. R.L. v. Bedell,* 192 W. Va. 435, 452 S.E.2d 893 (1994).

### 7.5.6 Burning or Attempting to Burn Insured Property

Count ___ of the INDICTMENT charges the DEFENDANT with Burning or Attempting to Burn Insured Property.

Burning or Attempting to Burn Insured Property occurs when a person willfully and with intent to injure or defraud an insurer sets fire to or burns, or attempts to do so, or causes to be burned, or aids, counsels, procures, persuades, incites, entices, or solicits another person to burn a building, structure, or personal property of any class or character, whether the property of himself or herself or of another, which shall at the time be insured or which is believed by the person committing the prohibited act to be insured by any person against loss or damage by fire.[413]

It is the State's burden to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent—the law presumes the DEFENDANT is innocent of this charge and this presumption remains with the DEFENDANT throughout this trial. To prove the DEFENDANT guilty of Burning or Attempting Insured Property, the

[413] W. VA. CODE § 61–3–5 (2014).

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State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. willfully, and
5. with intent to injure or defraud an insurer, [set fire to or burned attempted to set fire to or burn] [caused to be burned] [aided, counseled, procured, persuaded, incited, enticed, or solicited another person to burn],
6. a building, structure, or personal property which shall at the time be insured, or which the DEFENDANT believes to be insured, against loss or damage by fire.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Ownership of the property is of no importance under this statute. *State v. Clay*, 135 W. Va. 618, 625, 64 S.E.2d 117, 121 (1951).

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## 7.5.7. Setting Fire on Lands

Count ___ of the INDICTMENT charges the DEFENDANT with Setting Fire on Lands.

Setting Fire on Lands occurs when a person willfully, unlawfully, and maliciously sets fire to any woods, fence, grass, straw or other thing capable of spreading fire on lands.[414] An accidental burning is not a violation of this statute.

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent—[he] [she] is presumed by the law to be innocent of this charge and this presumption remains with the DEFENDANT throughout this trial. To prove the DEFENDANT guilty of Setting Fire on Lands, the State must overcome the presumption that the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. willfully, unlawfully, and maliciously
5. set fire to woods, fence, grass, straw, or [*insert* other material]
6. capable of spreading fire on lands

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[414] W. VA. CODE § 61–3–6 (2014).

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## COMMENTS

"Willfully and maliciously" means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse. *State v. Davis*, 178 W. Va. 87, 88–89, 357 S.E.2d 769, 770–71 (1987), *overruled on other grounds by State ex rel. R.L. v. Bedell,* 192 W. Va. 435, 452 S.E.2d 893 (1994).

### 7.5.8 Causing Bodily Injury During an Arson Related Crime

Count ___ of the INDICTMENT charges the DEFENDANT with Causing Bodily Injury During an Arson Related Crime.

Causing Bodily Injury During an Arson Related Crime occurs when a person commits the offense of First Degree Arson, Second Degree Arson, Third Degree Arson, Fourth Degree Arson, Fourth Degree Arson by Placing Material or Explosives, Burning or Attempting to Burn Insured Property, Setting Fire on Lands, which then causes bodily injury to another.[415]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent—[he] [she] is presumed by the law to be innocent of this charge and this presumption remains with the DEFENDANT throughout this trial. To prove the DEFENDANT guilty of Causing Injury During an Arson Related Crime, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. committed the offense of [First Degree Arson] [Second Degree Arson] [Third Degree Arson] [Fourth Degree Arson] [Fourth Degree Arson by Placing Material or Explosives] [Burning or Attempting to Burn Insured Property] [Setting Fire on Lands],
5. which caused
6. bodily injury
7. to another.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a

[415]W. VA. CODE § 61–3–7 (2014).

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reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

First degree arson under W. Va. Code § 61–3–1(a) (2014) is not a lesser included offense of arson resulting in serious bodily injury under W. Va. Code § 61–3–7(b) (2014). Syl. Pt. 3, *State ex rel. Games-Neely v. Silver*, 226 W. Va. 11, 697 S.E.2d 47, 49 (2010).

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## 7.5.9. Arson Causing Serious Bodily Injury

Count ___ of the INDICTMENT charges the DEFENDANT with Causing Serious Bodily Injury During an Arson Related Crime.

"Causing Serious Bodily Injury During an Arson Related Crime" occurs when a person commits the crime of First Degree Arson, Second Degree Arson, Third Degree Arson, Fourth Degree Arson, Fourth Degree Arson by Placing Material or Explosives, Burning or Attempting to Burn Insured Property, or Setting Fire on Lands, which act causes another person serious bodily injury.[416]

"Serious bodily injury" means that another person is maimed, disfigured or disabled.[417]

The burden is on the State to prove the DEFENDANT'S guilt beyond a reasonable doubt; the DEFENDANT is not required to prove [himself] [herself] innocent—[he] [she] is presumed by the law to be innocent of this charge and this presumption remains with the DEFENDANT throughout this trial. To prove the DEFENDANT guilty of Causing Serious Injury During an Arson Related Crime, the State must overcome the presumption the DEFENDANT is innocent and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. committed the crime of [First Degree Arson] [Second Degree Arson] [Third Degree Arson] [Fourth Degree Arson] [Fourth Degree Arson by Placing Material or Explosives] [Burning or Attempting to Burn Insured Property] [Setting Fire on Lands],
5. which caused
6. serious bodily injury to another.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the

[416]W. VA. CODE § 61–3–7 (2014).

[417]W. VA. CODE § 61–3–7(b) (2014).

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INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

First degree arson is not a lesser included offense of Arson Causing Serious Bodily Injury to another. Syl. Pt. 2, *State ex rel. Games-Neely v. Silver*, 226 W. Va. 11, 697 S.E.2d 47, 49 (2010). "By enacting West Virginia Code § 61–3–7(b) (2014), the Legislature intended that the same acts that constitute the offense of arson in the first degree under W. Va. Code § 61–3–1(a) (2014) may also constitute the offense of arson resulting in serious bodily injury if the felonious conduct at issue maims, disfigures or disables any person resulting in serious bodily injury." *Id*. Syl. Pt. 3.

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*Burglary*

## 7.5.10. Nighttime Burglary

Count ___ of the INDICTMENT charges the DEFENDANT with Nighttime Burglary.

Nighttime Burglary occurs when a person, during the nighttime, enters another person's dwelling house, or a house that adjoins or is occupied along with the owner's dwelling house, intending to commit a crime.[418]

"Nighttime" is that period between sunset and sunrise during which there is not enough daylight to discern a person's face except by artificial light or moonlight.[419]

"Breaking," as an element of the crime of burglary, may be either actual or constructive.[420]

An actual "breaking" involves the application of force to gain entrance; any slight physical force is sufficient to constitute a breaking.[421]

There is a "constructive breaking" when entrance is obtained by force or a threat of force.[422]

An "entry" is the slightest intrusion into the dwelling house or outhouse adjoining thereto of another by any part of the perpetrator's body,[423] or with any instrument or weapon introduced for the purpose of committing a crime therein.[424]

A "dwelling house" is a building or portion thereof intended for use as a human habitation, home or residence,[425] and includes, but is not limited to, a mobile home, house trailer, modular home, factory-built home, or self-

[418]W. VA. CODE § 61–3–11 (2014).

[419]13 AM. JUR. 2d *Burglary* § 20 (definition of nighttime at common law). *See also* 12A C.J.S. *Burglary* § 35 (similar); *Taylor v. United States*, 495 U.S. 575, 593 n.7 (1990) (similar).

[420]*Davis v. Commonwealth*, 132 Va. 521, 110 S.E. 356, 357 (1922).

[421]*Davis v. Commonwealth*, 132 Va. 521, 110 S.E. 356, 357 (1922).

[422]*State v. Plumley*, 181 W. Va. 685, 689, 384 S.E.2d 130, 134 (1989).

[423]*State v. Plumley*, 181 W. Va. 685, 384 S.E.2d 130, (1989).

[424]*Wilson v. Commonwealth.*, No. 1097-05-1, 2006 WL 1458140, at *3 n.3 (Va. Ct. App. May 30, 2006).

[425]Syl. Pt. 3, *State v. Mullins*, 181 W. Va. 415, 383 S.E.2d 47 (1989).

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propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time.[426]

An "outhouse" is a house that adjoins the owner's dwelling or is occupied along with it.[427]

To prove Nighttime Burglary, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. during the nighttime,
5. did feloniously,
6. enter
7. [a dwelling house] [an outhouse adjoining thereto or occupied therewith],
8. which belonged to a person other than the DEFENDANT, in this case, [*insert* name(s) of victim(s)]
9. with the intent to commit a crime therein, specifically [*insert* offense], which occurs when [*insert* statutory definition of underlying offense].[428]

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Although listed in the West Virginia Code as a property crime, burglary is perhaps better thought of as a crime against habitation. "At common law, 'burglary' was an offense against the habitation, not against the property[.]" Syl. Pt. 1, in part, *State v. Neff*, 122 W. VA. 549,11 S.E.2d

[426]W. VA. CODE § 61–3–11(c) (2014).

[427]*State v. Neff*, 122 W. Va. 549, 11 S.E.2d 171 (1940).

[428]W. VA. CODE § 61–3–11(a) (2014).

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171(1940). Thus, one of the important points of burglary is possession or occupancy and not title ownership. *Newcomb v. Coiner,* 154 W. Va. 653, 178 S.E.2d 155 (1970).

In *State v. Wallace,* 205 W. Va. 155, 517 S.E.2d 20 (1999), the Supreme Court of Appeals held "burglariously" need not appear in the indictment for burglary for the indictment to be valid.

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## 7.5.11. Daytime Burglary

Count ___ of the INDICTMENT charges the DEFENDANT with Daytime Burglary.

Daytime Burglary occurs when a person, during the daytime, breaks and enters another person's dwelling house, or a house that adjoins or is occupied along with the owner's dwelling house, intending to commit a crime.[429]

A "breaking" may be either actual or constructive.[430]

An "actual breaking" involves the application of force to gain entrance; any slight physical force is sufficient to constitute a breaking.[431]

A breaking may also be constructive. There is a "constructive breaking" when entrance has been obtained by force or a threat of force.[432]

An "entry" is the slightest intrusion into the dwelling house or outhouse of another by any part of the body,[433] or with any instrument or weapon introduced for the purpose of committing a crime therein.[434]

A "dwelling house" is a building or portion thereof intended for use as a human habitation, home or residence,[435] and includes, but is not limited to, a mobile home, house trailer, modular home, factory-built home, or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time.[436]

An "outhouse" is a house that adjoins the owner's dwelling or is occupied along with it.[437]

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[429]W. VA. CODE § 61–3–11(a) (2014).

[430]*Davis v. Commonwealth*, 132 Va. 521, 110 S.E. 356, 357 (1922).

[431]*Davis v. Commonwealth*, 132 Va. 521, 110 S.E. 356, 357 (1922).

[432]*State v. Plumley*, 181 W. Va. 685, 689, 384 S.E.2d 130, 134 (1989).

[433]*State v. Plumley*, 181 W. Va. 685, 384 S.E.2d 130, (1989).

[434]*Wilson v. Commonwealth.*, No. 1097-05-1, 2006 WL 1458140, at *3 n.3 (Va. Ct. App. May 30, 2006); 12A C.J.S. *Burglary* § 30; 3 WHARTON'S CRIMINAL LAW § 323.

[435]Syl. Pt. 3, *State v. Mullins*, 181 W. Va. 415, 383 S.E.2d 47 (1989).

[436]W. VA. CODE § 61–3–11(c) (2014).

[437]*State v. Neff*, 122 W. Va. 549, 11 S.E.2d 171 (W. Va. 1940).

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To prove the DEFENDANT guilty of Daytime Burglary, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that,

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. during the daytime,
5. did break and enter,
6. a dwelling house or an adjoining or occupied outhouse,
7. that belonged to another, in this case, [*insert* name(s) of victim(s)],
8. with the intent to commit a crime in the house, specifically, [*insert* offense], an offense that occurs when [*insert* statutory definition of underlying offense][438]

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

Although listed in the West Virginia Code as a property crime, burglary is better thought of as a crime against habitation.

[438]W. VA. CODE § 61–3–11(a) (2014).

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## 7.5.12. Entering without Breaking a Dwelling House

Count ___ of the INDICTMENT charges the DEFENDANT with Entering Without Breaking a Dwelling House.

Entering without Breaking a Dwelling House occurs when a person, during the daytime, enters without breaking another person's dwelling house or an outhouse that adjoins or is occupied along with the owner's dwelling house, intending to commit a crime.[439]

An "entry" is the slightest intrusion into another's dwelling house or outhouse by any part of the perpetrator's body,[440] or with an instrument or weapon introduced for the purpose of committing a crime therein.[441]

A "dwelling house" is a building or portion thereof, intended for use as a human habitation, home or residence,[442] and includes, but is not limited to, a mobile home, house trailer, modular home, factory-built home, or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time.[443]

An "outhouse" is a house that adjoins the owner's dwelling or is occupied along with it.[444]

To prove Entering without Breaking a Dwelling House, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. during the daytime,
5. entered without breaking
6. a dwelling house or an adjoining or occupied outhouse

[439]W. VA. CODE § 61–3–11(b) (2014).

[440]*State v. Plumley*, 181 W. Va. 685, 689, 384 S.E.2d 130, 134 (1989).

[441]*Wilson v. Commonwealth.*, No. 1097-05-1, 2006 WL 1458140, at *3 n.3 (Va. Ct. App. May 30, 2006).

[442]Syl. Pt. 3, *State v. Mullins*, 181 W. Va. 415, 383 S.E.2d 47 (1989).

[443]W. VA. CODE § 61–3–11(c) (2014).

[444]*State v. Neff*, 122 W. Va. 549, 11 S.E.2d 171 (W. Va. 1940).

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7. of another, that is [*insert* name(s) of victim(s)],
8. with the intent to commit a crime therein, that is, [*insert* offense], a crime that occurs when [*insert* statutory definition of underlying offense].[445]

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The offense of entering without breaking, while distinct from breaking and entering, is merely a lesser-included offense. *State v. Zacks*, 204 W. Va. 504, 513, 513 S.E.2d 911, 920 (1998)

[445]W. VA. CODE § 61–3–11(b) (2014).

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## 7.5.13. Entry of a [Building other than a Dwelling] [Railroad, Traction or Motorcar] [Steamboat or Other Vessel]

Count ___ of the INDICTMENT charges the DEFENDANT with Entry of a [Building Other than a Dwelling House] [Railroad, Traction or Motorcar] [Steamboat or Other Vessel].

[Entry of a Building Other than a Dwelling occurs when a person at any time enters an office, shop, underground coal mine, storehouse, warehouse, banking house, or a house or building other than a dwelling house or adjoining or occupied outhouse] [Entry of a Railroad, Traction or Motorcar occurs when a person enters a railroad or traction car that is propelled by steam, electricity or otherwise] [Entry of a Steamboat or other Vessel occurs when a person enters a steamboat or other boat or vessel] [Entry of an enclosed property occurs when a person enters a commercial, industrial, or public utility property enclosed by a fence, wall, or other structure erected with the intent of the property owner of protecting or securing the area within and its contents from unauthorized persons], within the jurisdiction of any county in this state and with the intent to commit a felony or a larceny.[446]

An "entry" is the slightest intrusion by any part of the body,[447] or with any instrument or weapon introduced for the purpose of committing a crime inside a building.[448]

To find the DEFENDANT guilty of Entry of a Building other than a Dwelling, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. [broke and entered] [entered without breaking]
5. [an office, shop, underground coal mine, storehouse, warehouse, banking house, or any house or building other than a dwelling house or outhouse adjoining thereto or occupied therewith] [a railroad or traction car that is propelled by steam, electricity or

[446] W. VA. CODE § 61–3–12 (2014).

[447] *State v. Plumley*, 181 W. Va. 685, 384 S.E.2d 130 (1989).

[448] *Wilson v. Commonwealth.*, No. 1097-05-1, 2006 WL 1458140, at *3 n.3 (Va. Ct. App. May 30, 2006).

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otherwise] [a steamboat or other boat or vessel] [a commercial, industrial or public utility property enclosed by a fence, wall or other structure erected with the intent of the property owner of protecting or securing the area within and its contents from unauthorized persons],

6. within the jurisdiction of [*insert* county] county,
7. with the intent to commit the felony of [*insert* offense], which occurs when [*insert* statutory definition of underlying offense], or any larceny, which occurs when [*insert* statutory definition of underlying offense].[449]

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The Supreme Court of Appeals has never interpreted this statute.

[449]W. VA. CODE § 61–3–12 (2014).

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## 7.5.14. Entry of an Automobile, Motorcar, or Bus

Count ___ of the INDICTMENT charges the DEFENDANT with Entry of an Automobile, Motorcar or Bus.

Entry of an Automobile, Motorcar, or Bus occurs when a person at any time enters an automobile, motorcar, or bus, intending to commit a felony or any larceny.[450]

An "entry" is the least intrusion into an automobile, motor car, or bus with the whole or any part of the body, hand, or foot, or with any instrument or weapon used for the purpose of committing a crime therein.

The law recognizes two kinds of breakings, actual and constructive.

An "actual breaking" involves the application of force to gain entrance to the automobile, motorcar, or bus; any slight physical force is sufficient to constitute a breaking.

A "constructive breaking" occurs when entrance has been obtained by a threat of violence or by fraud.

To find the DEFENDANT guilty of Entry of an Automobile, Motorcar, or Bus, the State must overcome the presumption of innocence and prove to you beyond a reasonable doubt that:

1. he DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. entered
5. an automobile, motorcar, or bus,
6. {with the intent to commit the felony of [*insert* offense], which occurs when [*insert* elements]} {any larceny, which occurs when [*insert* elements]}.[451]

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the

[450]W. VA. CODE § 61–3–12 (2014).

[451]W. VA. CODE § 61–3–12 (2014).

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INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The Supreme Court of Appeals has never interpreted this statute.

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*Larceny*

## 7.5.15 Grand Larceny

Count ___ of the INDICTMENT charges the DEFENDANT with Grand Larceny.

Grand Larceny occurs when a person takes and carries away the property of another person against that person's will and with the intent to permanently deprive that person of ownership thereof,[452] and the value of the goods taken is $1,000.00 or more.[453]

To find the DEFENDANT guilty of Grand Larceny, the State must overcome the presumption of innocence and prove beyond a reasonable doubt that

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. unlawfully and feloniously
5. took and carried away
6. property, specifically [*insert* description of property],
7. which belonged to [*insert* name(s) of victim(s)],
8. against [*insert* name(s) of victim(s)]'s will,
9. with the intent to permanently deprive [*insert* name(s) of victim(s)] of that property, and
10. the property was valued at $1,000.00 or more.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[452] *State v. Houdeyshell*, 174 W. Va. 688, 329 S.E. 2d 53 (1985).

[453] W. VA. CODE § 61–3–13(a) (2014).

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## Comments

"The theft of property from different owners at the same time and place may constitute one larceny. When considering whether the theft of several items of property from multiple victims constitutes one larceny under the single larceny doctrine, the controlling factor is whether the separate takings were part of a single scheme or continuing course of conduct. If so, the values of the property may be aggregated to determine the grade of the offense." Syl. Pt. 2, *State v. Jerrome*, 233 W. Va. 372, 758 S.E.2d 576 (2014).

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## 7.5.16 Petit Larceny

Count ___ of the [INDICTMENT charges the DEFENDANT with Petit Larceny.

Petit Larceny occurs when a person takes and carries away the goods and chattels of another person against that person's will and with the intent to permanently deprive that person of ownership thereof,[454] and the value of the goods so taken is less than $1,000.00.[455]

Therefore, to find the DEFENDANT guilty of Petit Larceny, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. unlawfully and feloniously,
5. took and carried away,
6. goods and chattels, that is [*insert* description of property],
7. belonging to [*insert* name(s) of victim(s)],
8. against [*insert* name(s) of victim(s)]'s will,
9. with the felonious intent to deprive [him] [her] of those goods and chattels permanently, and
10. the goods and chattels taken were of a value less than $1,000.00.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

### COMMENTS

"The theft of property from different owners at the same time and place may constitute one larceny. When considering whether the theft of several items of property from multiple victims

[454] *State v. Houdeyshell*, 174 W. Va. 688, 329 S.E. 2d 53 (W. Va. 1985).

[455] W. VA. CODE § 61–3–13(b) (2014).

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constitutes one larceny under the single larceny doctrine, the controlling factor is whether the separate takings were part of a single scheme or continuing course of conduct. If so, the values of the property may be aggregated to determine the grade of the offense." Syl. Pt. 2, *State v. Jerrome*, 233 W. Va. 372, 758 S.E.2d 576 (2014).

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## 7.5.17 Larceny of Bank Notes, Checks, Writings of Value, and Book Accounts.

Count ___ of the INDICTMENT charges the DEFENDANT with Larceny of Bank Notes, Checks, Writings of Value, and Book Accounts.

The Offense of Larceny of Bank Notes, Checks, Writings of Value, and Book Accounts occurs when a person takes and carries away Bank Notes, Checks, Writings of Value, and Book Accounts of another person against that person's will and with the intent to permanently deprive that person of ownership thereof, and the value of the goods taken is [less than $1,000.00] [$1,000.00 or more].[456]

Therefore, to find the DEFENDANT guilty of Larceny of Bank Notes, Checks, Writings of Value, and Book Accounts the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. took and carried away,
5. Bank Notes, Checks, Writings of Value, or Book Accounts, specifically [*insert* description of property]
6. of another person, in this case, [*insert* name(s) of victim(s)],
7. against [*insert* name(s) of victim(s)]'s will, and
8. with the intent to permanently deprive [*insert* name(s) of victim(s)]
9. of ownership thereof,
10. and the value of the [*insert* description of property] was [less than $1,000.00] [$1,000.00 or more].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the

[456]W. VA. CODE § 61–3–14 (2014).

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INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

At common law, only goods and chattels could be subject of larceny; it is only by this statute that bank notes, checks, writings of value, and book accounts are made the subject of larceny. *State v. McCoy*, 63 W. Va. 69, 59 S.E. 758 (1907).

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## 7.5.18 Receiving or Transferring Stolen Goods

Count ___ of the INDICTMENT charges the DEFENDANT with Receiving or Transferring Stolen Goods.

Receiving or Transferring Stolen Goods occurs when, for a dishonest purpose, a person buys or receives from another person, or aids in concealing, or transferring to a person other than its owner, any stolen goods or other thing of value which he or she knows or has reason to believe had been stolen.[457]

To find the DEFENDANT guilty of Receiving or Transferring Stolen Goods, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county], County, West Virginia,
4. for a dishonest purpose,
5. {bought or received from another person, in this case [*insert* name]} {aided in concealing, or transferring to another person, in this case [*insert* name]}
6. stolen goods,
7. which belonged to [*insert* name(s) of victim(s)]; and
8. the DEFENDANT did not steal the goods, and
9. the other person was not the owner of the goods, and
10. the DEFENDANT knew or had reason to believe the property had been stolen.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[457]W. VA. CODE § 61–3–18 (2014).

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## COMMENTS

"The elements of transferring stolen property are: (1) the property must have been stolen by someone other than the accused; (2) the accused must have transferred the property knowing or having reason to believe that the property was stolen; (3) the property must have been transferred to someone other than the owner; and (4) the accused must have transferred the property with a dishonest purpose." Syl. Pt. 1, in part, *State v. Taylor,* 176 W. Va. 671, 346 S.E.2d 822 (1986).

"In a prosecution under W. Va. Code § 61–3–18 (2014), for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a 'dishonest purpose' before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent." Syl. Pt. 4, *State v. Basham*, 159 W. Va. 404, 223 S.E.2d 53 (1976).

### 7.5.19 Bringing into this State, Receiving or Disposing of Property Stolen in Another State

Count ___ of the INDICTMENT charges the DEFENDANT with Bringing into this State, Receiving, or Disposing of, Property Stolen in another State.

"Bringing into this State, Receiving, or Disposing of Property Stolen in another State" occurs when a person, for a dishonest purpose, brings into this State, or receives, converts to his or her own use, or sells, property of any character, of value, which was stolen in another state, and which he or she knows or has reason to believe was stolen.[458]

To find the DEFENDANT guilty of Receiving or Disposing of Property Stolen in Another State, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. for a dishonest purpose,
5. brought, received, converted to [his] [her] own use, or sold,
6. property of any character, which
   a. was of value,
   b. belonged to [*insert* name(s) of victim(s)], and
   c. was stolen in another state, and
7. the DEFENDANT knew or had reason to believe the property was stolen.

[458]W. VA. CODE § 61–3–19 (2014).

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

In a prosecution for receiving stolen goods, refusal to give an instruction that defendant must have had actual knowledge that the goods were stolen was not prejudicial error where the instruction given required that defendant must reasonably have known that goods were stolen. *State v. Wainwright*, 119 W. Va. 34, 192 S.E. 121 (1937).

### 7.5.20 Embezzlement

Count ___ of the INDICTMENT charges the DEFENDANT with Embezzlement.

Embezzlement occurs when any officer, agent, clerk or servant of this state, or of any county, district, school district, or municipal corporation, or of any banking institution, or other corporation, or any officer of public trust in this state, or any agent, clerk, or servant of any firm or person, or company or association of persons not incorporated, embezzles or fraudulently converts to [his] [her] own use, bullion, money, bank notes, drafts, security for money, or any effects or property of another person, which shall have come into [his] [her] possession, or been placed under [his] [her] care or management, by virtue of [his] [her] office, place or employment.[459]

To "embezzle" means to fraudulently appropriate or misapply the property of another by one in whose care it has been entrusted, with the intent of depriving the owner of the property.[460]

To find the DEFENDANT guilty of Embezzlement, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that

1. the DEFENDANT,

[459]W. VA. CODE § 61-3-20 (2014).

[460]Syl. Pt. 1, *State v. Moyer*, 58 W. Va. 146, 52 S.E. 30 (1905).

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2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. was {an officer, agent, clerk or servant of [this state] [a county, district, school district or municipal corporation] [a banking institution, or other corporation]} {an officer of public trust in this state} {an agent, clerk or servant of a firm, or person, or company, or unincorporated association of persons}, in this case [*insert* name of entity), and
5. embezzled or fraudulently converted to [his] [her] own use,
6. bullion, money, bank notes, drafts, security for money, or any effects or property, specifically [*insert* description of property],
7. which belonged to another person, in this case [*insert* name(s) of victim(s)],
8. and which came into [his] [her] possession, or had been placed under [his] [her] care or management, by virtue of [his] [her] office, place or employment,
9. in the amount of [*insert* amount],
10. with the intent to permanently deprive the owner of the property of its use and possession.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The elements of embezzlement are: "(1) The trust relationship of the person charged, and that he falls within the class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in the care of the accused, under and by virtue of his office, place, or employment; (5) that his manner of dealing with or disposing of the property constituted a fraudulent conversion and an appropriation of the same to his own use; and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof." *State v. Workman*, 91 W. Va. 771, 114 S.E. 276, 277 (1922).

Embezzlement is a species of larceny, so the punishment is set by the value of the items taken.

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## 7.5.21 Embezzlement by Misuse of Power of Attorney or Other Fiduciary Relationship

Count ___ of the INDICTMENT charges the DEFENDANT with Embezzlement by Misuse of Power of Attorney or other Fiduciary Relationship.

Embezzlement by Misuse of Power of Attorney or other Fiduciary Relationship occurs when a person holding a fiduciary power of attorney or having a fiduciary relationship with a person willfully and intentionally defrauds, embezzles, misappropriates or fraudulently converts for [his] [her] own benefit, or for the benefit of another, the assets or property, real or personal, with which [he] [she] has been entrusted, or misuses or misappropriates funds from the person to whom [he] [she] owes a fiduciary duty or misuses any account, line of credit, or credit card of the principal for purposes not contemplated by the terms of the power of attorney instrument or fiduciary relationship, or for purposes not intended by the principal in the execution of the power of attorney or for purposes not intended by the fiduciary relationship.[461]

A "fiduciary relationship" is one in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship.[462]

To "embezzle" means to fraudulently appropriate or misapply the property of another by one in whose care it has been entrusted, with the intent of depriving the owner the property.[463]

To find the DEFENDANT guilty of Embezzlement by Misuse of Power of Attorney or other Fiduciary Relationship, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. had a [fiduciary power of attorney] [fiduciary relationship]
5. with a person, that is [*insert* name(s) of victim(s)],

[461]W. VA. CODE § 61–3–20a (2014).

[462]BLACK'S LAW DICTIONARY (10th ed. 2014).

[463]Syl. Pt. 1, *State v. Moyer*, 58 W. Va. 146, 52 S.E. 30 (1905).

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6. and the DEFENDANT willfully and intentionally either
   i. [defrauded, embezzled, misappropriated or fraudulently converted,
   ii. for the DEFENDANT'S own benefit, or for the benefit of another, in this case, [*insert* name of person],
   iii. the assets or property, real or personal, with which the DEFENDANT was entrusted]
7. or
   i. [misused or misappropriated funds from the person to whom the DEFENDANT owed a fiduciary duty or misused any account, line of credit or credit card belonging to the principal for purposes not contemplated by the terms of the power of attorney instrument or fiduciary relationship, or for purposes not intended by the principal in the execution of the power of attorney or for purposes not intended by the fiduciary relationship.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court of Appeals has not addressed this statute.

### 7.5.22 Embezzlement by Carrier or Other Person.

Count ___ of the INDICTMENT charges the DEFENDANT with Embezzlement by a Carrier or Other Person.

Embezzlement by a Carrier or Other Person occurs when a carrier or other person to whom money or other property may be delivered to be carried for hire, or any other person who may be entrusted to carry and deliver[464] such property, embezzles to [his] [her] own use, or secretes with intent to do so, any

[464] *State v. Cantor*, 93 W. Va. 238, 116 S.E. 396 (1923)

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such property, either in mass or otherwise, before delivery of the property to the proper person or place.[465]

To "embezzle" means to fraudulently appropriate or misapply the property of another by one in whose care it has been entrusted, with the intent of depriving the owner of the property.[466]

To find the DEFENDANT guilty of Embezzlement by carrier or other person the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. [was a carrier or other person to whom money or other property was delivered to be carried for hire] [was a person who was entrusted to carry and deliver money or other property], and
5. embezzled that property to the DEFENDANT'S own use
6. by depriving the owner of the property, or by secreting the property with intent to do so, either in mass or otherwise,
7. before delivery thereof at the place at which, or to the person to whom,
8. the property was to be delivered.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This section applies only to one to whom property is entrusted to be carried and delivered to another person. *State v. Cantor,* 93 W. Va. 238, 116 S.E. 396, 398 (1923). "Delivery" is (somewhat

[465]W. VA. CODE § 61–3–21 (2014).

[466]Syl. Pt. 1, *State v. Moyer*, 58 W. Va. 146, 52 S.E. 30 (1905).

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cumbersomely) described as "delivery thereof at the place at which, or to the person to whom, they were to be delivered." W. Va. Code § 61–3–21 (2014).

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## 7.5.23 Falsifying Accounts

Count ___ of the INDICTMENT charges the DEFENDANT with Falsifying Accounts.

"Falsifying Accounts" occurs when an officer, clerk, or agent of this State, or of any county, district, school district or municipal corporation, or of a banking institution or incorporated company, or a clerk or agent of any firm or person or unincorporated association, makes, alters, or omits to make any entry in any book of account of, or in any account kept by such State, county, district, school district, municipal corporation, banking institution, incorporated company, firm, person, or association of persons, or mutilate, destroy or conceal any such account or book of accounts, with intent in so doing to conceal the true state of any account, or to defraud the State or any county, district, school district, municipal corporation, banking institution, company, firm or person, or with intent to enable or assist a person to obtain money to which he or she was not entitled.[467]

To find the DEFENDANT guilty of Falsifying Accounts, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. [was an officer, clerk or agent of this State] [was an officer, clerk or agent of a county, district, school district or municipal corporation of this State] [was an officer, clerk or agent of a banking institution] [was an officer, clerk or agent of an incorporated company] [was a clerk or agent of a firm or person or unincorporated association], and
5. made, altered, or omitted to make an entry in any book of account, or in any account kept by such entity or person or association of persons, or mutilated, destroyed, or concealed any such account or book of accounts,
6. {with intent in so doing to conceal the true state of any account to

[467]W. VA. CODE § 61–3–22 (2014).

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defraud the State, to defraud the county district, school district, municipal corporation, banking institution, company, firm or person} {with intent to enable or assist a person to obtain money to which [he] [she] was not entitled}.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The statute under which these indictments were brought is the only law governing such offenses by employees of the state and without such statute there would be no control or prosecution of stratagems to defraud the state in such cases. *State v. Nuckols*, 152 W. Va. 736, 749, 166 S.E.2d 3, 12 (1968).

### 7.5.24 Possession or Use of Automated Sales Suppression Device

Count ___ of the INDICTMENT charges the DEFENDANT with Possession or Use of an Automated Sales Suppression Device.

Possession or Use of an Automated Sales Suppression Device occurs when a person willfully and knowingly sells, purchases, installs, transfers or possesses in this state any automated sales suppression device or zapper or phantom-ware.[468]

An "automated sales suppression device" or "zapper" means a software program, carried on a memory stick or removable compact disc, accessed through an Internet link, or accessed through any other means, that falsifies the electronic records of electronic cash registers and other point-of-sale systems, including, but not limited to, transaction data and transaction reports.

An "electronic cash register" means a device that keeps a register or supporting documents through means of an electronic device or computer

[468]W. VA. CODE § 61–3–22a(c) (2014).

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system designed to record transaction data for the purpose of computing, compiling, or processing retail sales transaction data in whatever manner.

"Phantom-ware" means a hidden, preinstalled, or installed at a later time, programming option embedded in the operating system of an electronic cash register or hardwired into the electronic cash register that can be used to create a virtual second till or may eliminate or manipulate transaction records that may or may not be preserved in digital formats to represent the true or manipulated record of transactions in the electronic cash register.

"Transaction data" includes items purchased by a customer, the price for each item, a taxability determination for each item, a segregated tax amount for each of the taxed items, the amount of cash or credit tendered, the net amount returned to the customer in change, the date and time of the purchase, the name, address and identification number of the vendor, and the receipt or invoice number of the transaction.

A "transaction report" means a report documenting, but not limited to, the sales taxes collected, media totals and discount voids at an electronic cash register that is printed on cash register tape at the end of a day or shift, or a report documenting every action at an electronic cash register that is stored electronically.

Therefore, to find the DEFENDANT guilty of Possession or Use of an Automated Sales Suppression Device, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county], County, West Virginia,
4. willfully and knowingly
5. sold, purchased, installed, transferred or possessed,
6. an automated sales suppression device or zapper or phantom-ware.

## COMMENTS

The West Virginia Supreme Court of Appeals has never addressed this statute.

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### 7.5.25 Destroying or Concealing Will

Count ___ of the INDICTMENT charges the DEFENDANT with Destroying or Concealing a Will.

Destroying or Concealing a Will occurs when a person fraudulently destroys or conceals a will or codicil, with intent to prevent the probate thereof. [469]

To find the DEFENDANT guilty of destroying or concealing a will or codicil, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. fraudulently,
5. destroyed or concealed a will or codicil,
6. with the intent to prevent the probate thereof.

## COMMENTS

The West Virginia Supreme Court has never addressed this statute.

### 7.5.26 Embezzlement by a Fiduciary

Count ___ of the INDICTMENT charges the DEFENDANT with Embezzlement by a Fiduciary.

Embezzlement by a Fiduciary occurs when a guardian, personal representative, or other fiduciary, willfully and knowingly fails to make and return an inventory of any personal property (of which an inventory is required by law to be made) which may come to [his] [her] hands as such, or willfully and knowingly fails or refuses to produce any such property for appraisement in the manner required by law, or willfully and knowingly conceals or embezzles any such property.[470]

[469] W. VA. CODE § 61–3–23 (2014).

[470] W. VA. CODE § 61–3–23 (2014).

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To "embezzle" means to fraudulently appropriate or misapply the property of another by one in whose care it has been entrusted, with the intent of depriving the owner of the property.[471]

A "fiduciary" is someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure.[472]

To find the DEFENDANT guilty of embezzlement by a fiduciary, you must find the State has overcome the DEFENDANT'S presumption of innocence and proved beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. was a guardian, personal representative, or other fiduciary, and
5. willfully and knowingly,
6. failed to make and return an inventory as required by law of any personal property which came to [his] [her] hands as such, or willfully and knowingly failed or refused to produce any such property for appraisement in the manner required by law, or willfully and knowingly concealed or embezzled any such property.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This statute imposes possible criminal sanctions on one who fails to deliver a will to probate in order to promote his own gain at the expense of others. The public policy and legislative intent of this Statute is to encourage the probate of wills and to prevent one from benefiting at the expense of

[471]Syl. Pt. 1, *State v. Moyer*, 58 W. Va. 146, 52 S.E. 30 (1905).

[472]BLACK'S LAW DICTIONARY (10th ed. 2014).

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others by refusing to probate a will in his possession. *Wetzel v. Watson*, 174 W. Va. 651, 328 S.E.2d 526, n.5 (1985).

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## 7.5.27 Obtaining Money, Property and Services by False Pretenses, Token, or Representation.

Count ___ of the INDICTMENT charges the DEFENDANT with Obtaining Money, Property, and Services by False Pretenses, Token, or Representations.

Obtaining Money, Property, and Services by False Pretenses occurs when a person obtains money, goods or other property from another person by any false pretense, token or representation, with intent to defraud.[473]

To find the DEFENDANT guilty of Obtaining Money, Property and Services by False Pretenses the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. obtained from another
5. by a false pretense, token or representation,
6. with intent to defraud,
7. money, goods, or other property, specifically [*insert* description of property].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The essential elements of the crime of obtaining money or property by false pretenses are: (1) the intent to defraud; (2) actual fraud; (3) a false pretense was used to accomplish the objective; and (4) the fraud was accomplished by means of the false pretense, that is, the false pretense must be in some degree the cause, if not the controlling cause, which induced the owner to part with his or her property. In this case, it is important to recognize that the false pretense need not be the sole inducing

[473]W. VA. CODE § 61–3–24 (2014).

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cause of the owner's parting with the property. *State v. Barnes*, 174 W. Va. 510, 513, 354 S.E.2d 606, 609 (1987).

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## 7.5.28 Obtaining Money, Property and Services by False Pretenses, Token, or Representation—on Credit

Count ___ of the INDICTMENT charges the DEFENDANT with Obtaining Money, Property and Services by False Pretenses, Token, or Representation—on Credit.

Obtaining Money, Property and Services by False Pretenses, Token, or Representation—on Credit occurs when a person obtains on credit from another person any money, goods or other property by representing that there is money due him or her or to become due [him] [her], and assigns the claim for such money, in writing, to the person from whom he or she obtains such money, goods or other property, and afterwards collects the money due or to become due, without the consent of the assignee, and with the intent to defraud.[474]

Therefore, to find the DEFENDANT guilty of Obtaining Money, Property and Services by False Pretenses, Token, or Representation—on Credit, the State must overcome the DEFENDANT'S presumption of innocence and prove to you beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. obtained on credit
5. from another person, [*insert* name of person),
6. money, goods or other property, specifically [*insert* description of property],
7. by representing there is money {due [him] [her]} {[to become due [him] [her]},
8. and assigns the claim for such money,
9. in writing,
10. to [*insert* name(s) of victim(s)],
11. and afterwards collects the money due [him] [her]
12. without the consent of the assignee, and
13. with the intent to defraud.

[474]W. VA. CODE § 61–3–24(a)(2) (2014).

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

This statute's obvious purpose is to discourage obtaining money, goods, labor, services and other things of value by false pretenses. *State v. Zain*, 207 W. Va. 54, 528 S.E.2d 748 (1999).

### 7.5.29 Disposing of Property to Defraud Creditors

Count ___ of the INDICTMENT charges the DEFENDANT with Disposing of Property to Defraud Creditors.

Disposing of Property to Defraud Creditors occurs in one of three ways:

1. when a person removes any of [his] [her] property out of any county with the intent to prevent the same from being levied upon by any execution;[475] or
2. when a person secretes, assigns or conveys, or otherwise disposes of any of [his] [her] property with the intent to defraud a creditor or to prevent the property from being made liable for payment of debts;[476] or
3. when a person receives the property of another with the intent to defraud a creditor or to prevent the property from being made liable for the payment of debts.[477]

To find the DEFENDANT guilty of Disposing of Property to Defraud Creditors, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

*Ground 1*

1. the DEFENDANT,

[475]W. VA. CODE § 61–3–24(c)(1) (2014).

[476]W. VA. CODE § 61–3–24(c)(2) (2014).

[477]W. VA. CODE § 61–3–24(c)(3) (2014)

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2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] Kanawha County, West Virginia,
4. removed [his] [her] property, that is, [*insert* description of property],
5. out of [*insert* county] County,
6. with the intent to prevent the property from being levied upon by any execution.

*Ground 2*

To find the DEFENDANT guilty of Disposing of Property to Defraud Creditors, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. secreted, assigned, conveyed, or otherwise disposed
5. of [his] [her] property, that is, [*insert* description of property]
6. [with the intent to defraud a creditor] [to prevent the property from being made liable for payment of debts]

*Ground 3*

To find the DEFENDANT guilty of Disposing of Property to Defraud Creditors, the State must overcome the DEFENDANT'S presumption of innocence and prove to you beyond a reasonable doubt that

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. received,
5. the property of another, that is, [*insert* description of property]
6. [with the intent to defraud a creditor] [to prevent the property from being made liable for the payment of debts].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you

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may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has not addressed this subsection.

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## 7.5.30 Theft of Services

Count ___ of the INDICTMENT charges the DEFENDANT with Theft of Services.

Theft of Services occurs when a person, firm or corporation obtains labor, services or other such thing of value from another by any false pretense, token, or representation, with intent to defraud. Theft of Services includes the obtaining of a stop payment order on a check, draft or order for payment of money owed for services performed in good faith and in substantial compliance with a written or oral contract for services, with the fraudulent intent to permanently deprive the provider of such labor, services or other thing of value of the payment represented by such check, draft or order.[478]

To find the DEFENDANT guilty of Theft of Services, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. obtained labor, services, or other such thing of value from another
5. by a false pretense, token, or representation,
6. with intent to defraud.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

### COMMENTS

The West Virginia Supreme Court has not addressed this subsection.

[478] W. VA. CODE § 61–3–24(d) (2014).

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## 7.5.31 Attempted or Fraudulent Use of Credit Cards

Count __ of the INDICTMENT charges the DEFENDANT with Attempted or Fraudulent Use of a Credit Card.

Attempted or Fraudulent Use of Credit Cards occurs when a person knowingly obtains or attempts to obtain credit, or purchases or attempts to purchase any goods, property or service, by the use of the following: a false, fictitious, or counterfeit credit card, telephone number, credit number, or other credit device; a credit card, telephone number, credit number, or other credit device of another beyond or without the authority of the person to whom such card, number or device was issued; a credit card, telephone number, credit number, or other credit device in any case where such card, number or device has been revoked and notice of such revocation has been given to the person to whom issued.[479]

"Counterfeit credit card" means:

1. Any credit card or a representation, depiction, facsimile, aspect or component thereof that is counterfeit, fictitious, altered, forged, lost, stolen, incomplete, or part of a scheme to defraud; or
2. Any invoice, voucher, sales draft or other reflection or manifestation of such a card.[480]

{*Insert* if applicable]: "Notice" means either information given in person or information given in writing to the person to whom the number, card or device was issued. The sending of a notice in writing by registered or certified mail in the United States mail, duly stamped and addressed to such person at [his] [her] last known address, is prima facie evidence that such notice was duly received. A cardholder's knowledge of the revocation of [his] [her] credit card may be reasonably inferred by evidence that notice of such revocation was mailed to him or her, at least four days prior to [his] [her] use or attempted use of the credit card, by first class mail at [his] [her] last known address.[481]}

[479]W. VA. CODE § 61–3–24a(b)(1) (2014).

[480]W. VA. CODE § 61–3–24a(a)(1) (2014).

[481]W. VA. CODE § 61–3–24a(a)(4) (2014).

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To find the DEFENDANT guilty of Attempted or Fraudulent Use, Forgery, or Traffic of Credit Cards, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly
5. {[obtained credit] [attempted to obtain credit]} {[purchased] [attempted to purchase] goods, property or service},
6. by the use of [a false, fictitious or counterfeit credit card, telephone number, credit number or other credit device] [a credit card, telephone number, credit number or other credit device of another without the authority of the person to whom such card, number or device was issued] [a credit card, telephone number, credit number or other credit device which had been revoked and notice of such revocation had been given to the person to whom issued].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has never substantively addressed this subsection.

### 6.5.32 Use of Telephone or Telegraph Facilities with the Intent to Avoid Paying Therefor

Count ___ of the INDICTMENT charges the DEFENDANT with Use of Telephone or Telegraph Facilities with the Intent to Avoid Paying Therefor.

"Use of Telephone or Telegraph Facilities with the Intent to Avoid Paying Therefor" occurs when a person knowingly obtains or attempts to obtain, by the use of a fraudulent scheme, device, means, or method, telephone or telegraph service or the transmission of a message, signal or other

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communication by telephone or telegraph, or over telephone or telegraph facilities, with the intent to avoid payment of charges therefor.[482]

To find the DEFENDANT guilty of Use of Telephone or Telegraph Facilities with the Intent to Avoid Paying Therefor, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly [obtained] [attempted to obtain]
5. by the use of a fraudulent scheme, device, means or method,
6. telephone or telegraph service or the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities
7. with the intent to avoid paying charges for it.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has never substantively addressed this subsection.

[482]W. VA. CODE § 61–3–24a(b)(2) (2014).

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## 7.5.33 Forgery of a Credit Card

Count ___ of the INDICTMENT charges the DEFENDANT with Forgery of a Credit Card.

Forgery of a Credit Card occurs when a person makes, manufactures, presents, embosses, alters or utters a credit card with intent to defraud a person, an issuer of credit, or an organization providing money, goods, services, or anything else of value in exchange for payment by credit card. [483]

To find the DEFENDANT guilty of Forgery of a Credit Card, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] Kanawha County, West Virginia,
4. made, manufactured, presented, embossed, altered, or uttered a credit card
5. with intent to defraud a person, an issuer of credit, or an organization providing money, goods, services, or anything else of value
6. in exchange for payment by credit card.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

### COMMENTS

The West Virginia Supreme Court has never interpreted this section.

[483] W. VA. CODE § 61–3–24a(c) (2014).

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## 7.5.34 Traffic in Counterfeit Credit Cards

Count ___ of the INDICTMENT charges the DEFENDANT with Traffic in Counterfeit Credit Cards.

Trafficking in Counterfeit Credit Cards occurs when a person traffics in or attempts to traffic in ten or more counterfeit credit cards or credit card account numbers of another in any six-month period. [484]

"Traffic" means:

1. To sell, transfer, distribute, dispense or otherwise dispose of any property; or
2. To buy, receive, possess, obtain control of or use property with the intent to sell, transfer, distribute, dispense or otherwise dispose of such property.[485]

"Counterfeit Credit cards" means:

1. Any credit card or a representation, depiction, facsimile, aspect or component thereof that is counterfeit, fictitious, altered, forged, lost, stolen, incomplete or obtained in violation of this section, or as part of a scheme to defraud;[486] or
2. Any invoice, voucher, sales draft or other reflection or manifestation of such a card.[487]

To find the DEFENDANT guilty of Traffic in Counterfeit Credit Cards, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. from the ___ day of [*insert* month], [*insert* year], to the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. [trafficked in 10 or more Counterfeit Credit Cards or credit card account numbers of another] [attempted to traffic in ten or more

[484]W. VA. CODE § 61–3–24a(d) (2014).

[485]W. VA. CODE § 61–3–24a(a)(3) (2014).

[486]W. VA. CODE § 61–3–24a(a)(1)(A) (2014).

[487]W. VA. CODE § 61–3–24a(a)(1)(B) (2014).

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counterfeit credit cards or credit card account numbers of another]

5. in a six-month period

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has never addressed this subsection.

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## 7.5.35 Possession of Illegal Credit Card Making Equipment

Count ___ of the INDICTMENT charges the DEFENDANT with Possession of Illegal Credit Card Making Equipment.

Possession of Illegal Credit Card Making Equipment occurs when a person receives, possesses, transfers, buys, sells, controls or has custody of any credit card making equipment with intent that the equipment be used in the production of counterfeit credit cards. [488]

"Credit Card Making Equipment" means any equipment, machined, plate mechanism, impression or any other contrivance which can be used to produce a credit card, a counterfeit credit card, or any aspect or component of either.[489]

"Counterfeit Credit card" means:

1. Any credit card or a representation, depiction, facsimile, aspect or component thereof that is counterfeit, fictitious, altered, forged, lost, stolen, incomplete or obtained in violation of this section, or as part of a scheme to defraud; or
2. Any invoice, voucher, sales draft or other reflection or manifestation of such a card.[490]

To find the DEFENDANT guilty of Possession of Illegal Credit Card Making Equipment, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. received, possessed, transferred, bought sold, controlled or had custody of
5. credit card making equipment
6. with the intent that the equipment be used in the production of counterfeit credit cards.

[488]W. VA. CODE § 61–2–24a(e) (2014).

[489]W. VA. CODE § 61–3–24a(a)(2) (2014).

[490]W. VA. CODE § 61–3–24a(a)(1) (2014).

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If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court of Appeals has never addressed this statute.

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## 7.5.36 Possession of a Counterfeit Credit Card

Count ___ of the INDICTMENT charges the DEFENDANT with Possession of a Counterfeit Credit Card.

Possession of a Counterfeit Credit Card occurs when a person knowingly receives, possesses, acquires, controls, or has custody of a counterfeit credit card.[491]

"Counterfeit Credit Card" means:

1. Any credit card or a representation, depiction, facsimile, aspect or component thereof that is counterfeit, fictitious, altered, forged, lost, stolen, incomplete or obtained in violation of this section, or as part of a scheme to defraud;[492] or
2. Any invoice, voucher, sales draft or other reflection or manifestation of such a card.[493]

To find the DEFENDANT guilty of Possession of a counterfeit credit card, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly,
5. received, possessed, acquired, controlled or had custody of
6. a counterfeit credit card.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[491]W. VA. CODE § 61–3–24a(f) (2014).

[492]W. VA. CODE § 61–3–24a(a)(1)(A) (2014).

[493]W. VA. CODE § 61–3–24s(a)(1)(B) (2014).

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## Comments

The West Virginia Supreme Court has never interpreted this statute.

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## 7.5.37 Making, Selling, Possessing, Transferring or Advertising for Sale a Device or Plans for a Device Designed to Obtain or Use Telephone or Telegraph Service or Facilities by False or Fraudulent Means.

Count ____ of the INDICTMENT charges the DEFENDANT with Making, Selling, Possessing, Transferring or Advertising for Sale a Device or Plans for a Device Designed to Obtain or Use Telephone or Telegraph Service or Facilities by False or Fraudulent Means.

Making, Selling, Possessing, Transferring or Advertising for Sale a Device or Plans for a Device Designed to Obtain or Use Telephone or Telegraph Service or Facilities by False or Fraudulent Means occurs when a person knowingly makes, sells, offers or advertises for sale, possesses, or gives or otherwise transfers to another person any instrument, apparatus, equipment, or device, or plans or instructions for making or assembling any instrument, apparatus, equipment, or device which has been designed, adapted, used, or employed with the intent or for the purpose of (1) obtaining telephone or telegraph service or the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities without the payment of charges for it, or (2) concealing or assisting another to conceal from any supplier of telephone or telegraph service or from any person charged with the responsibility of enforcing this section, the existence or place of origin or of destination of any message, signal, or other communication by telephone or telegraph, or over telephone or telegraph facilities.[494]

To find the DEFENDANT guilty of Making, Selling, Possessing, Transferring or Advertising for Sale a Device, or Plans for a Device, Designed to Obtain or Use Telephone or Telegraph Service or Facilities by False or Fraudulent Means, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly
5. made, sold, offered or advertised for sale, possessed, gave, or otherwise transferred to another person

[494]W. VA. CODE § 61–3–24b (2014).

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6. any [instrument, apparatus, equipment, or device] [plans or instructions for making or assembling any instrument, apparatus, equipment, or device]
7. which has been designed, adapted, used, or employed
8. with the intent or for the purpose of
   A. obtaining telephone or telegraph service or the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities without the payment of charges for it, or
   B. concealing or assisting another to conceal from a supplier of telephone or telegraph service or from a person charged with the responsibility of enforcing this section, the existence or place of origin or of destination of any message, signal, or other communication by telephone or telegraph, or over telephone or telegraph facilities.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

**[Reserved]**

### 7.5.38 Intercepting or Monitoring Customer Telephone Calls

Count ___ of the INDICTMENT charges the DEFENDANT with Intercepting or Monitoring Customer Telephone Calls.

Intercepting or Monitoring Customer Telephone Calls occurs when a person, firm or corporation intercepts or monitors, or attempts to intercept or monitor, the transmission of a message, signal or other communication by telephone between an employee or similar agent of such person, firm, or corporation and a customer of such person, firm or corporation unless such person, firm or corporation does all of the following:

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1. Notifies each employee or agent subject to interception or monitoring that their telephone messages are subject to interception or monitoring; and,
2. Provides telephone instruments for employee's personal use which are not subject to intercepting or monitoring.[495]

To find the DEFENDANT guilty of Intercepting or Monitoring Customer Telephone Calls, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. intercepted or monitored, or attempted to intercept or monitor,
5. the transmission of a message, signal or other communication
6. by telephone
7. between an employee or similar agent of such person, firm or corporation and a customer of such person, firm or corporation,
8. and such person, firm or corporation failed to do all of the following:

   A. Notify each employee or agent subject to interception or monitoring that their telephone messages were subject to interception or monitoring; and,
   B. Provide telephone instruments for employee's personal use which were not subject to intercepting or monitoring.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[495]W. VA. CODE § 61–3–24c (2014).

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# Comments

**[Reserved]**

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## 7.5.39 Fraudulent Schemes

Count ___ of the INDICTMENT charges the DEFENDANT with Fraudulent Schemes.

A Fraudulent Scheme occurs when a person willfully deprives another of any money, goods, property or services by means of fraudulent pretenses, representations, or promises.[496]

To find the DEFENDANT guilty of Fraudulent Schemes, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. willfully
5. deprived
6. another person, that is [*insert* name(s) of victim(s)], of money, goods, property, or services, specifically [*insert* description of money, goods, property, or services],
7. by means of fraudulent pretense, representations, or promises.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

**[Reserved]**

[496] W. VA. CODE § 61–3–24d (2014).

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## 7.5.40 Casting Away, Destroying or Interfering with Floating Craft.

Count ___ of the INDICTMENT charges the DEFENDANT with Casting Away, Destroying, or Interfering with Floating Craft. Casting Away, Destroying, or Interfering with Floating Craft occurs when a person willfully casts away or otherwise destroys a vessel within any county with intent to injure or defraud the owner of the vessel, or any owner of any property on board the vessel, or the insurer of such a vessel or property, or any part thereof.[497]

To find the DEFENDANT guilty of Casting Away, Destroying, or Interfering with Floating Craft, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year]
3. in [*insert* county] County, West Virginia,
4. willfully cast away or destroyed
5. a vessel,
6. with intent to injure or defraud the owner of the vessel or of any property on board the same, or the insurer of such vessel or property or of any part thereof.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

### COMMENTS

**[Reserved]**

[497] W. VA. CODE § 61–3–25 (2014).

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## 7.5.41 Casting Away, Destroying or Interfering with Floating Material.

Count ___ of the INDICTMENT charges the DEFENDANT with Casting Away, Destroying, or Interfering with Floating Material. Casting Away, Destroying, or Interfering with Floating Material occurs when a person does the following to any floating craft, lumber, timber or material which belongs to another, intending to injure, defraud, or damage the owner or intending to cause such vessel or material to become adrift or float away without the owner's consent: takes, carries away, removes, injures, destroys, breaks, cuts, detaches, unties, loosens, impairs, weakens, or otherwise interferes with any rope, line, fastening, connecting or other appliance used to tie, moor, attach, or fasten to a bank of any stream any such craft or material.[498]

Therefore, in order to find the DEFENDANT guilty of Casting Away, Destroying, or Interfering with Floating Material, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. took, carried away, removed, injured, destroyed, broke, cut, detached, untied, loosened, impaired, weakened, or otherwise interfered with
5. a rope, line, fastening, connecting, or other appliance used to tie, moor, attach, or fasten to the bank of a stream,
6. a floating craft, lumber, timber or material, which belonged to another,
7. with intent to injure, defraud or damage that other person, or
8. to cause such floating craft, lumber, timber or material to become adrift, or to float away without the consent of the owner.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the

[498] W. VA. CODE § 61–3–25 (2014).

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INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## Comments

The West Virginia Supreme Court has never interpreted this statute.

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*Animals*

### 7.5.42 Malicious Killing of an Animal—Felony

Count ___ of the INDICTMENT charges the DEFENDANT with Malicious Killing of an Animal. Malicious Killing of Animals occurs when a person maliciously administers poison to, or exposes poison with the intent that it should be taken by, any horse, cow, or other animal that is owned by another person, or when the person maliciously maims, kills, or causes the death of any horse, cow or other animal which is owned by another person and which is valued at one hundred dollars or more.[499]

To find the DEFENDANT guilty of Malicious Killing of Animals the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. maliciously,
5. [administered poison to, or exposed poison with the intent that it should be taken by a horse, cow or other animal that belonged to another person] [maimed, killed, or caused the death of any horse, cow or other animal which belonged to another person] and
6. the animal was valued at one hundred dollars or more.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

When a person unlawfully dispatches a domestic animal belonging to another person by using a commonly accepted, humane method, and there is no evidence of any other form of malice, the killing

[499]W. VA. CODE § 61–3–27 (2014).

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is not malicious and consequently does not violate W. Va. Code § 61-3-27 (2014). *State v. Burgess,* 205 W. Va. 87, 87, 516 S.E.2d 491, 491 (1999).

### 7.5.43 Malicious Killing of Animals—Misdemeanor

Count ___ of the [INDICTMENT charges the DEFENDANT with Malicious Killing of Animals. Malicious Killing of Animals occurs when a person maliciously administers poison to, or exposes poison with the intent that it should be taken by, any horse, cow or other animal that belongs to another person, or when a person maliciously maims, kills, or causes the death of any horse, cow or other animal which belongs to another person and which is valued at less than one hundred dollars.[500]

To find the DEFENDANT guilty of Malicious Killing of an Animal, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. maliciously
5. [administered poison to, or exposed poison with the intent that it should be taken by, any horse, cow or other animal of another person] [maimed, killed, or caused the death of any horse, cow or other animal of another person], and
6. worth less than one hundred dollars.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[500]W. VA. CODE § 61–3–28 (2014).

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## Comments

When a person unlawfully dispatches a domestic animal belonging to another person by using a commonly accepted, humane method, and there is no evidence of any other form of malice, the killing is not malicious and consequently does not violate West Virginia Code § 61-3-27 (2014). *State v. Burgess*, 205 W. Va. 87, 87, 516 S.E.2d 491, 491 (1999).

It appears that the killing of a dog, regardless of value, is a felony, based on the proviso at the end of the statute. W. Va. Code § 61–3–28 (2014).

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*Damage to Railroad Property*

### 7.5.44 Willfully Damaging, or Attempting to Damage, Railroad Property-Felony

Count ___ of the INDICTMENT charges the DEFENDANT with Willfully Damaging or Attempting to Damage Railroad Property.

Willfully Damaging or Attempting to Damage Railroad Property occurs when a person willfully damages or attempts to damage railroad property or willfully endangers or attempts to endanger the safety of another by taking any of the following actions:

1. If the person takes, removes, alters, or otherwise vandalizes a railroad sign, placard or marker;

2. If the person throws or drops an object capable of causing significant damage to railroad property at or on a locomotive, railroad car or train;

3. If the person shoots a firearm or other dangerous weapon at a locomotive, railroad car or train;

4. If the person removes appurtenances from, damages, or otherwise impairs the operation of a railroad signal system, including a train control system, centralized dispatching system, or highway-railroad grade crossing warning signal, on a railroad owned, leased, or operated by a railroad carrier, and without consent of the railroad carrier involved;

5. If the person interferes or tampers with, or obstructs in any way, or threatens to interfere with, tamper with or obstruct in any way any railcar or locomotive, switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure, or appliance pertaining to or connected with any railroad carrier without the consent of the railroad carrier involved; or

6. If the person takes, steals, removes, changes, adds to, alters, or in any manner interferes with any part of the operating mechanism of any locomotive, engine, tender, coach, car, caboose, or motor

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car used or capable of being used by any railroad carrier in this state, without consent of the railroad carrier;[501] and

7. bodily injury occurs or the damage to railroad property exceeds $1,000.00.

For purposes of Count ___ of the INDICTMENT:

"Bodily injury" means substantial physical pain, illness or any impairment of physical injury.[502]

"Railroad" means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including: commuter or other short-haul railroad passenger service in a metropolitan or suburban area; and high-speed ground transportation systems that connect metropolitan areas but do not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation;[503]

[*Insert*, if applicable. "Railroad carrier" means a person providing railroad transportation; railroad carrier including a right-of-way, track, bridge, yard, shop, station, tunnel, viaduct, trestle, depot, warehouse, terminal, railroad signal system, train control system, centralized dispatching system, or any other structure, appurtenance, or equipment owned, leased, or used in the operation of any railroad carrier including a train, locomotive, engine, railroad car, work equipment, rolling stock, or safety device. "Railroad property" does not include administrative buildings, administrative offices, or administrative office equipment;[504]]

[*Insert*, if applicable"Right-of-way" means the track or roadbed owned, leased, or operated by a railroad carrier which is located on either side of its tracks and which is readily recognizable to a reasonable person as being railroad property or is reasonably identified as such by fencing or appropriate signs;[505]]

[501]W. VA. CODE §§ 61–3–28(b)(1)–(6) (2014).

[502]W. VA. CODE § 61–3–28(a)(1) (2014).

[503]W. VA. CODE § 61–3–28(a)(2) (2014).

[504]W. VA. CODE §61–3–28(a)(3) (2014).

[505]W. VA. CODE § 61–3–28(a)(4) (2014).

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[*Insert*, if applicable. "Yard" means a system of parallel tracks, crossovers, and switches where railroad cars are switched and made up into trains, and where railroad cars, locomotives and other rolling stock are kept when not in use or when awaiting repairs.[506]]

To find the DEFENDANT guilty of Willfully [Damaging] [Attempting to Damage] Railroad Property, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. [took, removed, altered, or otherwise vandalized a railroad sign, placard or marker];
5. [threw or dropped an object capable of causing significant damage to railroad property at or on a locomotive, railroad car or train];
6. [shot a firearm or other dangerous weapon at a locomotive, railroad car or train];
7. [removed appurtenances from, damaged, or otherwise impaired the operation of any railroad signal system, including a train control system, centralized dispatching system, or highway-railroad grade crossing warning signal, on a railroad owned, leased, or operated by any railroad carrier, and without consent of the railroad carrier involved];
8. [interfered or tampered with, or obstructed in any way, or threatened to interfere with, tamper with or obstruct in any way any railcar or locomotive, switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure, or appliance pertaining to or connected with any railroad carrier without consent of the railroad carrier involved];
9. [took, stole, removed, changes, added to, altered, or in any manner interfered with any part of the operating mechanism of any locomotive, engine, tender, coach, car, caboose, or motor car used or capable of being used by any railroad carrier in this state

[506]W. VA. CODE § 61–3–28(a)(5) (2014).

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without consent of the railroad carrier]; and

10. bodily injury occurred or the damage to the railroad property exceeded $1,000.00.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court of Appeals has never had occasion to consider this statute substantively.

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*Fraud*

## 7.5.45 Taking Identity of Another Person (Identity Theft)

Count ___ of the INDICTMENT charges the DEFENDANT with taking the identity of another.

Identity theft occurs when a person knowingly takes the name, birth date, social security number, or other identifying information of another person, without the consent of that other person, with the intent to fraudulently represent that he or she is that other person for the purpose of making financial or credit transactions in the other person's name.[507]

To find the DEFENDANT guilty of identity theft, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly
5. took the name, birth date, social security number, or other identifying information of another person, [*insert* name(s) of victim(s)]
6. without the consent of [*insert* name(s) of victim(s)],
7. with the intent to fraudulently represent
8. that [he] [she] is the other person,
9. for the purpose of making financial or credit transactions in [*insert* name(s) of victim(s)]'s name.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[507]W. VA. CODE § 61–3–54 (2014).

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## COMMENTS

A criminal bail agreement constitutes a financial transaction under the provisions of the identity theft statute set forth in West Virginia Code § 61–3–54 (2014). Syl. Pt. 5, *State v. Soustek,* 233 W. Va. 422, 758 S.E.2d 775, (2014).

"Provided, That the provisions of this section do not apply to any person who obtains another person's drivers [sic] license or other form of identification for the sole purpose of misrepresenting his or her age." W. VA. CODE § 61–3–54 (2014).

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## 7.5.46 Scanning Device Fraud

Count ___ of the INDICTMENT charges scanning device fraud. Scanning device fraud occurs when a person uses a scanning device to access, read, obtain, memorize or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card without the permission of the authorized user of the payment card and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant. [508]

The Court further instructs you that

An "authorized user" is the person to whom a payment card is issued or any other person acting with the permission of the person to whom the card is issued;[509]

A "merchant" is an owner or operator of any retail mercantile establishment or any agent, employee, lessee, consignee, officer, director, franchisee or independent contractor of the owner or operator. A "merchant" also means a person who receives from an authorized user of a payment card, or someone the person believes to be an authorized user, a payment card or information from a payment card, or what the person believes to be a payment card or information from a payment card, as the instrument for obtaining, purchasing or receiving goods, services, money or anything else of value from the person;[510]

A "payment card" is a credit card, charge card, debit card, hotel key card, stored value card or any other card that is issued to an authorized card user and that allows the user to obtain, purchase or receive goods, services, money or anything else of value from a merchant;[511]

A "scanning device" is a scanner, reader or any other electronic device that is used to access, read, scan, obtain, memorize or store, temporarily or

[508]W. VA. CODE § 61–3–56(b) (2014).

[509]W. VA. CODE § 61–3–56(a)(1) (2014).

[510]W. VA. CODE § 61–3–56(a)(2) (2014).

[511]W. VA. CODE § 61–3–56(a)(3) (2014).

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permanently, information encoded on the magnetic strip or stripe of a payment card.[512]

To find the DEFENDANT guilty of scanning device fraud, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that

1. the DEFENDANT,
2. in [*insert* county] County, West Virginia,
3. on or about the ___ day of [*insert* month], [*insert* year],)
4. used a scanning device
5. to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card,
6. without the permission of the authorized user of the payment card, and
7. with the intent to defraud the authorized user, the issuer of the authorized user's payment card or a merchant.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has never addressed this statute.

[512]W. VA. CODE § 61–3–56(a)(5) (2014).

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## 7.5.47 Reencoder Fraud

Count ___ of the INDICTMENT charges the DEFENDANT with Reencoder Fraud. Reencoder fraud occurs when any person uses a reencoder to place information encoded on the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card without the permission of the authorized user of the card from which the information is being reencoded and with the intent to defraud the authorized user, or the issuer of the authorized user's payment card, or a merchant.[513]

An "Authorized user" is the person to whom a payment card is issued or any other person acting with the permission of the person to whom the card is issued;[514]

A "Merchant" is the owner or operator of any retail mercantile establishment or any agent, employee, lessee, consignee, officer, director, franchisee or independent contractor of the owner or operator. A "merchant" also means a person who receives from an authorized user of a payment card, or someone the person believes to be an authorized user, a payment card or information from a payment card, or what the person believes to be a payment card or information from a payment card, as the instrument for obtaining, purchasing or receiving goods, services, money or anything else of value from the person;[515]

"Payment card" is a credit card, charge card, debit card, hotel key card, stored value card or any other card that is issued to an authorized card user and that allows the user to obtain, purchase or receive goods, services, money or anything else of value from a merchant;[516] and

A "reencoder" is an electronic device that places encoded information from the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different payment card.[517]

[513]W. VA. CODE § 61–3–56(c) (2014).

[514]W. VA. CODE § 61–3–56(a)(1) (2014).

[515]W. VA. CODE § 61–3–56(a)(2) (2014).

[516]W. VA. CODE § 61–3–56(a)(3 (2014))

[517]W. VA. CODE § 61–3–56(a)(4) (2014).

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To find the DEFENDANT guilty of reencoder fraud, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County,
4. used a reencoder
5. to place information encoded on the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card
6. without the permission of the authorized user of the card from which the information is being reencoded and
7. with the intent to defraud the authorized user, the issuer of the card, or a merchant.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court of Appeals has not addressed this statute.

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## 7.5.48 Shoplifting

Count __ of the INDICTMENT charges the DEFENDANT with shoplifting. The offense of shoplifting occurs when a person, either alone or in concert with another and intending to appropriate merchandise without paying the merchant's stated price for the merchandise, knowingly: (1) conceals the merchandise upon his or her person or in another manner; or (2) removes or causes the removal of merchandise from the mercantile establishment or beyond the last station for payment; or (3) alters, transfers or removes any price marking affixed to the merchandise; or (4) transfers the merchandise from one container to another; or (5) causes the cash register or other sales recording device to reflect less than the merchant's stated price for the merchandise; or (6) removes a shopping cart from the premises of the mercantile establishment; or (7) repudiates a card-not-present credit or debit transaction after having taken delivery of merchandise ordered from the merchant and does not return the merchandise or attempt to make other arrangements with the vendor[518];

Shoplifting occurs also when a person, alone or in concert with another, knowingly and intentionally obtains an exchange or refund, or attempts to obtain an exchange or refund, for merchandise which has not been purchased from the store or establishment. [519]

The court instructs you that

[*Insert* if applicable: "Card-not-present credit or debit transaction" is a credit or debit sale of merchandise by telephone, mail order, internet or other means that does not require the cardholder's signature or physical presentation of the credit or debit card to the merchant.[520]]

"Conceal" is to hide, hold or carry merchandise so that, although there may be some notice of its presence, it is not visible through ordinary observation.[521]

[518]W. VA. CODE § 61–3A–1(a) (2014).

[519]W. VA. CODE § 61–3A–1(b) (2014).

[520]W. VA. CODE § 61–3A–6(a).

[521]W. VA. CODE § 61–3A–6(b).

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"Merchant" is an owner or operator of any mercantile establishment and includes the merchant's employees, servants, security agents or other agents.[522]

"Mercantile establishment" is any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments.[523]

"Merchandise" is any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart.[524]

"Value of the merchandise" is the merchant's stated price of the merchandise, or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, the difference between the merchant's stated price of the merchandise and the altered price.[525]

To find the DEFENDANT guilty of shoplifting, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that

1. the DEFENDANT, either alone or in concert with another person,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. with intent to appropriate merchandise without paying the merchant's stated price for the merchandise,
5. knowingly:
   i. [concealed the merchandise upon [his] [her] person or in another manner];
   ii. [removed or caused the removal of merchandise from the mercantile establishment or beyond the last station for

[522]W. VA. CODE § 61–3A–6(c) (2014).

[523]W. VA. CODE § 61–3A–6(d) (2014).

[524]W. VA. CODE § 61–3A–6(e) (2014).

[525]W. VA. CODE § 61–3A–6(f) (2014).

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payment];

iii. [altered, transferred or removed any price marking affixed to the merchandise];

iv. [transferred the merchandise from one container to another];

v. [caused the cash register or other sales recording device to reflect less than the merchant's stated price for the merchandise];

vi. [removed a shopping cart from the premises of the mercantile establishment];

vii. [repudiated a card-not-present credit or debit transaction after having taken delivery of merchandise ordered from the merchant and does not return the merchandise or attempt to make other arrangements with the vendor]

6. [or if such person, alone or in concert with another person,

7. knowingly and intentionally

8. obtained an exchange or refund, or attempted to obtain an exchange or refund, for merchandise which had not been purchased from the mercantile establishment.]

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

A Prosecutor may prosecute an offense fitting under shoplifting or grand larceny where the facts of the case may fit either crime. *State ex rel. Chadwell v. Duncil,* 196 W. Va. 643, 474 S.E.2d 573 (1996).

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## 7.5.49 Computer Fraud

Count ___ of the INDICTMENT charges the DEFENDANT with Computer Fraud. Computer fraud occurs when a person knowingly and willfully, directly or indirectly, accesses or causes to be accessed any computer, computer services or computer network for the purpose of (1) executing any scheme or artifice to defraud or (2) obtaining money, property or services by means of fraudulent pretenses, representations or promises.[526]

The Court instructs you that:

"Access" means to instruct, communicate with, store data in, retrieve data from, intercept data from or otherwise make use of any computer, computer network, computer program, computer software, computer data or other computer resources.[527]

"Computer" means an electronic, magnetic, optical, electrochemical or other high-speed data processing device performing logical, arithmetic or storage functions and includes any data storage facility or communication facility directly related to or operating in conjunction with such device. The term "computer" includes any connected or directly related device, equipment or facility which enables the computer to store, retrieve or communicate computer programs, computer data or the results of computer operations to or from a person, another computer or another device, file servers, mainframe systems, desktop personal computers, laptop personal computers, tablet personal computers, cellular telephones, game consoles and any other electronic data storage device or equipment, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator or other similar device.[528]

"Computer services" means computer access time, computer data processing or computer data storage and the computer data processed or stored in connection therewith.[529]

[526]W. VA. CODE § 61–3C–4 (2014).

[527]W. VA. CODE § 61–3C–3(a) (2014).

[528]W. VA. CODE § 61–3C–3(c) (2014).

[529]W. VA. CODE § 61–3C–3(j) (2014).

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"Computer network" means a set of connected devices and communication facilities, including more than one computer, with the capability to transmit computer data among them through such communication facilities.[530]

To find the DEFENDANT guilty of computer fraud, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly and willfully,
5. directly or indirectly accessed or caused to be accessed a computer, computer services or computer network for the purpose of
   i. executing a scheme or artifice to defraud or
   ii. obtaining money, property or services,
6. by means of fraudulent pretenses, representations or promises.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The Supreme Court of Appeals has never addressed this issue. This section also sets forth the specific crime of illegally accessing a computer, etc., owned by the Legislature. W. VA. CODE § 61–3C–4(b) (2014).

[530]W. VA. CODE § 61–3C–3(f) (2014).

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## 7.5.50 Unauthorized Possession of Computer Data or Programs—Felony

Count ___ of the INDICTMENT charges the DEFENDANT with unauthorized possession of computer data or programs.

Unauthorized possession of computer data or programs occurs when any person knowingly, willfully and without authorization possesses any computer data or computer program belonging to another and having a value of five thousand dollars or more.[531]

The Court instructs you that

"Computer data" means any representation of knowledge, facts, concepts, instruction or other information computed, classified, processed, transmitted, received, retrieved, originated, stored, manifested, measured, detected, recorded, reproduced, handled or utilized by a computer, computer network, computer program or computer software and may be in any medium, including, but not limited to, computer printouts, microfilm, microfiche, magnetic storage media, optical storage media, punch paper tape or punch cards, or it may be stored internally in read-only memory or random access memory of a computer or any other peripheral device.[532]

"Computer program" means an ordered set of computer data representing instructions or statements, in a form readable by a computer, which controls, directs or otherwise influences the functioning of a computer or computer network.[533]

To find the DEFENDANT guilty of unauthorized possession of computer data or programs, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly, willfully, and without authorization
5. possessed computer data or a computer program

[531]W. VA. CODE § 61–3C–6 (2014).

[532]W. VA. CODE § 61–3C–3(e) (2014).

[533]W. VA. CODE § 61–3C–3(h) (2014).

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6. which belonging to another, and
7. which had a value of five thousand dollars or more.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENT

**[Reserved]**

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## 7.5.51 Alteration, Destruction, etc., of Computer Equipment (Felony)

Count ___ of the INDICTMENT charges the DEFENDANT with Alteration or Destruction or [*insert* other] of Computer Equipment.

Alteration, Destruction or [*insert* other] of Computer Equipment occurs when a person knowingly, willfully, and without authorization, directly or indirectly, damages or destroys, or attempts to damage or destroy, any computer, computer network, computer software, computer resources, computer program or computer data by knowingly introducing, directly or indirectly, a computer contaminant into any computer, computer program or computer network, which results in a loss of value of property or computer services more than one thousand dollars.[534]

The Court instructs you that:

"Computer" means an electronic, magnetic, optical, electrochemical or other high-speed data processing device performing logical, arithmetic or storage functions and includes any data storage facility or communication facility directly related to or operating in conjunction with such device. The term "computer" includes any connected or directly related device, equipment or facility which enables the computer to store, retrieve or communicate computer programs, computer data or the results of computer operations to or from a person, another computer or another device, file servers, mainframe systems, desktop personal computers, laptop personal computers, tablet personal computers, cellular telephones, game consoles and any other electronic data storage device or equipment, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator or other similar device.[535]

"Computer network" means a set of connected devices and communication facilities, including more than one computer, with the capability to transmit computer data among them through such communication facilities.[536]

[534]W. VA. CODE § 61–3C–7 (2014).

[535]W. VA. CODE § 61–3C–3(c) (2014).

[536]W. VA. CODE § 61–3C–3(f) (2014).

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"Computer software" means a set of computer programs, procedures and associated documentation concerned with computer data or with the operation of a computer, computer program or computer network.[537]

"Computer resources" includes, but is not limited to, information retrieval; computer data processing, transmission and storage; and any other functions performed, in whole or in part, by the use of a computer, computer network, computer software or computer program.[538]

"Computer program" means an ordered set of computer data representing instructions or statements, in a form readable by a computer, which controls, directs or otherwise influences the functioning of a computer or computer network.[539]

"Computer data" means any representation of knowledge, facts, concepts, instruction or other information computed, classified, processed, transmitted, received, retrieved, originated, stored, manifested, measured, detected, recorded, reproduced, handled or utilized by a computer, computer network, computer program or computer software and may be in any medium, including, but not limited to, computer printouts, microfilm, microfiche, magnetic storage media, optical storage media, punch paper tape or punch cards, or it may be stored internally in read-only memory or random access memory of a computer or any other peripheral device.[540]

"Computer contaminant" means any set of computer instructions that are designed to damage or destroy information within a computer, computer system or computer network without the consent or permission of the owner of the information. They include, but are not limited to, a group of computer instructions commonly called viruses or worms that are self-replicating or self-propagating and are designed to contaminate other computer programs or computer data, consume computer resources or damage or destroy the normal operation of the computer.[541]

[537]W. VA. CODE § 61–3C–3(i) (2014).

[538]W. VA. CODE § 61–3C–3(l) (2014).

[539]W. VA. CODE § 61–3C–3(f) (2014).

[540]W. VA. CODE § 61–3C–3(e) (2014).

[541]W. VA. CODE § 61–3C–3(d) (2014).

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To find the DEFENDANT guilty of unauthorized possession of computer data or programs the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. knowingly, willfully, and without authorization, directly or indirectly damaged or destroyed, or attempted to damage or destroy, a computer, computer network, computer software, computer resources, computer program or computer data
5. by knowingly introducing, directly or indirectly, a computer contaminant into the computer, computer program or computer network, which
6. results in a loss of value of property or computer services of more than one thousand dollars.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has never addressed this statute.

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## 7.5.52 Fraud and Related Activity in Connection with Access Devices

Count ___ of the INDICTMENT charges the DEFENDANT with Fraud and Related Activity in Connection with Access Device. The offense of Fraud and Related Activity in Connection with an Access Device occurs when a person who knowingly, willfully and with intent to defraud possesses a counterfeit or unauthorized access device or who knowingly, willfully and with intent to defraud, uses, produces or traffics in any counterfeit or unauthorized access device.[542]

The Court instructs you that:

An "Access device" means any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument);[543]

A "Counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device;[544]

An "Unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained without authority;[545]

"Produce" includes design, alter, authenticate, duplicate, or assemble;[546]

"Traffic" means transfer, or otherwise dispose of, to another, or obtain control of with intent to transfer or dispose of.[547]

To find the DEFENDANT guilty of unauthorized possession of computer data or programs, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,

[542]W. VA. CODE § 61–3C–13(c) (2014).

[543]W. VA. CODE § 61–3C–13(a)(1) (2014).

[544]W. VA. CODE § 61–3C–13(a)(2) (2014).

[545]W. VA. CODE § 61–3C–13(a)(3) (2014).

[546]W. VA. CODE § 61–3C–13(a)(4) (2014).

[547]W. VA. CODE § 61–3C–13(a)(5) (2014).

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2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. [knowingly, willfully and with intent to defraud possessed a counterfeit or unauthorized access device] [knowingly, willfully and with intent to defraud, used, produced or trafficked in a counterfeit or unauthorized access device].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court has not addressed this statute.

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## 7.5.53 Endangering Public Safety

Count ___ of the INDICTMENT charges the DEFENDANT with Endangering Public Safety. The offense of Endangering Public Safety occurs when a person accesses a computer or computer network and knowingly, willfully and without authorization (a) interrupts or impairs the providing of services by any private or public utility; (b) interrupts or impairs the providing of any medical services; (c) interrupts or impairs the providing of services by any state, county or local government agency, public carrier or public communication service; or otherwise endangers public safety.[548]

The Court instructs you that:

"Computer" means an electronic, magnetic, optical, electrochemical or other high-speed data processing device performing logical, arithmetic or storage functions and includes any data storage facility or communication facility directly related to or operating in conjunction with such device. The term "computer" includes any connected or directly related device, equipment or facility which enables the computer to store, retrieve or communicate computer programs, computer data or the results of computer operations to or from a person, another computer or another device, file servers, mainframe systems, desktop personal computers, laptop personal computers, tablet personal computers, cellular telephones, game consoles and any other electronic data storage device or equipment, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator or other similar device.[549]

"Computer network" means a set of connected devices and communication facilities, including more than one computer, with the capability to transmit computer data among them through such communication facilities.[550]

To find the DEFENDANT guilty of endangering the public the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,

[548]W. VA. CODE § 61–3C–14 (2014).

[549]W. VA. CODE § 61–3C–3(c) (2014).

[550]W. VA. CODE § 61–3C–3(f) (2014).

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2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. accessed a computer or computer network
5. and knowingly, willfully and without authorization
6. [interrupted or impaired the providing of services by a private or public utility] [interrupted or impaired the providing of any medical services] [interrupted or impaired the providing of services by any state, county, or local government agency, public carrier or public communication service];
7. or otherwise endangered public safety by [*insert* conduct].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court of Appeals has never addressed this statute.

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*Explosives*

### 7.5.54 Illegal Possession of Destructive Devices, Explosive Materials or Incendiary Devices

Count ___ of the INDICTMENT charges the DEFENDANT with illegal possession of a destructive device, explosive materials, or incendiary devices. The offense of illegal possession of a destructive device, explosive materials, or incendiary device occurs when a person possesses or manufactures explosive material without first obtaining a permit to use explosives from the office of the state fire marshal, or who possesses or manufactures a destructive device or incendiary device.[551]

The Court instructs you that:

"Explosive material" means any chemical compound, mechanical mixture or device that is commonly used or can be used for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities or packaging that an ignition by fire, by friction, by concussion, by percussion, by detonator or by any part of the compound or mixture may cause a sudden generation of highly heated gases. These materials include, but are not limited to, powders for blasting, high or low explosives, blasting materials, blasting agents, blasting emulsions, blasting fuses other than electric circuit breakers, detonators, blasting caps and other detonating agents and black or smokeless powders not manufactured or used for lawful sporting purposes. Also included are all explosive materials listed annually by the office of the State Fire Marshal and published in the State Register, said publication being hereby mandated.[552]

A "Destructive device" means any bomb, grenade, mine, rocket, missile, pipebomb or similar device containing an explosive, incendiary, explosive gas or expanding gas which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts, either designed or intended for use in converting any

[551]W. VA. CODE § 61–3E–3 (2014).

[552]W. VA. CODE § 61–3E–1(b) (2014).

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device into a destructive device and from which a destructive device may be readily assembled.[553]

An "Incendiary device" means a container containing gasoline, kerosene, fuel oil, or derivative thereof, or other flammable or combustible material, having a wick or other substance or device which, if set or ignited, is capable of igniting such gasoline, kerosene, fuel oil, or derivative thereof, or other flammable or combustible material.[554]

To find the DEFENDANT guilty of endangering the public, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. [possessed or manufactured an explosive material without first obtaining a permit to use explosives from the office of the state fire marshal] [possessed or manufactured a destructive device or incendiary device].

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court of Appeals has never addressed this statute. "'Destruction device' does not include a firearm as such is defined in W. VA. CODE § 61–7–2 (2014) or model rockets as defined in W. VA. CODE § 29–3–23 (2013).

[553]W. VA. CODE § 61–3E–1(a) (2014).

[554]W. VA. CODE § 61–3E–1(d) (2014).

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## 7.5.55 Criminal Use of Destructive Device, Explosive Material or Incendiary Device

Count ___ of the INDICTMENT charges the DEFENDANT with criminal use of destructive device, explosive material or incendiary device.

Criminal use of a destructive device, explosive material, or incendiary device occurs when a person unlawfully and intentionally damages the property of another or attempts to damage the property of another by the use of a destructive device, explosive material or incendiary device.[555]

The Court instructs you that:

"Destructive device" means any bomb, grenade, mine, rocket, missile, pipebomb or similar device containing an explosive, incendiary, explosive gas or expanding gas which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts, either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled.[556]

"Explosive material" means any chemical compound, mechanical mixture or device that is commonly used or can be used for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities or packaging that an ignition by fire, by friction, by concussion, by percussion, by detonator or by any part of the compound or mixture may cause a sudden generation of highly heated gases. These materials include, but are not limited to, powders for blasting, high or low explosives, blasting materials, blasting agents, blasting emulsions, blasting fuses other than electric circuit breakers, detonators, blasting caps and other detonating agents and black or smokeless powders not manufactured or used for lawful sporting purposes. Also included are all explosive materials listed annually by the office of the State Fire Marshal and published in the State Register, said publication being hereby mandated.[557]

"Incendiary device" means a container containing gasoline, kerosene, fuel oil, or derivative thereof, or other flammable or combustible material, having a

[555]W. VA. CODE § 61–3E–4 (2014).

[556]W. VA. CODE § 61–3E–1(a) (2014).

[557]W. VA. CODE § 61–3E–1(b) (2014).

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wick or other substance or device which, if set or ignited, is capable of igniting such gasoline, kerosene, fuel oil, or derivative thereof, or other flammable or combustible material.[558]

To find the DEFENDANT guilty of endangering the public, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. unlawfully and intentionally damaged the property of another or attempted to damage the property of another
5. by the use of a destructive device, explosive material or incendiary device.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## 7.5.56 Theft of Explosive Material from Storage Magazines or Buildings

Count ___ of the INDICTMENT charges the DEFENDANT with theft of explosive material from a storage magazine or building. The offense of theft of explosive material from a storage magazine or building occurs when a person breaks and enters or enters without breaking a storage magazine, shop, office, storehouse, warehouse or any other building or out-house adjoining thereto, any railcar, boat, vessel or motor vehicle with the intent to commit larceny.[559]

The court instructs you that:

A "larceny" in this context is the trespassory taking of explosive material with the intent to deprive the rightful owner of the explosive material permanently.

[558]W. VA. CODE § 61–3E–1(d) (2014).

[559]W. VA. CODE § 61–3E–8 (2014).

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"Explosive material" means any chemical compound, mechanical mixture or device that is commonly used or can be used for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities or packaging that an ignition by fire, by friction, by concussion, by percussion, by detonator or by any part of the compound or mixture may cause a sudden generation of highly heated gases. These materials include, but are not limited to, powders for blasting, high or low explosives, blasting materials, blasting agents, blasting emulsions, blasting fuses other than electric circuit breakers, detonators, blasting caps and other detonating agents and black or smokeless powders not manufactured or used for lawful sporting purposes. Also included are all explosive materials listed annually by the office of the State Fire Marshal and published in the State Register, said publication being hereby mandated.[560]

To find the DEFENDANT guilty of endangering the public, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. broke and entered or entered without breaking
5. a storage magazine, shop, office, storehouse, warehouse, or other building or out-house adjoining thereto, or a railcar, boat, vessel or motor vehicle,
6. with the intent to commit larceny of explosive material.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

[560]W. VA. CODE § 61–3E–1(b) (2014).

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## Comments

The West Virginia Supreme Court of Appeals has never addressed this statute.

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## 7.5.57 Receipt, Possession, Storage, Sale or Transportation of Stolen Explosive Material

Count ___ of the INDICTMENT charges the DEFENDANT with Receipt, Possession, Storage, Sale or Transportation of Stolen Explosive Material. The offense of Receipt, Possession, Storage, Sale or Transportation of Stolen Explosive material occurs when a person receives, conceals, transports, ships, stores, barters, sells or disposes of any explosive material knowing or having reason to know that such material is stolen.[561]

The Court instructs you that:

"Explosive material" means any chemical compound, mechanical mixture or device that is commonly used or can be used for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities or packaging that an ignition by fire, by friction, by concussion, by percussion, by detonator or by any part of the compound or mixture may cause a sudden generation of highly heated gases. These materials include, but are not limited to, powders for blasting, high or low explosives, blasting materials, blasting agents, blasting emulsions, blasting fuses other than electric circuit breakers, detonators, blasting caps and other detonating agents and black or smokeless powders not manufactured or used for lawful sporting purposes. Also included are all explosive materials listed annually by the office of the State Fire Marshal and published in the State Register, said publication being hereby mandated.[562]

To find the DEFENDANT guilty of the Receipt, Possession, Storage, Sale or Transportation of Stolen Explosive Material, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. the DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. received, concealed, transported, shipped, stored, bartered, sold or disposed of,
5. an explosive material,

[561]W. VA. CODE § 61–3E–9 (2014).

[562]W. VA. CODE § 61–3E–1(b) (2014).

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6. knowing or having reason to know that such materials were stolen.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court of Appeals has never addressed this statute.

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## 7.5.58 Wanton Endangerment Involving Destructive Devices, Explosive Materials or Incendiary Devices

Count ___ of the INDICTMENT charges wanton endangerment involving destructive devices, explosive materials or incendiary devices. Wanton endangerment involving destructive devices, explosive materials or incendiary devices occurs when a person wantonly performs any act with a destructive device, explosive material or incendiary device which creates substantial risk of death or serious bodily injury to another.[563]

The Court instructs you that:

"Destructive device" means any bomb, grenade, mine, rocket, missile, pipebomb or similar device containing an explosive, incendiary, explosive gas or expanding gas which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts, either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled.[564]

"Explosive material" means any chemical compound, mechanical mixture or device that is commonly used or can be used for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities or packaging that an ignition by fire, by friction, by concussion, by percussion, by detonator or by any part of the compound or mixture may cause a sudden generation of highly heated gases. These materials include, but are not limited to, powders for blasting, high or low explosives, blasting materials, blasting agents, blasting emulsions, blasting fuses other than electric circuit breakers, detonators, blasting caps and other detonating agents and black or smokeless powders not manufactured or used for lawful sporting purposes. Also included are all explosive materials listed annually by the office of the State Fire Marshal and published in the State Register, said publication being hereby mandated.[565]

"Incendiary device" means a container containing gasoline, kerosene, fuel oil, or derivative thereof, or other flammable or combustible material, having a

[563]W. VA. CODE § 61–3E–10 (2014).

[564]W. VA. CODE § 61–3E–1(a) (2014).

[565]W. VA. CODE § 61–3E–1(b) (2014).

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wick or other substance or device which, if set or ignited, is capable of igniting such gasoline, kerosene, fuel oil, or derivative thereof, or other flammable or combustible material.[566]

To find the DEFENDANT guilty of endangering the public, the State must overcome the DEFENDANT'S presumption of innocence and prove beyond a reasonable doubt that:

1. he DEFENDANT,
2. on or about the ___ day of [*insert* month], [*insert* year],
3. in [*insert* county] County, West Virginia,
4. wantonly performed an act with a destructive device, explosive material or incendiary device,
5. which created substantial risk of death or serious bodily injury to another.

If, after impartially considering, weighing and comparing all the evidence (that of both the State and the DEFENDANT), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the DEFENDANT not guilty.

## COMMENTS

The West Virginia Supreme Court of Appeals has never addressed this statute.

[566]W. VA. CODE § 61–3E–1(d) (2014).

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# DEFENSES

## 8.1 Alibi

The DEFENDANT has asserted that he was not present at the place and time when the offense was supposed to have been committed. This is called an alibi. Please keep in mind that the DEFENDANT does not need to prove that [he] [she] was not present; the burden of proof never shifts from the State, who must prove every element of the crime beyond a reasonable doubt.

The DEFENDANT does not need to prove [his] [her] alibi beyond a reasonable doubt—or even by a preponderance of the evidence. [He] [She] need only introduce evidence which, when considered with the whole evidence, creates a reasonable doubt regarding [his] [her] guilt. If the DEFENDANT has offered sufficient evidence to raise the possibility that [he] [she] has an alibi regarding the offense in question, then the burden is on the State to prove beyond a reasonable doubt that the DEFENDANT was present at the place and time of the offense.

So if, after considering all the evidence, you have a reasonable doubt that the DEFENDANT was present at the time and place the alleged offense was committed, you should find the DEFENDANT not guilty.[567]

## COMMENTS

The key to this instruction, as with other defenses, is that counsel never allow the State or the Court to shift the burden of proof on this issue, as evidenced by the court's overruling of *State v. Alexander*, 161 W. Va. 776, 245 S.E.2d 633 (1978). Syl. Pt. 1, *State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412, 418 (1983).

[567] *State v. England*, 180 W. Va. 342, 350–51, 376 S.E.2d 548, 556–57 (1988), quoting, in part, *Frye v. Procunier*, 746 F.2d 1011, 1012 (4th Cir. 1984).

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## 8.2 Insanity (Test of Responsibility for Act)

The DEFENDANT has presented evidence that [he] [she] was insane at the time the offense was alleged to have been committed.

The Court instructs you that a person is not responsible for criminal conduct if

1. at the time of the offense set forth in the indictment
2. [he] [she] lacked the capacity to either
   a. appreciate the wrongfulness of [his] [her] conduct, or
   b. conform [his] [her] conduct to the requirements of the law
3. as a result of mental disease or defect.[568]

Therefore, if the State has proved beyond a reasonable doubt that the DEFENDANT committed all the elements of the offense charged in Count ___ of the INDICTMENT, but you have a reasonable doubt that, at the time of the commission of the act, [he] [she] was suffering from a mental disease or defect causing [him] [her] to lack the capacity to appreciate the wrongfulness of [his] [her] conduct, or to conform [his] [her] conduct to the requirements of the law, you should find the DEFENDANT not guilty by reason of insanity.

### COMMENTS

In *State v. Myers*, 159 W. Va. 353, 222 S.E.2d 300 (1976), the West Virginia Supreme Court of Appeals affirmed an earlier decision, in which it adopted the approach of the Model Penal Code: "We would approve of an instruction to the effect that an accused is not responsible for his act if, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act, or to conform his act to the requirements of the law." *State v. Grimm*, 156 W. Va. 615, 195 S.E.2d 637 (1973). *See also State v. Guthrie*, 173 W. Va. 290, 315 S.E.2d 397 (1984), in which the Court held that *any* expert testimony the State offers to counter the defendant's evidence is sufficient to support a guilty verdict (the case was reversed on other grounds).

The Court in *Myers* recognized the validity of the defense of insanity and acknowledged the psychiatric profession's contribution to the criminal justice system. "The defense of insanity is a serious and material defense and in most instances is established or is attempted to be established by reliance upon expert medical testimony. The field of psychiatry is well recognized in the medical profession and should be equally well recognized in the law. It can no longer be treated in a cavalier fashion as being less worthy of careful attention than testimony offered in other fields of medical specialization." *State v. Myers*, 159 W. Va. 353, 358, 222 S.E.2d 300, 304 (1976). The jury is

[568]Syl. Pt. 2, in part, *State v. Myers*, 159 W. Va. 353, 222 S.E.2d 300 (1976); Syl. Pt. 5, *State v. Massey*, 178 W. Va. 427, 359 S.E.2d 865 (1987), *State v. Orth*, 178 W. Va. 303, 359 S.E.2d 136 (1987).

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entitled to the benefit of competent psychiatric testimony. "When insanity is sought to be proved by expert medical testimony, the trial court should not keep from the jury information which may have been essential to the diagnosis." *Id*.

Defense counsel must aggressively seek to proffer testimony from qualified psychiatric experts, based upon competent evidence and records, in order to preserve this defense. It is not enough merely to argue that there is a mental disease or defect at play.

Unconsciousness, or automatism, is not part of the insanity defense, but is a separate defense. Syl. Pt. 2, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

## 8.3 Insanity (Burden of Proof)

The Court instructs you that there is a presumption that the DEFENDANT was sane at the time of the alleged offense. If, however, any evidence introduced by the DEFENDANT or by the State raised any doubt in your mind upon the issue of the DEFENDANT'S sanity at that time, then the presumption has been overcome, and the State has the burden of establishing the DEFENDANT'S sanity beyond a reasonable doubt.[569] If the proof on this issue leaves you with a reasonable doubt as to the DEFENDANT'S sanity at the time, you must acquit [him] [her]; if, on the on the other hand, the State has proved [his] [her] sanity beyond a reasonable doubt, you may find the DEFENDANT guilty as charged in Count ___ of the INDICTMENT.

## COMMENTS

In one formative case, the prosecution proffered an instruction which stated that the "prisoner cannot rely simply on having raised a reasonable doubt in the minds of the jury as to whether or not he was insane…." The Court then went on to write that "[i]n this State, the burden of proving insanity is upon the one who asserts the defense" and that "this burden need only be carried by a preponderance of the evidence." *State v. Myers*, 159 W. Va. 353, 361, 222 S.E.2d 300, 306 (1976). This seems to require more from the defendant than the language that states that the State retains the burden of proving sanity beyond a reasonable doubt, which implies the defendant need only provide competent evidence that brings the subject into dispute. In any case, however, defense counsel needs to bring to bear on the issue everything that is available from the arsenal, from the testimony of qualified experts to records and further documentation.

[569]Syl. Pt. 3, *State v. Daggett*, 167 W. Va. 411, 280 S.E.2d 545 (1981).

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## 8.4 Diminished Capacity

The DEFENDANT has presented expert testimony that, at the time of the offense, [he] [she] was suffering from a mental disease or defect which rendered [him] [her] incapable of forming the mental state that is set forth as an element of the offense.

The Court instructs you that a DEFENDANT who, because of a mental disease or defect, is unable to formulate a state of mind such as [*insert* applicable state of mind] required by law, then [he] [she] may be said to be suffering from "diminished capacity."[570] Such a finding means that the defendant is not guilty of the offense charged because this finding negates an essential element of the offense.

In other words, the State has alleged in this case that the DEFENDANT, at the time of the offense, acted with [*insert* applicable mental state—premeditation, specific intent, malice, etc.]. You may consider, in light of all the evidence presented in the case, whether the DEFENDANT was, at the time of the alleged offense, incapable of forming the mental state required as an element of the offense charged in the INDICTMENT. If the DEFENDANT was not capable of forming the mental state required, you must find [him] [her] not guilty of the offense charged in the INDICTMENT [.] [*insert*, if applicable: and consider whether the [he] [she] is guilty of the offense of [*insert* lesser included offense that does not require such element].

### COMMENTS

To get the defense of diminished capacity to the jury, it is important to have an expert testify to a reasonable degree of certainty that: (1) at the time of the offense (2) the defendant suffered from a mental disease or defect (3) which rendered him or her incapable of forming the mental state required for a finding of guilt. See *State v. Dunn*, 237 W. Va. 155, 786 S.E.2d 174 (2016), for a discussion of a case in which the proffered evidence was not sufficient to get to the jury.

It is important to note that, technically, "diminished capacity" is not a defense, but rather a rebuttal of an element of the crime, usually one which, like murder, has different degrees of seriousness that depend upon the mental state of the actor. *State v. Joseph*, 214 W. Va. 525, 530–31, 590 S.E.2d 718, 723-24 (2003).

[570] *State v. Joseph*, 214 W. Va. 525, 590 S.E.2d 718 (2003). *See also State v. Simmons*, 172 W. Va. 590, 309 S.E.2d 89 (1983).

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## 8.5 Intoxication and Drug Use (No Weapon)

The DEFENDANT has introduced evidence that [he] [she] was under the influence of [alcohol] [drugs] at the time of the offense and was, therefore, unable to form the requisite mental state required as an element of the offense charged in Count ___ of the INDICTMENT.

The Court instructs you that voluntary intoxication is generally not an excuse for a crime; however, where a certain state of mind is an essential element of the crime, the DEFENDANT is not guilty if, at the time [he] [she] commits the alleged offense, [he] [she] was so under the influence that [he] [she] was unable to form the requisite intent or mental status.[571]

In this case, the DEFENDANT is charged with [*insert* offense]. One of the essential elements of this offense is [*insert* mental state required as an element of the offense]. The DEFENDANT contends that at the time of the alleged offense [he] [she] was unable to form the required [intent] [other mental state] required by law for a verdict of guilt.

If you find that the DEFENDANT was incapable of forming the required [intent] [other mental state], then you must find [him] [her] not guilty of the offense charged in Count ___ of the INDICTMENT.

## COMMENTS

The "inability" to commit the crime set forth in this instruction must be complete: "Further, a defendant's claim of intoxication or drug use can never be used as a defense when the defendant claims that his or her capacity to control his or her actions were *diminished*, but can only be used when there is demonstrated a *total* lack of capacity so that the defendant's bodily machine completely failed." *State v. Miller*, 184 W. Va. 492, 401 S.E.2d 237 (1990) (emphasis in original).

A trial court errs when it fails to give an appropriate instruction on this issue in a murder case. "Where there is evidence in a murder case to support a defendant's theory that he was unable to formulate the requisite intent to kill, it is error for the trial court to refuse to give a proper instruction presenting such a theory when requested to do so." Syl. Pt. 4, *State v. Keeton*, 166 W. Va. 77, 272 S.E.2d 817 (1980).

In some cases, a directed verdict for the defendant may be appropriate. "If, in such case, the proof of temporary dementia occasioned by intoxication is so full, clear, and decisive as to leave no room for a reasonable opinion to the contrary, the trial court should direct the jury to find the defendant not guilty, if requested to do so, and, if it has failed in that respect, it should sustain a motion, made in due time, to set aside the verdict and grant a new trial." Syl. Pt. 3, *State v. Phillips*,

[571] *State v. Miller*, 184 W. Va. 492, 401 S.E.2d 237 (1990).

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30 W. Va. 748, 93 S.E. 828 (1917).

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## 8.6 Intoxication and Drug Use (With Use of Weapon)

The DEFENDANT has introduced evidence that [he] [she] was under the influence of [alcohol] [drugs] at the time of the offense and was, therefore, unable to form the requisite mental state required as an element of the offense charged in Count ___ of the INDICTMENT.

The Court instructs you that voluntary intoxication is generally not an excuse for a crime; however, where a certain state of mind is an essential element of the crime, the DEFENDANT is not guilty if, at the time [he] [she] commits the alleged offense, [he] [she] was so under the influence that [he] [she] was unable to form the requisite intent or mental status.[572] Moreover, because the DEFENDANT is charged with having used a weapon in the commission of the offense charged, you must find that [he] [she] had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the intoxication merely brought to the forefront.[573]

In this case, the DEFENDANT is charged with [*insert* offense]. One of the essential elements of this offense is [*insert* mental state required as an element of the offense]. The DEFENDANT contends that at the time of the alleged offense [he] [she] was unable to form the required [intent] [other mental state] required by law to be found guilty of the offense.

If you find that the DEFENDANT was incapable of forming the required [intent] [other mental state], and that [he] [she] had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the influence of the [alcohol] [drugs] simply brought to the forefront, then you must find [him] [her] not guilty of the offense charged in Count ___ of the INDICTMENT.

## COMMENTS

The "inability" to commit the crime set forth in this instruction must be complete: "Further, a defendant's claim of intoxication or drug use can never be used as a defense when the defendant claims that his or her capacity to control his or her actions were *diminished*, but can only be used when there is demonstrated a *total* lack of capacity so that the defendant's bodily machine completely failed. *Furthermore, for intoxication to be used as a defense where a weapon is used, it must*

[572] *State v. Miller*, 184 W. Va. 492, 401 S.E.2d 237 (1990).

[573] *State v. Miller*, 184 W. Va. 492, 401 S.E.2d 237 (1990).

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*affirmatively appear that the defendant had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the intoxication merely brought to the forefront*." *State v. Miller*, 184 W. Va. 492, 401 S.E.2d 237 (1990) (emphasis in original).

## 8.7 Unconsciousness (Automatism)

The DEFENDANT has claimed [he] [she] was unconscious at the time of the offense of [*insert* offense]. The Court instructs you that being unconscious may eliminate the element of voluntariness for the offense.

If the DEFENDANT introduces evidence of unconsciousness at the time the offense was committed, the State must prove beyond a reasonable doubt that the DEFENDANT'S actions were voluntary.[574] {*Insert*, if applicable: If the defendant has introduced evidence of a medical condition that can render [him] [her] unconscious, then the State must prove beyond a reasonable doubt that the DEFENDANT acted both voluntarily and in reckless disregard of the safety of others.}

Therefore, if you find, after consideration of all the evidence, that the DEFENDANT was conscious at the time of the offense [*insert*, if applicable, or the State has proved beyond a reasonable doubt that the DEFENDANT acted voluntarily and in reckless disregard of the safety of others], you may find [him] [her] guilty as charged in Count ___ of the INDICTMENT. If on the other hand, you find that the DEFENDANT was unconscious at the time of the offense [insert, if applicable: and if the State has failed to prove beyond a reasonable doubt that the DEFENDANT acted voluntarily and in reckless disregard for the safety of others], you must find the DEFENDANT not guilty.

### COMMENTS

The alternative language of this instruction is meant to account for the situation in which the defendant suffers from a condition (such as epilepsy, in the cited case) that renders him or her unconscious for periods of time, and the State introduces evidence that the defendant knew about the condition but still, for example, operated a motor vehicle.

> If a defendant is sufficiently apprised and aware of a preexisting condition and previously experienced recurring episodes of loss of consciousness, e.g., epilepsy, then operating a vehicle or other potentially destructive implement, with knowledge of the potential danger, might well amount to reckless disregard for the safety of others. Therefore, the jury should be charged that even if it believes there is a reasonable doubt about the defendant's consciousness at the time of the event, the voluntary

[574] Syl. Pt. 2, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

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operation of a motor vehicle with knowledge of the potential for loss of consciousness can constitute reckless behavior.

Syl. Pt. 4, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

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## 8.8 Accident

The DEFENDANT has presented evidence that the [death] [injury] [other offense] was an accident. While it is never the DEFENDANT'S burden to prove anything, if you find the DEFENDANT'S evidence of accident to be credible, then the State must prove beyond a reasonable doubt that the [death] [injury] [other offense] was not accidental.[575] If the State has not met this burden, then you must find the DEFENDANT not guilty of the offense charged in Count ___ of the INDICTMENT.

## COMMENTS

This instruction is better than the one found in *State v. Miller*, 184 W. Va. 492, 401 S.E.2d 237 (1990), n. 9:

> The Court instructs the jury that where a defendant relies upon a claim of accidental killing as his defense to murder you may only consider that claim of accidental killing in your deliberations if you are convinced there is evidence demonstrating such defense to an appreciable degree. If no such evidence has been presented, then you should find that the killing of Lorilei Reed was not accidental.

While the West Virginia Supreme Court found that this instruction was not an inappropriate shifting of the burden of proof for an affirmative defense, it is still a confusing instruction: it certainly *feels* like a shifting of the burden. Defense counsel should argue for an instruction that affirmatively states the government is required to prove beyond a reasonable doubt that it was not accidental. See *State v. Daniel*, 182 W. Va. 643, 391 S.E.2d 90 (1990), which holds that presenting "credible" evidence means that the evidence is simply "believable." The defendant's burden of "proving" the defense is not heavy; the "beyond a reasonable doubt" burden is still on the State.

> …the instructions in this case do not reduce the burden of proof placed upon the prosecution to prove all elements of the crime beyond a reasonable doubt, nor do they assign an insurmountable burden to the defendant…While perhaps unartfully worded, we do not believe the use of the word "credible" renders these instructions invalid. For evidence to be credible, it must merely be believable.

*State v. Daniel*, 182 W. Va. 643, 653, 391 S.E.2d 90, 100 (1990).

The *Daniel* Court's discussion of *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L.Ed.2d 267 (1987), is appropriately considered here. In *Martin*, the state's requirement that all defenses be proved by the defendant by a preponderance of the evidence is declared to be permissible, as it does not unconstitutionally shift the burden of proof to the defendant. Justice Powell's dissent notwithstanding, the language quoted by the West Virginia Court in *Daniels* is extremely helpful to the defense:

> More recently, in *Martin v. Ohio* (citation omitted), the Court addressed the specific issue of whether the due process clause forbids placing the burden to prove self-defense on the defendant in a murder case by a preponderance of the evidence. In that

[575] *State v. Daniel*, 182 W. Va. 643, 391 S.E.2d 90 (1990).

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case, the defendant argued that placing the burden of proving an affirmative defense on the defendant improperly required her to disprove elements of the prosecution's case of murder. The Supreme Court disagreed, holding that it was permissible to require the defendant to prove self-defense because

> Ohio does not shift to the defendant the burden of disproving any element of the State's case. When the prosecution has made out a *prima facie* case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. **Evidence creating a reasonable doubt could easily fall short of proving self-defense by a preponderance of the evidence**.

*Id.* At 234, 107 S. Ct. at 1102, 94 L.Ed.2d at 274-75.

*State v. Daniel*, 182 W. Va. 643, 652, 391 S.E.2d 90, 99 (1990) (emphasis supplied). This supports the West Virginia Court's language in *Daniel* to the effect that pretty much any quantum of evidence will do, so long as it is believable.

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## 8.9 Self-Defense (General)

The DEFENDANT has asserted that [he] [she] acted in self-defense, and has introduced evidence in support of that position.

You are instructed that—although the DEFENDANT does not have to prove [his] [her] innocence—when asserting the doctrine of self-defense, [he] [she] is required to introduce sufficient evidence to produce in your mind a reasonable doubt on the issue and that the [killing] [wounding] may have resulted from the DEFENDANT acting in self-defense.[576] The DEFENDANT must present evidence that:

1. The DEFENDANT was not the aggressor and did nothing to provoke the attack;
2. [He] [She] believed, based upon all the circumstances [he] [she] perceived at the time deadly force was used, that [he] [she] was at imminent risk of death or serious bodily injury, and that such force was necessary;
3. Considering all the circumstances surrounding the use of deadly force, another person, similarly situated, could have reasonably formed the same belief (i.e., that there was an imminent risk of death or serious bodily injury and that such force was necessary;
4. The DEFENDANT'S actions were proportionate to the danger.[577]

If you find that the DEFENDANT has produced evidence on these matters sufficient to cause you a reasonable doubt as to the DEFENDANT'S guilt or culpability, then the State must prove beyond a reasonable doubt that the DEFENDANT did not, in fact, act in self-defense. If the State fails to prove this, then you must enter a verdict of not guilty as to Count ___ of the INDICTMENT.

### COMMENTS

Based upon the West Virginia Supreme Court's discussion in its cases, it is clear that there is no particular burden of proof the defendant needs to adduce on the issue of self-defense, other than that he or she provide "some" evidence. *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978). In

[576]Syl. Pt. 4, *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978); *see also State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

[577]*State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

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*Kirtley*, the court leans heavily on federal law and what it perceives to be the majority trend, that the State retains the burden of proof and must prove the defendant did *not* act in self-defense beyond a reasonable doubt. It cites with approval the federal instruction developed to handle self-defense cases, which instruction reads, "If evidence of self-defense is present,…." *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978), n. 8. The inference here is that, as long as such evidence is competent and not inherently incredible, the defendant has met his or her burden of proof. The wording of much of the case law in West Virginia—to the effect that "Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense…" (as is found in Syl. Pt. 4, *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978))—is confusing, as it seems to say the opposite of what it means.

The defense attorney ought to argue for the simpler, "If credible evidence of self-defense is present…"

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## 8.10 Self-Defense (Home Intrusion, Occupant Defendant and Non-Occupant Victim)

The DEFENDANT has asserted, first, that [he] [she] was the occupant of the property, second, that [insert name of victim] attempted to gain access to the DEFENDANT'S home and third, that the DEFENDANT acted in self-defense. The DEFENDANT has introduced evidence in support of that position.

You are instructed that—although the DEFENDANT does not have to prove [his] [her] innocence—when asserting the doctrine of self-defense, [he] [she] is required to introduce sufficient evidence to produce in your mind a reasonable doubt on the issue and that the [killing] [wounding] may have resulted from [his] [her] acting in self-defense.[578] The DEFENDANT must present evidence that:

1. The DEFENDANT was not the aggressor and did nothing to provoke the attack;
2. The intruder threatened the defendant with imminent physical violence or the commission of a felony;[579]
3. [He] [She] believed, based upon all the circumstances [he] [she] perceived at the time deadly force was used, that such force was necessary;
4. Considering all the circumstances surrounding the use of deadly force, another person, similarly situated, could have reasonably formed the same belief (i.e., that such force was necessary;
5. The DEFENDANT'S actions were proportionate to the danger.[580]

If you find that the DEFENDANT has produced evidence on these matters sufficient to cause you a reasonable doubt as to [his] [her] guilt or culpability, then the State must prove beyond a reasonable doubt that the DEFENDANT did not, in fact, act in self-defense. If the State fails to prove this, then you must enter a verdict of not guilty as to Count ___ of the INDICTMENT.

## COMMENTS

[578] Syl. Pt. 4, *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978); *see also State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

[579] *State v. W.J.B.* 166 W. Va. 602, 276 S.E.2d 550 (1981); *see also State v. Harden*, 223 W. Va. 796,679 S.E.2d 628 (2009).

[580] *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

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West Virginia continues in its jurisprudence to adhere to the "Castle Doctrine," which states that a person may use deadly force on his or her own property if there is the reasonable belief (subjectively and objectively) that the intruder intends to harm an occupant or commit some significant crime on the property. *State v. W.J.B*. 166 W. Va. 602, 276 S.E.2d 550 (1981). In other words, the occupant need not, as is the case in typical self-defense prosecutions, demonstrate that he or she reasonably believed there was the threat of imminent death or serious bodily injury. There is the further provision that a homeowner need not retreat in the face of the threat, but may meet that threat with deadly force if its use is reasonable under the circumstances: "Even an unlawful intrusion will not be sufficient [to justify deadly force] when coupled with only a vague suspicion that the intruder may intend to commit a felony or physically assault the occupant." *State v. W.J.B.*, 166 W. Va. 602, 613, 276 S.E.2d 550, 556 (1981).

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## 8.11 Self-Defense (Home Intrusion, Occupant Defendant and Occupant Victim)

The DEFENDANT has asserted, first, that both [he] [she] and [insert name of victim] were co-occupants of the property and that the DEFENDANT acted in self-defense. The DEFENDANT has introduced evidence in support of that position.

You are instructed that—although the DEFENDANT does not have to prove [his] [her] innocence—when asserting the doctrine of self-defense, [he] [she] is required to introduce sufficient evidence to produce in your mind a reasonable doubt on the issue and that the [killing] [wounding] may have resulted from the DEFENDANT acting in self-defense.[581] The DEFENDANT must present evidence that:

1. The DEFENDANT was not the aggressor and did nothing to provoke the attack;
2. [He] [She] believed, based upon all the circumstances [he] [she] perceived at the time deadly force was used, that [he] [she] was at imminent risk of death or serious bodily injury, and that such force was necessary;
3. Considering all the circumstances surrounding the use of deadly force, another person, similarly situated, could have reasonably formed the same belief (i.e., that there was an imminent risk of death or serious bodily injury and that such force was necessary;
4. The DEFENDANT'S actions were proportionate to the danger.[582]

If you find that the DEFENDANT has produced evidence on these matters sufficient to cause you a reasonable doubt as to [his] [her] guilt or culpability, then the State must prove beyond a reasonable doubt that the DEFENDANT did not, in fact, act in self-defense. If the State fails to prove this, then you must enter a verdict of not guilty as to Count ___ of the INDICTMENT.

## COMMENTS

The West Virginia Supreme Court of Appeals has held that even where the victim is shot in the head while unconscious in a chair following a sustained assault and threats against the defendant

[581]Syl. Pt. 4, *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978); *see also State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

[582]*State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).

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and the children in the dwelling, the defendant has satisfied the subjective and objective beliefs in the "imminent" threat of death or serious bodily injury, rejecting the notion that the apprehension of danger must exist at the time of the use of deadly force. *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009). The rule existing in the state until *Harden* was that the "Castle Doctrine" did not apply to situations where the defendant and the attacker were co-owners. While it did not give a license to shoot your spouse (the conduct still needs to be subjectively and objectively reasonable), it expanded the protections available to co-occupants where one was subject to abuse.

With this decision, West Virginia allowed the broader use of "Battered Spouse Syndrome" and similar defenses based upon long-term, significant abuse. The prosecution's arguments that the wife had opportunity to leave the premises without killing her husband were unpersuasive. In other words, a battered wife need not "retreat" out of the home; it is her castle, too.

The higher threshold for the threat remains in place, however. The court noted,

> While we have today set out certain standards under which an occupant of a home … does not have a duty to retreat when attacked by a co-occupant …, we wish to clarify that this standard is not equal to the standards that have been established for using deadly force against an intruder into a dwelling. Indeed, we do not believe that the use of deadly force by one occupant against a co-occupant presents the same nature of circumstances posed by an intruder into a home. For example, under the law in West Virginia, the occupant of a dwelling may respond with deadly force to an intruder who merely threatens physical violence or the commission of a felony where the occupant reasonably believes that deadly force is necessary. **Given that heated exchanges may be commonplace between household occupants, we believe that the greater threat of imminent death or serious bodily injury is necessary to justify the use of deadly force between co-occupants**. Therefore, we expressly decline to extend to self-defense cases involving co-occupants our holding in Syllabus Point 2, *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 550 (1981), which provides that
>
> > The occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary.

*State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628, n. 9 (2009) (emphasis supplied).

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## 8.12 Duress, Compulsion, and Coercion

The DEFENDANT has introduced evidence that [he] [she] lacked criminal intent in this case because [he] [she] was under duress, or was compelled or coerced to commit the act charged. You are instructed that, in general, an act that would otherwise be a crime may be excused if it was done under compulsion or duress, because there is then no criminal intent.[583] You are cautioned again that the DEFENDANT does not have the burden of proving duress or compulsion beyond a reasonable doubt or even by a preponderance of the evidence; once the DEFENDANT has given evidence sufficient to raise a reasonable doubt as to [his] [her] intent, the burden is on the State to prove beyond a reasonable doubt that there was no duress or compulsion.

The compulsion or coercion that will excuse an otherwise criminal act must be present, and imminent or impending, and such as would induce a well-grounded apprehension of death or serious bodily harm if the criminal act is not done; it must be continuous; and there must be no reasonable opportunity to escape the compulsion without committing the crime. The mere threat of a future injury is not enough.

If, therefore, you find that the DEFENDANT has provided sufficient evidence to raise a reasonable doubt in your mind as to whether [he] [she] intended to commit the crime willfully and voluntarily, then the State must prove beyond a reasonable doubt that the duress, or compulsion, or coercion

1. did not exist; or
2. was not present at the time of the act; or
3. was not continuous, in other words, there was a break or letup in the compulsion;
4. and that the DEFENDANT had a reasonable opportunity to escape the compulsion without committing the crime.

If the State proves to your satisfaction that the duress or compulsion was not such as to induce a well-grounded apprehension of death or serious bodily harm unless the DEFENDANT committed the criminal act, then you may find the DEFENDANT guilty as charged. If, on the other hand, you have a reasonable doubt about the voluntariness of the DEFENDANT'S conduct

[583] *See*, *generally*, Syl. pt. 1, *State v. Tanner*, 171 W. Va. 529, 301 S.E.2d 160 (1982); *State v. Lambert*, 173 W. Va. 60, 312 S.E.2d 31 (1984).

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based on the presence of duress or compulsion, then you should find the DEFENDANT not guilty.

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## 8.13 Bona Fide Claim of Right (as to Robbery and Larceny)

The Court instructs you that a person who takes property in good faith under fair color or claim of title, honestly believing that he or she is the owner and has a right to take it, is not guilty of [*insert* offense], even though that belief is mistaken. Such a person would, in most cases, lack felonious intent.[584]

Therefore, if you have a reasonable doubt as to the defendant's guilt based upon [his] [her] belief that [he] [she] owned the property in question, then the State has failed to prove beyond a reasonable doubt that the defendant intended to commit the offense and you must find the defendant not guilty of [*insert* offense].

## COMMENTS

Proving intent is a matter of looking at the circumstances surrounding the taking. So, for example, if the defendant takes the property but then hides it, that might tend to show a lack of belief in the right to take it or in the ownership thereof. "Facts and circumstances indicating lack of confidence in the claim of right under which property has been taken and carried away, and determination to defeat the adverse claim by putting the property beyond the reach of legal process, such as concealment, disposition or destruction thereof, tend to prove lack of good faith on the part of the taker." Syl. Pt. 4, *State v. Bailey*, 63 W. Va. 668, 60 S.E. 785 (1908).

The most recent case to discuss the defense in any substantive way is *State v. Kelly*, 175 W. Va. 804, 338 S.E.2d 405 (1985). An unreported memorandum decision issued in 2017 discussed whether the addition to language similar to the instruction herein of a sentence that "a defendant's mistaken belief of the law is not a defense…" rendered the instruction unconstitutional. The Supreme Court of Appeals found that the jury instructions as a whole properly instructed the jury. *State v. Bowen*, 2017 WL 4711417.

[584]Syl. Pt. 1, *State v. Kelly*, 175 W. Va. 804, 338 S.E.2d 405 (1985); citing Syl. Pt. 2, *State v. Bailey*, 63 W. Va. 668, 60 S.E. 785 (1908).

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