NEW MEXICO LAW REVIEW

Volume 13
Issue 2 *Spring 1983*

Spring 1983

Criminal Law

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CRIMINAL LAW

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INTRODUCTION

This has been a year of definitions and clarification in the area of criminal law. The New Mexico appellate courts have focused considerable attention on statutory terms in need of definition for proper consideration by the jury. In addition to defining such diverse terms as "dwelling house" in a burglary statute and "average person" in a city ordinance, the courts held that certain words are within the common knowledge of most people and need no definition.

The courts have also directed their energies at clarification, particularly in the area of sentencing. Conflicting decisions had been handed down as a result of statutory amendments to the Habitual Offender Act. The New Mexico Supreme Court finally resolved the confusion this year.

The other major area of activity centered around the crime of voluntary manslaughter. This particular crime has always generated a great deal of law and this year was no exception.

STATUTORY CONSTRUCTION

1. Kidnapping

In *State v. Carnes*,[1] the New Mexico Court of Appeals found no error in the trial court's refusal to give the defendant's requested instruction defining the word "hostage" in a prosecution for kidnapping.[2] The requested instruction properly defined the word "hostage"[3] and the definition was not covered by any uniform jury instruction. Therefore, the

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1. 97 N.M. 76, 636 P.2d 895 (Ct. App. 1981).

2. *See* N.M. Stat. Ann. § 30-4-1 (1978), which provides:

> A. Kidnapping is the unlawful taking, restraining or confining of a person, by force or deception, with intent that the victim:
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> (1) be held for ransom;
>
> (2) as a hostage, confined against his will; or
>
> (3) be held to service against the victim's will.
>
> B. Whoever commits kidnapping is guilty of a first degree felony except that he is guilty of a second degree felony when the victim is freed without having had great bodily harm inflicted upon him by his captor.

3. Defendant's requested instruction was taken from the following language found in State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971): "[H]ostage . . . implies the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person." *Id.* at 492–93, 484 P.2d at 334–35.

court of appeals also found it would not have been error had the trial court given the instruction.[4]

The court began its analysis by distinguishing this case from two previous New Mexico cases, *State v. Ruiz*[5] and *State v. Marquez*.[6] In *Ruiz*, the court of appeals reversed the trial court which had refused to give an instruction which would have told the jury how to determine the defendant's competency to make a statement. No appropriate definition of competency exists in the criminal jury instructions. In *Marquez*, the trial court had refused a defense instruction defining the term "mental illness" for which there is no definition in the uniform jury instructions. In *Marquez*, the tendered instruction was not a correct statement of the law; therefore, there was no error in the court's refusal to give it.[7] However, the *Marquez* court cited *Ruiz* for the proposition that "because the meaning of mental disease is not adequately covered, it would have been error to refuse a requested instruction which correctly defined the term."[8]

The court of appeals distinguished these cases from *Carnes* because both mental illness and competency to give a statement are technical terms which must be defined for the jury if so requested. The court found the word "hostage" not to be a technical term, but rather a term of common understanding which could be understood by the jury without definition. *State v. Carnes* holds that the trial court's refusal to give a requested instruction defining a term contained in the charge against the defendant will not be error if the term is one of common understanding. Assuming, however, the definition is a correct statement of the law, giving it will not constitute error. If the instruction defines a term of a technical nature and the definition is a correct statement of the law, the instruction must be given. Unfortunately, the court provided no guidance in the determination of which words are within the "common understanding." That problem will continue to arise and be resolved on a case by case basis.

2. *Burglary*

In *State v. Ervin*,[9] the court of appeals defined the perimeters of the term "dwelling house" as used in the New Mexico burglary statute.[10]

4. "We point out that it would not have been error to have given the requested instruction which correctly defined 'hostage.' " 97 N.M. at 79, 636 P.2d at 898.

5. 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

6. 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

7. *Id.* at 749, 634 P.2d at 1301.

8. *Id.*

9. 96 N.M. 366, 630 P.2d 765 (Ct. App. 1981).

10. N.M. Stat. Ann. § 30-16-3 (1978):

> Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

The uniform jury instructions define a dwelling house as "any structure, any part of which is customarily used as living quarters."[11] This instruction failed to contend with the question presented by the *Ervin* case: When does a dwelling house cease to be a dwelling house? The question was vital to the defendant because the burglary of a dwelling house is a third-degree felony, whereas the burglary of any other structure is a fourth-degree felony.[12]

The house in this case had not been occupied for more than one year; gas, water, and electricity had been turned off; and mattresses had been stacked against the windows. The former occupant of the dwelling was an elderly, infirm lady who presumably would not be able to reoccupy the house in the foreseeable future. There was no evidence presented, however, that the lady had abandoned the house with no intention of ever returning.

Interestingly, this question had never been addressed by the New Mexico courts, which took the occasion to formally adopt the common law definition of a dwelling house. That definition provides that a building is not a dwelling house before the first occupant has moved in nor does it continue to be a dwelling house after the last occupant has moved out, if the last occupant has no intention of returning.[13] During the entire interim time it remains a dwelling even if unoccupied for an extended period of time. Without evidence in this case that the last occupant had no intention of returning, the court held this building remained a dwelling within the meaning of the statute. Therefore, the court of appeals affirmed the defendant's conviction for residential burglary.

3. Escape from Jail

In *State v. Gilman,*[14] the court of appeals held that the offense of escape from jail[15] logically includes a situation where the defendant escapes from a location outside the physical confines of the jail. The defendant, Gilman,

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A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.

B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

11. N.M. U.J.I. Crim. 16.21.

12. N.M. Stat. Ann. § 30-16-3 (1978). See *supra* note 10 for text of the statute.

13. The court cited R. Perkins, Criminal Law and Procedure 157 (1957); 3 Burdick, Law of Crime § 694 (1946); W. Clark and W. Marshall, A Treatise on the Law of Crimes § 13.02 (6th ed. 1958). 96 N.M. at 367, 630 P.2d at 766.

14. 97 N.M. 67, 636 P.2d 886 (Ct. App. 1981).

15. See N.M. Stat. Ann. § 30-22-8 (1978), which provides: "Escape from jail consists of any person who shall have been lawfully committed to any jail, escaping or attempting to escape from such jail. Whoever commits escape from jail is guilty of a fourth degree felony."

was serving a sentence at the Roosevelt County jail and escaped while he was working at the county fairgrounds.

Gilman argued that strict construction of the statute prohibiting escape from jail required construing escape to encompass only escape from within the confines of the jail building itself. Although the opinion did not contain the details of the defendant's analysis, merit for this argument can be found by comparing this statute with the statute prohibiting escape from the penitentiary.[16] That statute contains a specific section prohibiting escape from areas outside the confines of the penitentiary building itself. The statute prohibiting escape from a jail contains no such language. Furthermore, the state would not be without a remedy should the statute be construed as Gilman argued. A prisoner who escapes while working outside the jail building or while being transported could be charged with escape from custody of a peace officer, which provides the same penalty as escape from jail.[17]

Rejecting Gilman's argument, the court of appeals found support in another statute which permits county jail officers to compel jail prisoners to work on public roads and buildings.[18] Construing that statute with the statute prohibiting escape from jail, the court interpreted the latter statute to punish "one who escapes custody while lawfully sentenced to jail."[19]

4. Disorderly Conduct

City of Alamogordo v. Ohlrich[20] involved the interpretation of the words "average person" in section 6-2-8(d) of the codified ordinances of the City of Alamogordo.[21] The ordinance defines disorderly conduct as "using, in any public place, words which are inherently likely to provoke an immediate violent reaction in an average person to whom such words

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16. N.M. Stat. Ann. § 30-22-9 (1978) provides:

Escape from penitentiary consists of any person who shall have been lawfully committed to the state penitentiary:

A. escaping or attempting to escape from such penitentiary; or

B. escaping or attempting to escape from any lawful place of custody or confinement and although not actually within the confines of the penitentiary.

Whoever commits escape from penitentiary is guilty of a second degree felony.

17. See N.M. Stat. Ann. § 30-22-10 (1978), which states:

> Escape from custody of a peace officer consists of any person who shall have been placed under lawful arrest for the commission or alleged commission of any felony, unlawfully escaping or attempting to escape from the custody or control of any peace officer.
>
> Whoever commits escape from custody of a peace officer is guilty of a fourth degree felony.

Violations of this statute and N.M. Stat. Ann. § 30-22-8 (1978) are both fourth-degree felonies.

18. N.M. Stat. Ann. § 33-3-19 (1978).

19. 97 N.M. at 68, 636 P.2d at 887.

20. 95 N.M. 725, 625 P.2d 1242 (Ct. App. 1981).

21. Alamogordo, N.M., Ordinances § 6-2-8(d) (1960).

are addressed." The police arrested the defendant after he shouted, "You mother fucking son-of-a-bitch," to a policeman who was attempting to arrest a motorist.[22]

The decision held that "a trained police officer is not an average person."[23] The court in *Ohlrich* quite correctly assumed that a police officer should be trained to use more restraint than an average person and should be able to take a certain amount of verbal abuse without reacting violently. The court of appeals reversed the defendant's conviction because the statute required specifically that the words used be likely to provoke an immediate violent reaction in the person addressed.[24]

The Albuquerque disorderly conduct ordinance[25] contains the same language as that used in the Alamogordo ordinance which was before the court in *Ohlrich*. The Albuquerque ordinance defines disorderly conduct in part as "[u]sing in any public place fighting words which by their very utterance are likely to promote a violent reaction in an average person to whom such words are addressed."[26] The Albuquerque ordinance prohibiting assault is also comparable. That ordinance defines assault as "[t]he use of fighting words which by their very utterance are likely to cause an average addressee to fight."[27] The holding in *Ohlrich* should be applicable to both Albuquerque ordinances.

When comparing the Alamogordo ordinance at issue in *Ohlrich* with the relevant New Mexico statutes, however, the definitions are not sufficiently similar for *Ohlrich* to be controlling. The New Mexico statute prohibiting assault by the use of words defines the crime as "the use of insulting language toward another impugning his honor, delicacy or reputation."[28] The word "another" is not defined and could include a policeman.[29] The New Mexico disorderly conduct statute is also outside the

22. 95 N.M. at 726, 625 P.2d at 1243.

23. *Id.*

24. This decision was probably mandated by Lewis v. City of New Orleans, 415 U.S. 130 (1974). In *Lewis*, the United States Supreme Court reversed a conviction for a violation of a New Orleans ordinance making it a breach of the peace "for any person wantonly to curse or revile or use obscene or opprobrious language toward or with reference to" a city policeman. *Id.* at 132. The words at issue in *Lewis* were, "you god damn m. f. police." *Id.* at 131 n. 1. Justice Powell, in his concurring opinion, stated that "a properly trained [police] officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen. . . ." *Id.* at 135.

25. Albuquerque, N.M., Ordinances § 2–5 (Nov. 1, 1978).

26. *Id.* § 2-5(E).

27. *Id.* § 2-1(C).

28. N.M. Stat. Ann. § 30-3-1(C) (1978).

29. The constitutionality of that section of the statute is in serious question. "We recognize that, properly raised, we might agree that a constitutional infirmity in the statute exists insofar as *first* and *fourteenth* . . . amendment rights are concerned, *Gooding v. Wilson*, 405 U.S. 518 . . . (1972)." State v. Parrillo, 94 N.M. 98, 99, 607 P.2d 636, 637 (Ct. App.), *cert. denied*, 94 N.M. 629, 614 P.2d 546 (1979). *Gooding v. Wilson* involved a Georgia statute which suffered from the same infirmity as the New Orleans ordinance in *Lewis v. City of New Orleans*. *See supra* note 24. The Georgia statute proscribed the use of "opprobrious" language.

confines of this decision. The verbal conduct in that statute must tend to disturb the peace in order to create grounds for a conviction.[30]

5. Receiving Stolen Property

In *Sanchez v. State*,[31] the New Mexico Supreme Court reversed convictions for receiving stolen property. The relevant statute states: "Receiving stolen property means intentionally to receive, retain or dispose of stolen property. . . ."[32] Thus, the broad concept of "receiving stolen property" includes property that is either received, retained, or disposed of by the defendant. A complication arises when there are charges of separate acts which may require separate proof. In *Sanchez,* the defendants had allegedly taken property from four separate victims. The defendants argued that they should have been charged with four separate counts. The indictment, however, cumulated the four charges for the purpose of making the crime a third-degree felony,[33] thus allowing for a substantially higher penalty than would have been permitted by charging each offense separately as a fourth-degree felony.[34] The New Mexico Supreme Court ruled in favor of the defendants, holding that cumulating offenses in this indictment "would allow the State to increase a misdemeanor to a felony by combining separate offenses to reach the statutory amount for a felony."[35]

If the indictment had charged the defendants with retaining stolen property owned by different individuals but all possessed by the defendants at the same time, this would have been a single act and the value of the property could have been cumulated to create a third-degree felony. Similarly, if the defendants had been charged with disposing of all the property at the same time and place, that would have been a single transaction. But if the defendants disposed of the property on different occasions, each "disposal" would constitute a separate count involving different facts. The key is whether different facts are required to prove each charge. If so, there are separate crimes; if not, there is only one crime. " 'The test to be applied to determine whether there are two

30. N.M. Stat. Ann. § 30-20-1 (1978). The New Mexico Supreme Court had previously ruled in State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978), that a conviction under the New Mexico disorderly conduct statute will not stand when based only on evidence that the defendant was angry, spoke to the policeman in a loud voice, and had his fist clenched.

31. 97 N.M. 448, 640 P.2d 1325 (1982).

32. N.M. Stat. Ann. § 30-16-11 (1978).

33. Receiving stolen property when the value is $100 or less is a petty misdemeanor; receiving stolen property when the value of the property is over $100 but not more than $2500 is a fourth-degree felony; and receiving stolen property when the value of the property exceeds $2500 is a third-degree felony. N.M. Stat. Ann. § 30-16-11 (1978).

34. N.M. Stat. Ann. § 31-18-15 (Repl. Pamp. 1981).

35. 97 N.M. at 449, 640 P.2d at 1326.

offenses or only one is whether each count requires proof of an additional fact which the other does not.' "[36]

In *Sanchez,* the indictment was extremely vague without any specific facts to alert the defendants to the actual charges against them. The defendants could not determine whether the charges were being stacked to increase the penalty because they did not know whether they were being charged with receiving, retaining, or disposing of property. The court found the indictment to be fatally defective.

6. Custodial Interference

In *State v. Sanders,*[37] the court of appeals defined the words "knowing" and "legal right" in the statute prohibiting custodial interference.[38] The defendant in *Sanders* had actual knowledge of a children's court order temporarily depriving him of custody of his child; that order had expired, however, by the time the defendant took the child out of the state. On September twenty-eighth, the children's court held a second hearing, *ex parte,* without notice to the defendant. At that hearing the court orally awarded custody of the child to the Department of Human Services. The defendant took the child on October fourteenth and the court filed a written custody order on October sixteenth.

The *Sanders* court held that the "knowing" requirement in the statute would be met "if defendant was actually aware of the court's custody orders or, in the exercise of reasonable diligence, should have been aware of the . . . custody orders."[39] The only order of which the defendant had actual notice had expired by the time he took the child. The court held, however, that through reasonable efforts the defendant could have learned of the September twenty-eighth hearing and the oral order of the court awarding custody to the Department of Human Services. Therefore, the court of appeals held that the "knowing" requirement had been satisfied.

The court nonetheless reversed the defendant's conviction and held that the oral order of September twenty-eighth granting custody to the Department of Human Services was not effective to terminate the defendant's legal right to custody. Children's court Rule 62(a) specifically provides that the "judge shall sign a *written* judgment and disposition in

36. *Id.* at 450, 640 P.2d at 1327 (quoting United States v. Schrenzel, 462 F.2d 765, 771 (8th Cir.), *cert. denied,* 409 U.S. 984 (1972).

37. 96 N.M. 138, 628 P.2d 1134 (Ct. App. 1981).

38. N.M. Stat. Ann. § 30-4-4 (1978):

> A. Custodial interference consists of the taking from this state or causing to be taken from this state, or enticing to leave this state or causing to be enticed to leave this state, a child who is less than sixteen years of age by a parent with the intention of holding the child permanently or for a protracted period, knowing that he has no legal right to do so.
>
> B. Whoever commits custodial interference is guilty of a fourth degree felony.

39. 96 N.M. at 140, 628 P.2d at 1136.

. . . neglect proceedings."[40] The court had not entered a written order until October sixteenth, two days after the defendant had failed to return the child to the Department. Therefore, when the defendant took the child on October fourteenth, he still had a legal right to do so.

DRUG CONVICTIONS

Two convictions under the New Mexico Controlled Substances Act[41] gave the appellate courts the opportunity to discuss suppression of evidence by the state, Wharton's Rule, and the applicablity of the Act to physicians.

1. State Suppression of Evidence

The problems arising when the state or its agents lose or fail to preserve evidence have been the subject of several New Mexico cases over the past number of years.[42] The precise set of standards contained in the newest case, *State v. Chouinard*,[43] did not solve those problems.

In *Chouinard*, the New Mexico Supreme Court adopted the rules first announced by the New Mexico Court of Appeals in *State v. Lovato*.[44] *Lovato* imposed three requirements for a determination of reversible error when evidence has been lost by the state: (1) the state either breached some duty or intentionally deprived the defendant of evidence; (2) the improperly "suppressed" evidence must have been material; and (3) the suppression of this evidence prejudiced the defendant.[45] An analysis of these three requirements in light of the facts in *Lovato* and *Chouinard* exposes some remaining questions.

Lovato involved the negligent failure of the state to preserve a blood sample in a vehicular homicide case grounded on the defendant's alleged intoxication.[46] In *Chouinard*, the defendant was charged with trafficking in cocaine. The police negligently destroyed the alleged drugs because they erroneously thought the case had been resolved. Although police chemists had analyzed the blood sample in *Lovato* and the alleged cocaine in *Chouinard*, the substances were destroyed before the defendants had any opportunity to engage chemists for independent analyses. In each case, the state introduced the test results and the state's chemists testified as to the tests they had performed. In *Lovato*, the court of appeals reversed the conviction; in *Chouinard*, the supreme court affirmed the conviction.

40. N.M. R. Child. Ct. P. 62(a) (emphasis added).

41. N.M. Stat. Ann. §§ 30-31-1 to -40 (Repl. Pamp. 1980 & Cum. Supp. 1982).

42. Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965); State v. Lovato, 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980); Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975).

43. 96 N.M. 658, 634 P.2d 680 (1981).

44. 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980).

45. *Id.* at 782, 617 P.2d at 171.

46. The defendant was charged with violating N.M. Stat. Ann. § 66-8-101(B) (1978).

The defendants in both *Lovato* and *Chouinard* met the first two requirements of the *Lovato* decision.[47] The difficult problem arose with the third requirement that the defendant show the suppression of evidence had prejudiced him. In *Lovato*, the defendant succeeded in this showing but in *Chouinard*, the defendant failed. The defendant in *Chouinard* had based his entire defense on the theory that the tests performed by the state's chemists did not prove beyond a reasonable doubt that the substance which he was charged with selling was cocaine. The defendant's only witness was a chemist who testified that the tests performed by the state's chemists were improperly conducted and were not the correct tests to determine the exact nature of the destroyed substance. The chemist further testified that other readily available tests could have been performed and if properly conducted, would have conclusively determined the nature of the substance.

The New Mexico Supreme Court was not persuaded:

> In the posture of this case, we cannot say that there is a realistic basis, beyond extrapolated speculation, for supposing that availability of the lost evidence would have undercut the prosecution's case. Chouinard made no assertion . . . that the substance was other than what the State said it was. His only defense was that the State's tests were insufficiently conclusive.[48]

The *Chouinard* court distinguished the previous lost evidence cases, *Lovato*, *Chacon v. State*,[49] and *Trimble v. State*,[50] all of which reversed convictions, either on the basis of a stronger showing of prejudice,[51] the failure to disclose the loss prior to trial,[52] or prosecutorial misconduct

47. The first requirement followed previous case law in New Mexico in providing that no different standard exists for intentional or negligent destruction of evidence by the state if the evidence lost is both material and prejudicial to the defendant. Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975). Although not explicitly discussed in the previous cases, *Chouinard* seems to hold that a showing of bad faith on the part of the state would be sufficient to find reversible error even without a showing of materiality and prejudice. The second requirement—that the evidence be material—was never fully explained in *Chouinard*, although the court of appeals in *Lovato* defined matreriality as evidence "material to the guilt or innocence of the accused, or to the penalty to be imposed." 94 N.M. at 782, 617 P.2d at 171 (quoting State v. Morris, 69 N.M. 244, 365 P.2d 668 (1961)). This requirement caused no trouble because the defendants clearly met it in both cases.

48. 96 N.M. at 663, 634 P.2d at 685.

49. 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975).

50. 75 N.M. 183, 402 P.2d 162 (1965).

51. The court stated:

> *Lovato* . . . dealt with the invocation of a statutory presumption of guilt based on a blood alcohol test. Retesting could have made invocation of the presumption improper. This is significant because it appears that no other evidence was presented on the question of the defendant's intoxication. In the present case, the test results were not so determinative of guilt.

96 N.M. at 662, 634 P.2d at 684.

52. "*Chacon* . . . presented a situation where the jury, and the defendant, were unaware during the trial of the prosecution's failure to disclose relevant evidence. This presented a question signif-

and inappropriate police conduct.[53] These factors did not exist in *Chouinard*. A statutory presumption was not involved; the state disclosed the loss prior to trial; and the loss was the result of negligence, not bad faith.

Chouinard gives the trial court two alternatives when the loss is known prior to trial: "Exclusion of all evidence which the lost evidence might have impeached, or admission with full disclosure of the loss and its relevance and import."[54] The trial court must make the choice, in its discretion, depending on an assessment of materiality and prejudice. Full disclosure having been made to the jury in *Chouinard*, the court ruled any prejudice caused by the lost evidence had been cured.

One crucial question remains: How is the defendant supposed to establish prejudice when the very means by which he could do so has been destroyed? The requirements adopted by the New Mexico Supreme Court in *Chouinard*, when applied to the facts in that case, appear to have shifted the burden of proof to the defendant by requiring him to prove the nature of the substance which the state has charged him with distributing: "Chouinard did not say what the substance was, only that it might have been something other than illegal cocaine."[55] The burden of proof of each essential element of a crime is always upon the state,[56] yet the *Chouinard* court held that the defendant must prove to the jury what the substance is and that he must do so without the substance. Full disclosure to the jury will ordinarily cure any prejudice. This catch-22 situation places impossible burdens on the defendant.[57]

2. *Wharton's Rule*

In *State v. Carr*,[58] the court of appeals dealt with two interesting, if somewhat esoteric issues: the application of Wharton's Rule and the relationship between the sections of the Controlled Substances Act dealing

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icantly different from the case at hand, where the destruction of evidence was fully presented to the jury for their consideration." *Id.*

53. *Trimble* . . . was a response to wholly inappropriate police conduct. There, evidence not necessary to the prosecution was taken, damaged and lost. The prosecutor apparently contradicted himself at trial as to the very existence of the lost items. The defendant specifically identified the contents of the lost evidence. Here, however, Chouinard did not say what the substance was, only that it might have been something other than illegal cocaine. There is no indication of prosecutorial misconduct at trial.

Id.

54. *Id.*

55. *Id.*

56. Mullaney v. Wilbur, 421 U.S. 684 (1975).

57. This could perhaps give the state license to "negligently" destroy evidence without fear of reprisals.

58. 95 N.M. 755, 626 P.2d 292 (Ct. App.), *cert. denied*, 95 N.M. 669, 625 P.2d 1186, U.S. *cert. denied*, ___ U.S. ___, 102 S. Ct. 298 (1981).

with street crimes and those dealing with persons registered to distribute certain drugs.

Carr, a medical doctor, was convicted of forty-two counts of conspiracy to traffic, trafficking, and distributing controlled substances by writing prescriptions not in the course of his professional medical practice or research. One question presented was whether or not Wharton's Rule[59] applied to the conspiracy charge. "Wharton's Rule provides that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the particular crime is of such a nature as to necessarily require the participation of two persons for its commission."[60] The classic Wharton's Rule offenses are adultery, incest, bigamy, and dueling.[61] These are crimes which require an agreement in order to exist and the parties to the agreement are the only persons who participate in the commission of the substantive offense. Furthermore, the consequences of the crime rest upon the parties themselves rather than on society at large. Wharton's Rule is not constitutionally mandated, but is "a judicial presumption, to be applied in the absence of legislative intent to the contrary."[62]

From the facts available in the *Carr* opinion, it appears that a co-conspirator named Nicky Jones took the prescriptions written by the defendant, obtained the drugs, then sold them and shared the money she obtained with the defendant. While trafficking in controlled substances clearly requires at least two people, a giver and a taker of the drugs, the court felt that the other requirements of Wharton's Rule were not met. Most importantly, the court found that drug distributing affects society as a whole because those under the influence of drugs may commit other crimes and the drugs themselves may be passed on to other purchasers. Finally, the court rejected the defendant's arguments because the application of Wharton's Rule is inappropriate when the agreement poses a threat to society which the law of conspiracy seeks to avert.

3. Applicabiilty of the Controlled Substances Act to Physicians

Carr also provided an exhaustive explanation of the relationship between three sections of the Controlled Substances Act. Section 30-31-20 prohibits trafficking in narcotic drugs;[63] section 30-31-22 prohibits distributing nonnarcotic controlled substances;[64] and section 30-31-24 pro-

59. Wharton's Rule owes its name to Francis Wharton, whose treatise on criminal law identified the doctrine and its fundamental rationale. *See* 4 C. Torcia, Wharton's Criminal Law § 731 (14th ed. 1981).

60. 95 N.M. at 766, 626 P.2d at 303.

61. *See* Iannelli v. United States, 420 U.S. 770 (1975).

62. *Id.* at 782.

63. N.M. Stat. Ann. § 30-31-20 (Repl. Pamp. 1980).

64. N.M. Stat. Ann. § 30-31-22 (Repl. Pamp. 1980).

hibits the issuance of prescriptions not in the course of professional medical practice or research.[65] A first offense under section 30-31-20 is a second-degree felony; second and subsequent offenses are first-degree felonies. Under section 30-31-22, the degree of felony varies depending on the drug involved and whether the violation is a first offense under the statute. A violation of section 30-31-24 is a fourth-degree felony.

The defendant argued that the statutory scheme of the New Mexico Controlled Substances Act embraces two parallel systems of drug enforcement depending upon whether the violator is registered to conduct transactions in controlled substances. In this case the defendant was a physician who was registered to conduct such transactions. The New Mexico Supreme Court held against the defendant, relying heavily on *United States v. Moore*,[66] which had interpreted the similar federal Controlled Substances Act to allow the prosecution of a physician for distribution of drugs. After a detailed comparison of the definitional sections of the New Mexico Controlled Substances Act as they applied to physicians and non-physicians, the New Mexico Supreme Court held that "[t]he Legislature did not establish parallel systems—one for registrants under the Controlled Substances Act and another one for everyone else."[67] In so holding, the New Mexico Supreme Court refused to shield a physician writing prescriptions from a second-degree felony conviction if in fact he was not dispensing the drugs for legitimate medical purposes. "When . . . a physician acts without any legitimate medical purpose and beyond the course of professional practice by selling prescriptions that allow the bearer to obtain controlled substances, his conduct should be treated like that of any street-corner pill-pusher."[68] Thus, the court upheld the defendant's convictions for trafficking and distributing drugs.

SENTENCING

In the area of sentencing, the emphasis this year was on clarification. The New Mexico Supreme Court resolved some confusion about the sentencing of habitual offenders by reversing the court of appeals' decision in *Hernandez v. State*,[69] overruling a previous case, *State v. Valenzuela*,[70] and affirming and adopting the opinion of the court of appeals in *State v. Hughes*.[71]

65. N.M. Stat. Ann. § 30-31-24 (Repl. Pamp. 1980).

66. 423 U.S. 122 (1975). The New Mexico Controlled Substances Act is patterned on the Uniform Controlled Substances Act, Unif. Controlled Substances Act, 9 U.L.A. 187 (1970), which is similar to the federal Controlled Substances Act, 21 U.S.C. §§ 801–966 (1976).

67. 95 N.M. at 761, 626 P.2d at 298.

68. *Id.* at 763, 626 P.2d at 300 (quoting United States v. Green, 511 F.2d 1062 (7th Cir. 1975)).

69. 96 N.M. 585, 633 P.2d 693 (1981).

70. 94 N.M. 285, 609 P.2d 1241 (Ct. App. 1979), *aff'd*, 94 N.M. 340, 610 P.2d 744 (1980).

71. 96 N.M. 606, 633 P.2d 714 (Ct. App.), *aff'd*, 96 N.M. 585, 633 P.2d 693 (1981).

The question in each of these cases was whether the rule previously announced in *State v. Linam*[72] had been changed by the enactment of a rewritten habitual offender statute.[73] In *Linam*, the New Mexico Supreme Court had held that the habitual offender act applied only to a felony committed after conviction for a previous felony. The court's holding was consistent with the previous statute, which allowed one to be prosecuted under the habitual offender act only if "after having been convicted . . . [he] commits any felony."[74] The 1979 amendment completely redrafted the section and omitted this language. The new statute states only that "[a]ny person convicted of a noncapital felony in this state who has incurred one prior felony conviction which was part of a separate transaction or occurrence is a habitual offender. . . ."[75] The supreme court in *Hernandez* held, however, that this change in the language of the statute did not change the result reached in *Linam*.

The court of appeals' decision in *Hernandez* had not directly addressed the question of the relationship between *Linam* and the amended statute. That court held, however, that evidence that the defendant had been convicted of robbery in 1975 and subsequently convicted of fraud in 1980 was sufficient for conviction under the new statute because "the California conviction was prior to the New Mexico conviction, and . . . it was part of a separate transaction or occurrence."[76]

Two months later in *Hughes*, the court of appeals rejected the state's argument that the new statute requires only that the prior felony convictions be part of separate transactions or occurrences. The court based its decision on the lack of a clear showing that the legislature intended a different purpose than that expressed in *Linam*.

The supreme court in *Hernandez* adopted the court of appeals' reasoning from *Hughes* and interpreted the statute as requiring that one cannot be convicted as a habitual offender unless the prior felony conviction occurred before the subsequent offense. In other words, construing the statute in accordance with *Linam*, the phrase "prior felony conviction" in the statute means prior to commission of the subsequent felony.

The New Mexico Supreme Court dealt with a second issue in *Hernandez*. The court held that the sole question submitted to the jury in any habitual prosecution was the question of the identity of the defendant. The jury can only be asked to find that the defendant is or is not the same person who was convicted of the previous crime. The trial judge must determine whether or not the convictions occurred before or after the

72. 93 N.M. 307, 600 P.2d 253, *cert. denied*, 444 U.S. 846 (1979).
73. N.M. Stat. Ann. § 31-18-17 (Repl. Pamp. 1981).
74. N.M. Stat. Ann. § 31-18-5 (1978).
75. N.M. Stat. Ann. § 31-18-17 (Repl. Pamp. 1981).
76. 96 N.M. at 605, 633 P.2d at 713.

subsequent offense, i.e., whether the *Linam* requirement was satisfied.[77] In so holding, the New Mexico Supreme Court overruled *State v. Valenzuela,*[78] in which the court of appeals had held that the sequence of convictions was an element of the state's case, not a defense to be raised and established by the defendant. The sequence of convictions is no longer an element of the state's case but an affirmative defense.

Two other cases involved enhancement proceedings under the Controlled Substances Act.[79] In *State v. Santillanes,*[80] the defendant pled guilty and was convicted of three counts of trafficking in heroin. He had previously been convicted of the same offense but contended that since the present indictment did not specifically call for an enhanced penalty based upon a second conviction for trafficking, he could not be sentenced to the enhanced penalty. He also argued that his sentence could not be enhanced after he had already begun serving it.[81] The supreme court rejected both arguments. The court held that the notice of intent to enhance the penalty required by *State v. Rhodes,*[82] may be given after the underlying sentence is already being served without offending due process. The supreme court relied on its previous decision in *State v. Stout,*[83] where it had held that enhancement of a sentence after the defendant had begun serving it did not violate due process. The supreme court also found no constitutional or statutory bar to the enhancement of the defendant's sentence after he had begun to serve it.

State v. Sanchez,[84] involved an issue which has now become moot because the statute upon which the *Sanchez* court based its decision has been amended to avoid the problem raised in this case.[85] The question

77. "The sequence of commission-conviction may be determined by the trial judge similarly to questions raised concerning the validity of prior convictions." 96 N.M. at 586, 633 P.2d at 694.

78. 94 N.M. 340, 610 P.2d 744 (1980).

79. N.M. Stat. Ann. § 30-31-20(B) (Repl. Pamp. 1980). This section provides for an enhanced sentence for second and subsequent convictions of trafficking in controlled substances. Prior to being amended in 1980, the statute did not provide any procedures for imposition of the enhanced sentence. *See* State v. Santillanes, 96 N.M. 477, 478, 632 P.2d 354, 355 (1981).

80. 96 N.M. 477, 632 P.2d 354 (1981).

81. Pursuant to N.M. Stat. Ann. § 30-31-20(B) (1978), which was in effect at the time of the defendant's sentencing, the appropriate sentence for each count of trafficking in heroin would have been 10 to 50 years.

82. 76 N.M. 177, 413 P.2d 214 (1966), *aff'd on rehearing,* 77 N.M. 536, 425 P.2d 47 (1967). "[E]ssential fairness requires that there be some pleading filed by the state, whether it be by motion or otherwise, by which a defendant is given notice and opportunity to be heard before an increased penalty can be imposed." 76 N.M. at 181, 413 P.2d at 217.

83. 96 N.M. 29, 627 P.2d 871 (1981). Although *Stout* involved enhancement under N.M. Stat. Ann. § 30-16-2 (1978), for a second armed robbery, the statutes treat a second armed robbery and a second trafficking charge in the same fashion. In both cases, conviction for a second offense is now a first-degree felony.

84. 21 N.M. St. B. Bull. 342 (Ct. App. Nov. 17, 1981).

85. The statute in effect at the time was N.M. Stat. Ann. § 30-31-20(B) (1978). Subsection B provided that a defendant found guilty of a second trafficking offense was "guilty of a felony and shall be punished by a fine . . . or by imprisonment for life or both." The amended statute, N.M. Stat. Ann. § 30-31-20(B) (Repl. Pamp. 1980), now reads "for the second and subsequent offenses,

raised was whether a designation of a life sentence in the statute was to be considered the same as a first-degree felony. If the life sentence were to be considered a first-degree felony, New Mexico law would prohibit suspending or deferring the sentence.[86] The court of appeals held that the statute was not specific in denominating the penalty as first degree, therefore the trial court was free to suspend all or part of it or to defer sentencing on it. The supreme court affirmed,[87] holding that the crime was not a first-degree felony and that a life sentence was not mandatory. Although disagreeing with the reasoning of the court of appeals, the supreme court also affirmed the court of appeals' holding that the trial court may defer or suspend the sentence. Under the amended statute the term is now specifically designated as a first-degree felony.[88]

State v. Mabry[89] addressed another question of sentencing: Whether N.M. Stat. Ann. §31-18-3(A) (1978), by requiring a mandatory life sentence, violated the separation of powers doctrine in article III, section 1 of the New Mexico Constitution. Section 31-18-3(A) prohibited deferred or suspended sentences for first-degree felonies.[90] The court held that the legislature could impose certain sentencing restrictions on judges without violating the separation of powers doctrine embodied in the New Mexico Constitution.[91]

HOMICIDE CASES

Three cases decided this year involved questions related to voluntary manslaughter. In *State v. Venegas*,[92] the defendant claimed that the court

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[a defendant found] guilty of a first degree felony . . . shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978."

86. N.M. Stat. Ann. §31-20-3 (Repl. Pamp. 1981).

87. State v. Sanchez, 97 N.M. 521, 641 P.2d 1068 (1982).

88. The defendant in *Sanchez* also contended that the penalty of life imprisonment was cruel and unusual punishment in violation of the eighth amendment to the United States Constitution. The recent United States Supreme Court decision in Rummel v. Estelle, 445 U.S. 263 (1980), foreclosed this question.

89. 96 N.M. 317, 630 P.2d 269 (1981).

90. Although the statute under which Mabry was punished has now been repealed, the new statute imposes the same requirement. N.M. Stat. Ann. §31-20-3 (Repl. Pamp. 1981), states:

> Upon entry of a judgment of conviction of any crime not constituting a capital or *first degree felony,* any court having jurisdiction when it is satisfied that the ends of justice in the best interest of the public as well as the defendant will be served thereby, may either:
>
> A. enter an order deferring the imposition of sentence;
>
> B. sentence the defendant and enter an order suspending in whole or in part the execution of the sentence. . . .

(Emphasis added.)

91. Judge Gene Franchini, District Judge, Second Judicial District, stepped down rather than enforce a different mandatory jail sentence provided by the legislature under N.M. Stat. Ann. §31-18-16 (Repl. Pamp. 1981). That statute imposes a mandatory prison term of one year in any case involving the use of a firearm. In State v. Aguilar, (N.M. Ct. App. no. 5082, Aug. 11, 1981) (unreported), the New Mexico Court of Appeals ordered Judge Franchini to sentence the defendant to jail. Rather than do so, Judge Franchini resigned.

92. 96 N.M. 61, 628 P.2d 306 (1981).

of appeals' refusal of her tendered jury instruction, N.M. U.J.I. Crim. 41.15, on mistake of fact, was prejudicial error. The New Mexico Supreme Court disagreed. The court's opinion analyzed the relationship between the mistake of fact instruction[93] and the justifiable homicide—defense of another instruction.[94]

In *Venegas*, the defendant heard the sound of a gunshot while waiting outside an office for her friend. Immediately after hearing the gunshot she ran into the office where she found her friend (who was also her lover and the father of her child) and the deceased facing each other. The deceased had shot the defendant's friend in the hand and was still pointing a shotgun at him. The defendant grabbed a coke bottle and hit the deceased several times. She then took a .22 pistol from her purse and gave it to her friend who shot the deceased. The evidence showed the cause of death was the blows struck by the defendant.

The defendant requested the mistake of fact instruction. This request was based on the fact that although she entertained an honest belief the deceased was about to kill her friend, the only gun in his hands was a single-shot shotgun which had already been discharged. The New Mexico Supreme Court found that the evidence supported the defendant's theory of the case, i.e. mistake of fact, and that she was entitled to have the jury instructed upon her theory. The court held that refusal of her instruction was not error, however, because the justifiable homicide—defense of another instruction implicitly included mistake of fact. The court stated that:

> The theory of the defense to the homicide in the case at bar is justifiable homicide or defense of another embraced within N.M.U.J.I. Crim. 41.42, N.M.S.A. 1978, which instruction was given. It is essential to that defense for there to be substantial evidence that the defendant's actions were based on a reasonable belief that such action was necessary to save the life or prevent great bodily harm to another. Such belief may rest upon *apparent* danger and need not be supported by actual danger. Thus, the instruction allows and is consistent with mistaken belief. Since an honest and reasonable mistaken belief fits within the justifiable homicide instruction, the tendered instruction of mistake of fact, N.M.U.J.I. Crim. 41.15, duplicates that which was already within N.M.U.J.I. Crim. 41.42 and which was given.[95]

The court was also afraid that the addition of N.M. U.J.I. 41.15 might confuse the jury into thinking that mistake of fact was a sufficient defense to the homicide. The court's concern was that the jury would be led to believe that the defendant must be found not guilty if the state failed to

93. N.M. U.J.I. Crim. 41.15.
94. N.M. U.J.I. Crim. 41.42.
95. 96 N.M. at 62, 628 P.2d at 307 (emphasis by the court).

prove she did not act under a mistaken belief that the gun was loaded. The defense of justifiable homicide actually requires that the defendant be in fear, real or apparent, and that her fear be reasonable.

Two other significant cases decided this year involve different questions related to the crime of voluntary manslaughter. *State v. Melendez*,[96] concerned the relationship between a conviction for voluntary manslaughter and the jury's disbelief in the evidence of self-defense. *State v. Marquez*[97] involved the trial court's refusal to instruct on voluntary manslaughter. Professor Leo Romero discussed both cases in great length in a previous volume of this journal.[98] Although Professor Romero's article discussed the court of appeals' opinion in *State v. Melendez*, an opinion which has since been overruled by the New Mexico Supreme Court,[99] Professor Romero's analysis of *Melendez* predicted this result.

Melendez had been charged with murder and pled self-defense. The jury acquitted him of first and second-degree murder but found him guilty of voluntary manslaughter. In reversing his conviction, the court of appeals held that a conviction for voluntary manslaughter cannot stand as a matter of law if the jury did not acquit when there was evidence of self-defense. In essence, the court of appeals was saying that because the jury acquitted the defendant of first and second-degree murder but found him guilty of voluntary manslaughter, they had to have found provocation.[100]

The facts of the case showed that the defendant and his companions had been shot at by occupants of another car three hours earlier on the night the deceased was killed. Later, the defendant saw the other car again and testified that as he approached it another shot was fired from that car after which the defendant fired the fatal shot at one of its passengers. The court of appeals reasoned that the jury could not have believed the defendant acted in self-defense when he did the shooting or the jury would have acquitted him. "Once defendant's story of self-defense is obliterated (by reason of the jury's verdict), the only evidence of provocation left in the record is the testimony that defendant and his companion were shot at by occupants of the Tegada car about three hours

96. 97 N.M. 740, 643 P.2d 609 (Ct. App. 1981), *rev'd*, 97 N.M. 738, 643 P.2d 607 (1982).

97. 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

98. Romero, *Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice*, 12 N.M.L. Rev. 747 (1982) [hereinafter cited as Romero].

99. 97 N.M. 738, 643 P.2d 607 (1982).

100. The statute which defines voluntary manslaughter, N.M. Stat. Ann. § 30-2-3 (1978), defines it as: "[T]he unlawful killing of a human being without malice. A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion." The jury instruction defining voluntary manslaughter, N.M. U.J.I. Crim. 2.20, at that time stated in part: "[I]f you find that the defendant acted as a result of sufficient provocation or if you have a reasonable doubt as to whether he so acted, you must not find him guilty of second degree murder, and you should proceed to consider whether he is guilty of voluntary manslaughter." The wording of this instruction was changed in 1981. *See* N.M. U.J.I. Crim. 2.20 (Repl. Pamp. 1982).

earlier that night."[101] The court of appeals reversed the conviction because three hours was too long to retain sufficient "heat of passion" to justify voluntary manslaughter.

Professor Romero's discussion of *Melendez* analyzed the relationship between voluntary manslaughter and self-defense and explained the fallacy in the court of appeals' reasoning.[102] The New Mexico Supreme Court agreed. The court found it quite reasonable for the defendant to be found guilty of voluntary manslaughter even though the jury had rejected his claim of self-defense. The court reasoned that the jury could have found the defendant was provoked by the shooting which was contemporaneous with his killing of the deceased but the jury could also have failed to find that all of the elements of self-defense had been satisfied.

In *State v. Marquez*,[103] the court of appeals discussed what provocation is sufficient to reduce a charge of murder to manslaughter. The court concluded that there was no evidence to support an instruction on voluntary manslaughter after analyzing the facts from both the defendant's testimony and the testimony of the eyewitness to the killing, the victim's mother. According to the defendant, he started stabbing the victim, she escaped, threw a vase at him, and then he caught her and stabbed her again. Because the stabbing began before the vase throwing (which was alleged to be the act of provocation), it could not have provoked the defendant's actions. According to the mother's version, the defendant simply did not react to the vase throwing. Therefore, the court found that it could not have provoked him. Finally, the court held that, even if the defendant had been provoked by the vase throwing incident, it would not have been sufficient provocation because he had broken into the house and the victim had a legal right to protect her house and herself from his illegal intrusion.[104] The court affirmed his convictions for aggravated burglary and second-degree murder.

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101. 97 N.M. 744, 643 P.2d at 613.

102. Romero, *supra* note 98.

103. 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

104. [T]he exercise of a legal right, no matter how offensive, is not provocation adequate to reduce homicide from murder to manslaughter. Jeanette threw the vase at defendant, a burglar. Whether Jeanette threw the vase to protect herself or her home, she had a right to do so. . . . If there was any provocation, it was not brought about by Jeanette throwing a vase, but by defendant's illegal entry into Jeanette's home. Thus, if defendant had any provocation, that provocation would not reduce the homicide from murder to manslaughter.

Id. at 749, 634 P.2d at 1301.