Previous Next

C.R.S. 18-3-202

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Colorado Revised Statutes Annotated Title 18. Criminal Code (Arts. 1 — 26) Article 3. Offenses Against the Person (Pts. 1 — 6) Part 2. Assaults (§§ 18-3-201 — 18-3-209)

18-3-202. **Assault** in the first degree

(1) A person commits the crime of **assault** in the first degree if:

(a) With intent to cause serious bodily injury to another person, he causes serious bodily injury to any person by means of a deadly weapon; or

(b) With intent to disfigure another person seriously and permanently, or to destroy, amputate, or disable permanently a member or organ of his body, he causes such an injury to any person; or

(c) Under circumstances manifesting extreme indifference to the value of human life, he knowingly engages in conduct which creates a grave risk of death to another person, and thereby causes serious bodily injury to any person; or

(d) Repealed.

(e) With intent to cause serious bodily injury upon the person of a peace officer, firefighter, or emergency medical service provider, he or she threatens with a deadly weapon a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, and the offender knows or reasonably should know that the victim is a peace officer, firefighter, or emergency medical service provider acting in the performance of his or her duties; or

(e.5) With intent to cause serious bodily injury upon the person of a judge of a court of competent jurisdiction or an officer of said court, he threatens with a deadly weapon a judge of a court of competent jurisdiction or an officer of said court, and the offender knows or reasonably should know that the victim is a judge of a court of competent jurisdiction or an officer of said court; or

(f) While lawfully confined or in custody as a result of being charged with or convicted of a crime or as a result of being charged as a delinquent child or adjudicated as a delinquent

division in the department of human services responsible for youth services and who is a youth services counselor or is in the youth services worker classification series, he or she

threatens with a deadly weapon such a person engaged in the performance of his or her duties and the offender knows or reasonably should know that the victim is such a person engaged in the performance of his or her duties while employed by or under contract with a detention facility or while employed by the division in the department of human services responsible for youth services. A sentence imposed pursuant to this paragraph (f) shall be served in the department of corrections and shall run consecutively with any sentences being served by the offender. A person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility, as defined in section 18-8-203 (3), and who is required to report back to the detention facility at a specified time shall be deemed to be in custody.

(g) With the intent to cause serious bodily injury, he or she applies sufficient pressure to impede or restrict the breathing or circulation of the blood of another person by applying such pressure to the neck or by blocking the nose or mouth of the other person and thereby causes serious bodily injury.

(2)

(a) If **assault** in the first degree is committed under circumstances where the act causing the injury is performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the person causing the injury sufficiently to excite an irresistible passion in a reasonable person, and without an interval between the provocation and the injury sufficient for the voice of reason and humanity to be heard, it is a class 5 felony.

(b) If **assault** in the first degree is committed without the circumstances provided in paragraph (a) of this subsection (2), it is a class 3 felony.

(c) If a defendant is convicted of **assault** in the first degree pursuant to subsection (1) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

(d) Repealed.

(e) For purposes of determining sudden heat of passion pursuant to subsection (2)(a) of this section, a defendant's act does not constitute an act performed upon a sudden heat of passion if it results solely from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.

(3) Repealed.

History

Source: L. 71: R&RE, p. 420, § 1. **C.R.S. 1963:** § 40-3-202. **L. 75:** (1)(d) amended, p. 632, § 6, effective July 1; (1)(a) amended, p. 618, § 7, effective July 21. **L. 76, Ex. Sess.:** (1)(f) added, p. 8, § 1, effective September 18. **L. 77:** (1)(c) amended, p. 961, § 9, effective July 1. **L. 79:** (2) R&RE, p. 732, § 1, effective May 18. **L. 81:** (1)(d) R&RE, p. 973, § 6, effective July 1. **L. 86:** (1)(d) amended, p. 770, § 5, effective July 1; (1)(f) amended, p. 789, § 1,

p. 991, § 1, effective April 5; (1)(c.5) added and (2)(c) amended, p. 986, § 7, 8, effective April 24. **L. 94:** (1)(f) amended, p. 2655, § 137, effective July 1. **L. 95:** (1)(d) and (2)(d) repealed, p. 1250, § 6, effective July 1. **L. 97:** (2)(a) amended, p. 1544, § 13, effective July 1; (1)(e) amended, p. 1011, § 15, effective August 6. **L. 98:** (2)(c) amended, p. 1441, § 25, effective July 1. **L. 2002:** (2)(c) amended, p. 1512, § 186, effective October 1. **L. 2003:** (1)(f) amended, p. 1430, § 16, effective April 29. **L. 2014:** (1)(e) amended, (HB 14-1214), ch. 336, p. 1496, § 5, effective August 6. **L. 2015:** (3) added, (SB 15-005), ch. 108, p. 314, § 1, effective July 1; (3)(d) repealed, (SB 15-126), ch. 109, p. 318, § 3, effective July 1. **L. 2016:** (1)(g) added, (HB 16-1080), ch. 327, p. 1327, § 1, effective July 1; (3) repealed, (HB 16-1393), ch. 304, p. 1226, § 3, effective July 1. **L. 2020:** (2)(e) added, (SB 20-221), ch. 279, p. 1369, § 8, effective July 13.

Annotations

State Notes

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews.

For article, "Joinder of Criminal Charges, Election, Duplicity", see 30 Dicta 117 . For article, "One Year Review of Criminal Law", see 34 Dicta 98 (1957). For article, "The Definition of 'Deadly Weapon' Under the Colorado Criminal Code", see 15 Colo. Law. 1663 (1986).

Annotator's note. Since § 18-3-202 is similar to former § 40-2-34, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Subsection (1)(b) is unconstitutionalas violative of a person's right to equal protection of the laws. People v. Dominguez, 193 Colo. 468, 568 P.2d 54 (1977).

Subsection (1)(b) is unconstitutional because it imposes a higher penalty for essentially the same conduct proscribed in § 18-3-203(1)(a). People v. Dominguez, 193 Colo. 468,

Subsection (1)(e) is not unconstitutionally vague. People v. Jackson, 194 Colo. 93, 570 P.2d 527 (1977).

There is a sufficient pragmatic difference between the first degree **assault** statute and the second degree **assault** statute so as not to violate the defendant's constitutional guarantee of equal protection. People v. Jackson, 194 Colo. 93, 570 P.2d 527 (1977).

Divergent penalties in former versions of criminally negligent homicide and first degree assault violated equal protectionbecause both statutes proscribed similar conduct and intent. People v. Jackson, 198 Colo. 193, 601 P.2d 622 (1979).

Different mental states required for first degree assault and criminally negligent homicide justify different penalties,and thus harsher penalty for first degree **assault** does not violate equal protection. People v. Lucero, 714 P.2d 498 (Colo. App. 1985).

This section does not proscribe conduct identical to § 18-3-203and therefore does not violate equal protection. People v. Brake, 196 Colo. 575, 588 P.2d 869 (1979); People v. Montoya, 709 P.2d 58 (Colo. App. 1985), rev'd on other grounds, 736 P.2d 1208 (Colo. 1987); People v. Johnson, 923 P.2d 342 (Colo. App. 1996).

Requirement for proof of "extreme indifference to human life"is a sufficient differentiation between first and second degree **assault** and the statutes do not violate the equal protection clause. People v. Johnson, 923 P.2d 342 (Colo. App. 1996).

The extreme indifference first degree assault statute contains no requirement that universal malice be proved. Therefore, a conviction for extreme indifference first degree **assault** may be upheld where defendant's conduct is directed at a single individual. Unlike the first degree extreme indifference murder statute, which requires proof of universal malice against human life generally, the **assault** statute contains no similar language. People v. Baker, 178 P.3d 1225 (Colo. App. 2007).

Special protection of peace officers reasonable. The general assembly recognizes that peace officers are placed in a position of great risk and responsibility, so to invoke a special punishment for an **assault** upon a peace officer acting in the scope of his official duties is neither arbitrary, capricious, nor unreasonable. People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972).

Assault on off-duty peace officerwho is attempting to perform a law enforcement function violates this section. People v. Rael, 198 Colo. 225, 597 P.2d 584 (1979).

Scope of police duties for purposes of assault statutes.A law enforcement officer is "engaged in the performance of his duties" while making in good faith an arrest or stop which may be later adjudged to be invalid, unless he is on a personal frolic or resorts to unreasonable or excessive force. People v. Johnson, 677 P.2d 424 (Colo. App. 1983).

Every attempt to do personal injury involves an assault. Every attempt at robbery, or to commit rape, or to do other like personal injury, involves within it the idea of an **assault**, either actual or constructive. McNamara v. People, 24 Colo. 61, 48 P. 541 (1897).

offense,not distinct offenses to be charged separately. The same defendant cannot be charged with multiple offenses under subsection (1) as a result of the same physical action. People v. Anderson, 2016 COA 47, — P.3d —, rev'd on other grounds, 2019 CO 34, 442 P.3d 76.

Section applies to murder in either of the degrees. In a prosecution under this section it is not required that in order to sustain a conviction an attempt to commit murder in the first degree should be shown. This section applies to murder in either of the degrees. Dillulo v. People, 56 Colo. 339, 138 P. 33 (1914).

A simple assault is necessarily included as a part of aggravated assault. Lane v. People, 102 Colo. 83, 77 P.2d 121 (1938).

Reason for distinction among degrees of assault. This statutory scheme distinguishes between the degrees of **assault** based upon whether the injury was inflicted by means of a deadly weapon and whether the victim's injuries were so severe as to constitute "serious bodily injury" under the statutory definition. Stroup v. People, 656 P.2d 680 (Colo. 1982); People v. Tyler, 728 P.2d 314 (Colo. 1986).

Under subsection (2), heat of passion is not an affirmative defenseto first degree **assault**. If found by the jury, it merely results in a reduction of penalty. People v. Pennese, 830 P.2d 1085 (Colo. App. 1991).

Under subsection (1)(d), because defendant could not be convicted of first degree assault without proof that he committed a class 3 felony sexual assault,the latter offense was a lesser included offense of the first degree **assault** charge and he could not, therefore, be convicted of both offenses. People v. Moore, 860 P.2d 549 (Colo. App. 1993).

By enacting subsection (2)(a), the general assembly maintained the offense of first degree assault,while providing for a lesser sentence if the additional mitigating factor of heat of passion was present. Rowe v. People, 856 P.2d 486 (Colo. 1993).

If first degree assault is committed under heat of passion, it is still a crime of violenceand defendant must be sentenced in accordance with § 16-11-309. People v. Farbes, 973 P.2d 704 (Colo. App. 1998); People v. Ferguson, 43 P.3d 705 (Colo. App. 2001).

The general assembly did not intend for heat of passion to be an affirmative defense to the offense of first degree assault. Rowe v. People, 856 P.2d 486 (Colo. 1993).

The predicate offenses for "felony" first degree assault under this section fit the statutory test for a lesser included offense. As such, the conviction of the predicate offense must merge into the conviction for "felony" first degree **assault**, even though the predicate offense is a more serious offense and carries a greater punishment. People v. Halstead, 881 P.2d 401 (Colo. App. 1994).

Second degree assault is a lesser included offense of first degree assault. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

robbery. Therefore, since **assault** with intent to rob is a lesser included offense of aggravated robbery, it was error for the court to permit both verdicts to stand. Thus, the conviction on the lesser included offense must be set aside. People v. Stephens, 188 Colo. 8, 532 P.2d 728 (1975).

Doctrine of merger required convictions for attempted aggravated robbery to be vacatedwhere separately charged crime of attempted aggravated robbery of each victim was lesser included offense of crime of first degree **assault** on each victim. People v. Griffin, 867 P.2d 27 (Colo. App. 1993); People v. Fisher, 904 P.2d 1326 (Colo. App. 1994) (decided under law as it existed prior to 1995 repeal of subsection (1)(d)).

Felony menacing and attempted first degree assault do not merge. People v. Procasky, 2019 COA 181, — P.3d —.

There is no offense of attempt to commit an assaultwith a deadly weapon in Colorado. Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971).

There is no crime of attempted **assault** in Colorado. People v. Gordon, 178 Colo. 406, 498 P.2d 341 (1972).

There is a crime of attempt to commit rapeunder § 18-2-101 despite the existence of the crime of **assault** with intent to commit rape under this section for these are separate and distinct offenses. Clark v. People, 176 Colo. 48, 488 P.2d 1097 (1971).

A deadly weaponis one which is likely to produce death or great bodily injury from the manner in which it is used. Armijo v. People, 134 Colo. 344, 304 P.2d 633 (1956).

The offense of assault and battery is a matter of mixed state and local concern. City of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973).

"Unreasonable but good faith belief" defense not available. The general assembly excluded in this section the defense of "unreasonable but good faith belief", inasmuch as a conviction is required if the jury should find that the defendant should reasonably have known that the police officers were acting within their lawful duties. People v. Estrada, 198 Colo. 188, 601 P.2d 619 (1979).

Applied in

Zeiler v. People, 157 Colo. 332, 403 P.2d 439 (1965); Segura v. People, 159 Colo. 371, 412 P.2d 227 (1966); Hammond v. People, 161 Colo. 532, 423 P.2d 331 (1967); People in Interest of D.G.P., 194 Colo. 238, 570 P.2d 1293 (1977); Jones v. District Court, 196 Colo. 261, 584 P.2d 81 (1978); People v. Watkins, 196 Colo. 377, 586 P.2d 43 (1978); People v. Dowdell, 197 Colo. 76, 589 P.2d 948 (1979); People v. Thompson, 197 Colo. 299, 592 P.2d 803 (1979); People v. Trout, 198 Colo. 98, 596 P.2d 762 (1979); Perea v. District Court, 199 Colo. 27, 604 P.2d 25 (1979); Kreiser v. People, 199 Colo. 20, 604 P.2d 27 (1979); People v. Hoehl, 629 P.2d 1083 (Colo. 1980); People v. Lichtenstein, 630 P.2d 70 (Colo. 1981); People v. Valencia, 630 P.2d 85 (Colo. 1981); People v. Jordan, 630 P.2d 613 (Colo. 1981); People v. Henry, 631 P.2d 1122 (Colo. 1981); People v. Jones, 631 P.2d 1132 (Colo. 1981); People v. Walker, 634 P.2d 1026 (Colo. App. 1981); People v. District Court, 652 P.2d 582 (Colo. 1982); People v. Ferguson, 653 P.2d

660 P.2d 1292 (Colo. 1983); People v. Brandt, 664 P.2d 712 (Colo. 1983); People v. Reed, 695 P.2d 806 (Colo. App. 1984), cert. denied, 701 P.2d 603 (Colo. 1985).

II. ELEMENTS OF OFFENSE.

Assault under this section is in part a specific-intent crime,requiring the prosecution to prove that the defendant had the conscious objective to cause serious bodily injury. People v. Gonzales, 926 P.2d 153 (Colo. App. 1996).

First degree murder statutes(§§ 18-2-101 and 18-3-102) contain rationally different elements than this first degree **assault** statute, and thus a defendant sentenced under the former and not the latter was not denied equal protection of law. People v. Brewer, 720 P.2d 596 (Colo. App. 1985).

Attempted first degree assault is not a lesser included offense of attempted first degree murder after deliberation. Attempted first degree **assault** requires that a defendant act with the intent to cause serious bodily injury to another person by means of a deadly weapon. Use of a deadly weapon is not an element of attempted first degree murder after deliberation. People v. Beatty, 80 P.3d 847 (Colo. App. 2003).

Proof of actual ability to inflict injury not necessarily essential. The crime of **assault** with intent to rob under this section may be committed by intimidation as well as by actual force, and the intimidation may be as effectually accomplished by apparent as by actual ability to inflict the injury, hence, proof of actual ability to inflict the injury in the manner threatened is not necessarily essential. McNamara v. People, 24 Colo. 61, 48 P. 541 (1897).

Assault to commit murder requires evidence of defendant's present abilityto commit an **assault** on the victim and specific intent to murder. People v. Baca, 179 Colo. 166, 503 P.2d 348 (1972).

Conviction under this section is not inconsistent with conviction for attempted second degree murder.A defendant can engage in conduct with the intent to cause serious bodily injury while knowing but not caring that the conduct is practically certain to result in death. In such circumstances, the defendant may be found guilty of attempted second degree murder, even though lacking the specific intent to cause death. People v. Gonzales, 926 P.2d 153 (Colo. App. 1996).

However, attempted second degree murder is not a lesser-included offense of first degree **assault**. People v. Laurson, 15 P.3d 791 (Colo. App. 2000).

Intent to cause serious bodily injury is not necessarily an intent to cause only serious bodily injury. People v. Gonzales, 926 P.2d 153 (Colo. App. 1996).

Present ability must be construed in the light of the particular situation. In construing the criminal **assault** statute, therefore, factors such as the gravity of the potential harm and the uncertainty of the result are to be included in appraising the actor's present ability. Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971); People v. Gordon, 178 Colo. 406, 498 P.2d 341 (1972).

Essential elements of assault arean unlawful attempt to commit a violent injury and

Colo. 421, 510 P.2d 317 (1973).

The absence of heat of passion provocation is neither an element nor a sentencing enhancer of first degree assault. People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005).

Although an inconsistency exists between jury verdicts for attempted first degree murder and those for first and second degree assault under the heat of passion,the inconsistency does not require reversal because the existence or absence of heat of passion is not a necessary element of either **assault** charge. People v. Sanchez, 253 P.3d 1260 (Colo. App. 2010).

Defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time. Therefore, jury's guilty verdicts for attempted first degree murder and first degree **assault** based on defendant's stabbing of one person and the jury's guilty verdicts for attempted first degree murder and second degree **assault** based on defendant's stabbing of a second person are not necessarily inconsistent. People v. Sanchez, 253 P.3d 1260 (Colo. App. 2010).

Specific intent is element of offense. Where a crime consists of an act combined with a specific intent, the intent is just as much an element of the crime as is the act. Shreeves v. People, 126 Colo. 413, 249 P.2d 1020 (1952).

"Specific", as applied to intent to do great bodily harm is an adjective which distinguishes the intent to do great bodily harm from other intentions in the defendant's mind at the time of the commission of the crime, and to require that intention to be in actual existence in defendant's mind at the time of the commission of the alleged crime. Shreeves v. People, 126 Colo. 413, 249 P.2d 1020 (1952); Moyer v. People, 165 Colo. 583, 440 P.2d 783 (1968).

The elements of **assault** and specific intent on the part of the assaulter must coexist in order to constitute the crime. Crump v. People, 129 Colo. 58, 266 P.2d 1100 (1954); Barnhisel v. People, 141 Colo. 243, 347 P.2d 915 (1959).

The specific intent to commit bodily injury upon the person of another is a necessary and essential element of **assault** with a deadly weapon. Armijo v. People, 157 Colo. 217, 402 P.2d 79 (1965); Baker v. People, 176 Colo. 99, 489 P.2d 196 (1971).

Specific intent is an essential element of the crime of **assault** with a deadly weapon. Duran v. People, 156 Colo. 385, 399 P.2d 412 (1965).

Intent to rob requires knowing, deliberate action. Martinez v. People, 172 Colo. 82, 470 P.2d 26 (1970).

The specific intent to do bodily injury to another person is an essential element of the offense of **assault** with a deadly weapon. People v. Garcia, 186 Colo. 167, 526 P.2d 292 (1974).

Where a defendant engages in only one assaultive act, he or she cannot simultaneously have a specific intent to harm a particular person and universal

"Serious bodily injury" is an element of first degree assault,which the people must prove beyond a reasonable doubt. People v. Martinez, 189 Colo. 287, 540 P.2d 1091 (1975).

"Serious bodily injury" is defined asbodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body. People v. Martinez, 189 Colo. 287, 540 P.2d 1091 (1975).

"Serious bodily injury" and "bodily injury" constitutionally distinguishable. Sections 18-3-202 (1)(a) and 18-3-203 (1)(a), thus, do not proscribe identical conduct and therefore do not violate equal protection. People v. Elam, 198 Colo. 170, 597 P.2d 571 (1979).

The basic element in both first and second degree assault is injury to a person's body,the difference being one of the degree of the injury. People v. Martinez, 189 Colo. 287, 540 P.2d 1091 (1975).

By establishing all of the essential elements of first degree assault, all of the essential elements of second degree assault would necessarily be proven. People v. Martinez, 189 Colo. 287, 540 P.2d 1091 (1975).

If the prosecution proves that a defendant intended to cause, and did cause, serious bodily injury to another person, the prosecution has necessarily provedthat the person intended to cause, and did cause, the lesser degree of bodily injury as well. People v. Lovato, 2014 COA 113, 357 P.3d 212.

Because second degree assault is a lesser included offense of first degree assault,and the same evidence applied to the first and second degree **assault** charges, the convictions must merge into one conviction for first degree **assault**. People v. Lovato, 2014 COA 113, 357 P.3d 212.

First degree assault and burglary each require proving additional fact. First degree **assault** and first degree burglary each require proof of an additional fact not necessary in proof of the other. People v. Rael, 199 Colo. 201, 612 P.2d 1095 (1980).

In order to prove first degree assault and crime of violenceinstead of second degree **assault** and crime of violence, an additional element must be proven — that the use of the deadly weapon actually caused the serious bodily injury. People v. Mozee, 723 P.2d 117 (Colo. 1986).

The elements of assault with intent to commit rape are:(1) The **assault**; (2) the intent to commit rape; and (3) the purpose to effect such intent. Barnhisel v. People, 141 Colo. 243, 347 P.2d 915 (1959).

Unnecessary to show witness in fact resisted. If defendant made the **assault** with the specific intent to commit rape and to overcome resistance with force, it is unnecessary in a prosecution under this section to establish that the prosecuting witness in fact resisted, or that she failed to resist because of threats of bodily harm. Crump v. People, 129 Colo. 58, 266 P.2d 1100 (1954).

convict for first degree assault of a peace officer. People v. Denhartog, 2019 COA 23, 452 P.3d 148.

The prosecution did not prove that defendant expressed a purpose or intent to cause injury or harm to the peace officer or the peace officer's property. People v. Denhartog, 2019 COA 23, 452 P.3d 148.

Conditional threat of death will sufficeto establish **assault** against a jail guard even though no attempt was made to commit a battery on the guard. People v. Goff, 187 Colo. 57, 530 P.2d 512 (1974).

Wounds resulting in disfigurement of leg. Pictures of wounds as exhibited to the jury justified the reasonable inference that the wounds resulted in disfigurement of the leg, a necessary element of proof under this section. People v. Strohm, 185 Colo. 260, 523 P.2d 973 (1974).

Requirement of knowledge that victim of assault was peace officeris not constitutionally required and the general assembly could have made the commission of the act as such a crime without regard to the knowledge of the doer that the victim was a peace officer. People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972).

Defendant committed first degree extreme indifference assaultwhen he fired into a closed door upon leaving house and admitted that he was not directing his fire at any particular individual, despite fact that he knew some of the victims inside the house. People v. Ellis, 30 P.3d 774 (Colo. App. 2001).

III. TRIAL AND PROSECUTION.

A. In General.

Proof beyond reasonable doubt required. In order to find one guilty of a violation of this section, it is incumbent upon the people to prove beyond a reasonable doubt that the defendant violated the statute with a specific intent so to do. Shreeves v. People, 126 Colo. 413, 249 P.2d 1020 (1952); Baker v. People, 176 Colo. 99, 489 P.2d 196 (1971).

A showing of actual knowledge that the one **assaulted** was a peace officer engaged in his official duties or proof of the probability of such knowledge beyond a reasonable doubt must precede conviction of **assault** of a peace officer. People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972).

It is no defense to show that specific intent to do bodily harm was directed at someone elseother than victim. Medina v. People, 133 Colo. 67, 291 P.2d 1061 (1956); People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972).

Failure to advise pleading defendant of specific intent element not "fundamental defect". The sentencing court's failure explicitly to advise the defendant of the element of specific intent in the crime of aggravated **assault** was not such a "fundamental defect" that would result in a "complete miscarriage of justice" upon the defendant's plea of guilty. Martinez v. Ricketts, 498 F. Supp. 893 (D. Colo. 1980).

Elements of first degree assault are readily understandable to persons of

698 P.2d 234 (Colo. 1985).

Conviction for both first degree assault and first degree burglary does not violate constitutional guaranteeagainst double jeopardy. People v. Rael, 199 Colo. 201, 612 P.2d 1095 (1980).

Under subsection (1)(d) when there are separate victims for each crime an underlying conviction of sexual assault on a child does not merge into a conviction of first degree assault while committing a crime. People v. Moore, 877 P.2d 840 (Colo. 1994).

Prosecution need not prove, and the jury need not be instructed about, the absence of heat of passion provocation as a sentence enhancer under Apprendi. People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005).

B. Indictment or Information.

Several counts may be united. It is proper to unite in one information counts charging an **assault**, an **assault** with a deadly weapon with intent to do bodily injury, and an **assault** with intent to commit murder, where all refer to the same transaction. Rice v. People, 55 Colo. 506, 136 P. 74 (1913).

Allegation that defendant "did make an assault" sufficient. An indictment for **assault** with intent to rob under this section, which alleges, as to the **assault**, that the defendant "did make an **assault**", without stating all of the particulars comprehended by the statutory definition of that term is sufficient. McNamara v. People, 24 Colo. 61, 48 P. 541 (1897).

Indictment for assault with intent to murder, where word "feloniously" is unnecessarily used, is good. Gile v. People, 1 Colo. 60 (1867).

Information held sufficient. Mayer v. People, 116 Colo. 284, 180 P.2d 1017 (1947).

C. Evidence.

Specific intent not presumed from act. Proof of the commission of the act does not warrant the presumption that accused had the requisite specific intent. Shreeves v. People, 126 Colo. 413, 249 P.2d 1020 (1952); Armijo v. People, 157 Colo. 217, 402 P.2d 79 (1965).

Intent may be inferred from all circumstances. Intent is usually manifested by circumstances and proof thereof necessarily is by circumstantial evidence, and, of course, such intent is ordinarily inferable from the facts. Peterson v. People, 133 Colo. 516, 297 P.2d 529 (1956); Moyer v. People, 165 Colo. 583, 440 P.2d 783 (1968).

Proof of specific intent is necessarily circumstantial and inferable from all the facts and circumstances surrounding the doing of the act. Gonzales v. People, 168 Colo. 545, 452 P.2d 46 (1969).

On a charge of **assault** with a deadly weapon, while the mere commission of the act does not necessarily mean that the defendant had the requisite specific intent to harm,

176 Colo. 99, 489 P.2d 196 (1971).

Specific intent to do great bodily harm may be supplied by inferences drawn from the circumstances of the case. People v. Focht, 180 Colo. 259, 504 P.2d 1096 (1972).

It is clear that specific intent may be inferred from the facts and circumstances surrounding the commission of an **assault**. People v. Edwards, 184 Colo. 440, 520 P.2d 1041 (1974).

While specific intent must be established beyond a reasonable doubt, it may be proven by circumstantial evidence. People v. Walker, 189 Colo. 545, 542 P.2d 1283 (1975).

Intent shown by direct or circumstantial evidence. Under this section general criminal intent is insufficient and there must be a showing of specific intent by direct or circumstantial evidence. Shreeves v. People, 126 Colo. 413, 249 P.2d 1020 (1952); Peterson v. People, 133 Colo. 516, 297 P.2d 529 (1956); Armijo v. People, 157 Colo. 217, 402 P.2d 79 (1965).

On a charge of **assault** with a deadly weapon, specific intent to do bodily harm need not be proved by direct substantive evidence. Baker v. People, 176 Colo. 99, 489 P.2d 196 (1971).

Intent to cause serious bodily injury may be proven by circumstantial evidence. People v. Olinger, 180 Colo. 58, 502 P.2d 79 (1972).

Evidence which tends to establish motive or intentis not rendered inadmissible merely because it may tend to show commission by the accused of a crime different from the one with which he is charged. Swift v. People, 171 Colo. 178, 465 P.2d 391 (1970).

Evidence of uncommunicated threats by deceasedshortly before the killing, together with acts and conduct indicating an intention to put the threats into execution, may be admissible as part of the res gestae. This does not mean, however, that all uncommunicated threats are admissible, for they have to be offered for a proper purpose. Sowards v. People, 158 Colo. 557, 408 P.2d 441 (1965).

A defendant's character, temperament, and status,as well as his reason for acting as he did, are important to enable the jury to arrive at a proper verdict. Sowards v. People, 158 Colo. 557, 408 P.2d 441 (1965).

Section requires sufficient evidence of force. All that is necessary to sustain a verdict of **assault** with intent to commit rape is that there should be sufficient evidence of force from which the jury can justly find that the defendant intended to overcome the resistance of the woman by the necessary force. Crump v. People, 129 Colo. 58, 266 P.2d 1100 (1954).

Complaint of rape victim corroborates her testimony. In criminal trials for rape, where rape was attempted but not consummated, it may be shown by the testimony of the prosecuting witness or that of other witnesses that the alleged victim made complaint of the outrage soon after its commission for the purpose of corroborating her

Evidence of the failure of the person **assaulted** to make complaint soon after the commission of the outrage is a circumstance which tends to discredit her testimony. Padilla v. People, 156 Colo. 186, 397 P.2d 741 (1964).

It is not independent evidence of the offense charged. Padilla v. People, 156 Colo. 186, 397 P.2d 741 (1964).

Evidence sufficient to submit to jury issue of intent. People v. Olinger, 180 Colo. 58, 502 P.2d 79 (1972).

Evidence sufficient to show specific intent. Swift v. People, 171 Colo. 178, 465 P.2d 391 (1970); Baker v. People, 176 Colo. 99, 489 P.2d 196 (1971); People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972); People v. Focht, 180 Colo. 259, 504 P.2d 1096 (1972).

Eyewitness testimony established use of weapon. Where three witnesses for the people testified only that they did not see the defendant with a knife, a fourth witness testified unequivocally to possession of a knife by the defendant, and no witness of the people stated that the defendant did not have a knife, there is no internal contradiction, and the evidence of one eyewitness, if believed by the jury, is sufficient to establish that defendant had in his possession a knife and used it to inflict the wounds on the victim of the **assault**. People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972).

Impeachment of victim's reputation and credibility. When the reputation and credibility of the victim of an **assault** is sought to be impeached, the general rule is that evidence as to such reputation must be confined to the community in which the person, whose reputation is sought to be shown, lives, and limited to some reasonable time previous to the time of the present criminal act. However, the general rule does not apply if the defendant contends that he acted in self-defense, and at the time of the criminal act the defendant was aware of the victim's prior acts of violence upon a third person. People v. Burress, 183 Colo. 146, 515 P.2d 460 (1973).

Sufficiency of present ability and intent. When a defendant who threatens to kill a police officer places both hands on the officer's revolver in an attempt to remove it, the evidence of defendant's present ability to commit **assault** with a deadly weapon as well as possession and control of the weapon by defendant is sufficient to sustain a conviction. People v. Gordon, 178 Colo. 406, 498 P.2d 341 (1972).

When there is no evidence of any nature that a defendant possessed a gun or had the present ability to inflict the victim's injury, and there is no evidence whatsoever from which the jury could draw an inference that the defendant had the specific intent to murder the victim, defendant cannot be convicted of **assault** to commit murder. People v. Baca, 180 Colo. 166, 503 P.2d 348 (1972).

Evidence of act giving rise to self-defense. Before the defendant, whose defense to an **assault** is self-defense, can impeach the credibility of the victim by a prior specific violent act, the defendant must lay a proper foundation, and the trial court is justified in excluding the specific act evidence until such time as the defendant establishes that he was aware that the specific violent act took place, and that either the act occurred, or the defendant became aware of its occurrence within a reasonable time of his use of force in self-defense. People v. Burress, 183 Colo. 146, 515 P.2d 460 (1973).

Photographs as evidence. In a child abuse prosecution, the trial court did not err in

accurately depicted the burns and the bruises, contusions and abrasions on the child's body. They were relevant and had probative value concerning the nature and

permanency of the injuries inflicted upon the child. People v. Strohm, 185 Colo. 260, 523 P.2d 973 (1974).

Testimony of emergency room physician related to substantial risk of permanent injurybased upon points of bullet entry and exit, taking into account the structures and vessels in or near the path to the extent that such path could be determined, held proper. People v. Covington, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

Granting motion for judgment of acquittal was error. Where evidence in prosecution for first degree **assault** was held sufficient to support jury verdict of guilty, the granting of motion for judgment of acquittal by the trial judge was error. People v. Martinez, 191 Colo. 428, 553 P.2d 774 (1976).

Evidence sufficient to support conviction. Where defendant said that he was going home to get a gun and would be back, and afterwards returned with a gun and stated to complaining witness, "I told you I would do it", the evidence was sufficient to support a verdict of guilty of **assault** with a deadly weapon. Peterson v. People, 133 Colo. 516, 297 P.2d 529 (1956).

Testimony of an eyewitness in which she spontaneously and unequivocally identified the defendant as the culprit, the testimony of the police officers as to apprehension of the defendant almost immediately after the commission of the offense in the vicinity of the victim's home, and the condition of the defendant's clothing, was sufficient evidence to support the verdict of the jury of guilty of **assault** with a deadly weapon. Harris v. People, 174 Colo. 483, 484 P.2d 1223 (1971).

Evidence that defendant drove recklessly and with extreme indifference through business and residential areas was sufficient to uphold defendant's conviction for first degree assault. People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011).

D. Jury.

Whether fight was by consent is jury question.A fight by consent is a fight had upon a mutual agreement to fight together. As a proof of such agreement may be direct or circumstantial, it is ordinarily a proper question to be submitted to the jury. Carpenter v. People, 31 Colo. 284, 72 P. 1072 (1903).

As is issue of specific intent. The question of whether there was sufficient evidence to sustain an allegation as to specific intent under this section is not a question of law but a question of fact which rests entirely within the competency of the trier of fact, whether it be a jury or a court, and was thus not reviewable by the supreme court. People v. Archer, 173 Colo. 299, 477 P.2d 791 (1970), overruled on other grounds in People v. Kirkland, 174 Colo. 362, 483 P.2d 1349 (1971).

Knowledge that victim was officer. The question of whether one knew or should have known another to be a peace officer is a purely factual issue and it is the jury's duty to

P.2d 1083 (1972).

Likewise, credibility and weight of testimony. Where a genuine issue as to facts exists, the jury as trier of the facts must be the judge of the credibility of the witnesses and the weight to be accorded their testimony. People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972).

Whether defendant established heat of passion claim was issue for jury to determine. Thompson v. Ricketts, 500 F. Supp. 688 (D. Colo. 1980).

Determination of issue by jury is not vague guide. The fact that a penal statute is framed in a way such as to require a jury to determine a question of reasonableness does not make it too vague to afford a practical guide to acceptable behavior. People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972).

Jury verdict not defective,where record reflects verdict form allowed jury, if it found the defendant guilty of first or second degree **assault**, to assign the mitigator of heat of passion. People v. Pennese, 830 P.2d 1085 (Colo. App. 1991).

Record supported jury's determination that defendant was guilty beyond a reasonable doubt of first degree assaultwhere defendant was a complicitor in the robbery of the victim, and in the course of or in furtherance of that crime, the victim was seriously injured by one of the individuals involved in the robbery. People v. Fisher, 904 P.2d 1326 (Colo. App. 1994) (decided under law as it existed prior to 1995 repeal of subsection (1)(d)).

E. Instructions.

Instruction which fails to define all necessary elements of crime is deficient. Barnhisel v. People, 141 Colo. 243, 347 P.2d 915 (1959).

The failure to give an instruction which informed the jury that an essential ingredient of the crime was the specific intent to commit bodily injury upon the person of another and that it was incumbent upon the people to prove, beyond a reasonable doubt, such specific intent was reversible error. Armijo v. People, 157 Colo. 217, 402 P.2d 79 (1965).

Inadequate instruction on specific intent. Instruction on specific intent in prosecution for **assault** with intent to commit murder which read, "Where a crime consists of an act combined with a specific intent, the intent is just as much an element of the crime as is the act. In such cases, mere general intent is insufficient, and the requisite specific intent must be shown as a matter of fact, either by direct or circumstantial evidence", was too general and failed to advise the jury as to what the requisite specific intent was. People v. Nace, 182 Colo. 127, 511 P.2d 501 (1973).

Instruction on possession of knife erroneous. It was error to instruct the jury that it was unlawful to possess or carry a pocket knife, the blade of which can be opened by mechanical contrivance, where the information charged the defendant with an alleged **assault** with a deadly weapon, and not with violating such statute. Watts v. People, 159 Colo. 347, 411 P.2d 335 (1966).

Where evidence justifies it, simple assault may be submitted as lesser included offenseof an aggravated **assault** such as **assault** with a deadly weapon, and an

jury an instruction on simple **assault** as a lesser included offense. Sims v. People, 177 Colo. 279, 493 P.2d 365 (1972).

Where the elements of **assault** are common in both offenses, the jury should have been instructed on the crime of simple **assault** as a lesser included offense to the crime of **assault** with intent to rape and a verdict on simple **assault** should have been submitted. Barnhisel v. People, 141 Colo. 243, 347 P.2d 915 (1959).

Where defendant was charged with an alleged **assault** with a deadly weapon, it was not error to refuse to submit an instruction on the lesser included offense of simple **assault** where there was nothing in the evidence warranting the submission to the jury of that question. Watts v. People, 159 Colo. 347, 411 P.2d 335 (1966).

The court need not invariably submit lesser included **assault** to the jury. There remains the question whether the evidence justifies this action. Oftentimes the evidence precludes submission even when the offense is charged in a separate count, and in some cases the evidence is such that the jury must determine the case on the greater offense and that alone. Miera v. People, 164 Colo. 254, 434 P.2d 122 (1967).

Where the trial judge submitted to the jury not only the offense of **assault** with a deadly weapon, but also simple **assault** as a lesser included offense, this was not error. Plainly, an instruction on general intent was necessary for simple **assault**, and it was also necessary for the court to instruct on specific intent for the charge of **assault** with a deadly weapon. Arellano v. People, 174 Colo. 456, 484 P.2d 801 (1971).

Failure to give instruction without request not error. Failure of court to instruct on **assault** with intent to commit rape as a lesser included offense of forcible rape, where defendant does not request such an instruction or raise this point in motion for new trial, does not constitute reversible error and absent a showing of plain error it will not be considered on appeal. People v. Chavez, 179 Colo. 316, 500 P.2d 365 (1972).

Instruction based on information count proper. Where defendant who was charged duplicitously in one and the same count with **assault** with intent to murder and **assault** with a deadly weapon failed to object before trial, it was not error to instruct jury on crime of **assault** with a deadly weapon. Russell v. People, 155 Colo. 422, 395 P.2d 16 (1964).

Defendant charged with **assault** with a deadly weapon and conspiracy to **assault** with deadly weapon was not subjected to double jeopardy by conspiracy instruction in combination with accessory instruction. People v. Grass, 180 Colo. 346, 505 P.2d 1301 (1973).

Instructions taken as whole adequate. In a prosecution for **assault** with intent to murder, an instruction is not erroneous because omitting the element of defendant's ability to carry his intention into effect at the time, where such element was specifically called to the jury's attention by a subsequent instruction, as the instructions must be considered as a whole. Warford v. People, 43 Colo. 107, 96 P. 556 (1908).

In prosecution for **assault** on peace officer, trial court did not err in rejecting defendant's tendered instruction on lesser degree of **assault**, in refusing to limit instruction on general intent to lesser degree of **assault**, and in dealing with legal effect

adequately covered law and advised jury as to specific intent and where there was no evidence on lesser degree of **assault**. People v. Olinger, 180 Colo. 58, 502 P.2d 79 (1972).

Jury was properly instructed to consider whether defendant acted in the heat of passion only after deciding whether defendant committed first degree **assault**. Under subsection (2)(a), heat of passion is not an affirmative defense, but merely results in the decrease of penalty. People v. Pennese, 830 P.2d 1085 (Colo. App. 1991).

No error in instructions directing jury to consider whether the people had proven the elements of first degree assault before considering heat of passion and provocation,where the general assembly has not chosen to classify heat of passion as an affirmative defense that exonerates offenders from the offense of first degree **assault**, but rather, reduces the penalty if an **assault** occurs in the heat of passion. People v. Pennese, 830 P.2d 1085 (Colo. App. 1991).

No error in refusal of trial court to deliver an instructionstating that the definition of serious bodily injury focuses on the injury which the victim actually suffered and the damage actually caused rather than the risk to the victim and the damages that might have occurred. People v. Covington, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

Heat of passion instruction.A defendant charged with **assault** is entitled to a special interrogatory on heat of passion if the evidence supports it. People v. Rowe, 837 P.2d 260 (Colo. App. 1992), rev'd on other grounds, 856 P.2d 486 (Colo. 1993).

Since defendant did not request an instruction or a special interrogatory on sudden heat of passion, no plain error occurred when the trial court did not sua sponte instruct the jury on that theory of the defense. People v. Lee, 18 P.3d 192 (Colo. App. 2000).

The trial court erred when it did not instruct the jury that the prosecution had to prove the absence of heat of passion provocation beyond a reasonable doubt. People v. Tardif, 2017 COA 136, 433 P.3d 60.

Since the general assembly did not intend to create a new offense of first degree assault committed under heat of passion when it enacted subsection (2)(a),there is no chargeable offense of first degree **assault** committed under heat of passion nor a separate offense to classify as a "lesser included offense" or a "lesser nonincluded offense" of first degree **assault**; rather, there is only one single crime of first degree **assault**, albeit one that may have different sentences depending on whether the mitigating factor of heat of passion has been established. Rowe v. People, 856 P.2d 486 (Colo. 1993).

The district court erroneously instructed the jury that first degree assault committed under heat of passion was a lesser included offense of first degree assault. Rowe v. People, 856 P.2d 486 (Colo. 1993).

Court did not err in failing to include jury instructions on the meaning of "extreme indifference" and "grave risk of death". The terms are not so technical or mysterious that a reasonable person of common intelligence would not know what they mean. People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011).

Defendant did not receive aggravated sentence for first degree assault crime, therefore, Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply. First degree **assault** is a class 3 felony that is a per se crime of violence and an extraordinary risk crime that triggers a special legislatively created penalty range, not a judicially imposed aggravated sentence. Since defendant was sentenced within special penalty range created by the legislature, there was no Apprendi violation. People v. Trujillo, 169 P.3d 235 (Colo. App. 2007).

Consecutive sentences for burglary and assault upheld. Conviction and sentences for two distinct offenses did not put appellees twice in jeopardy as the Colorado statutes separately define the offenses of burglary and **assault** with intent to rob. The imposition of two consecutive sentences did not constitute a violation of any federally protected right. Trujillo v. Patterson, 266 F. Supp. 901 (D. Colo. 1966), aff'd per curiam, 389 F.2d 1003 (10th Cir. 1967); Trujillo v. People, 178 Colo. 136, 496 P.2d 1026 (1972).

The offense of **assault** with intent to murder requires proof of a specific intent to kill, a fact not necessary to sustain a charge of aggravated robbery. On the other hand, aggravated robbery requires proof of a robbery, a fact not necessary for **assault**. Therefore, punishment for both of these offenses committed during one course of conduct does not violate the constitutional prohibition against double jeopardy for the same offense. People v. Bugarin, 181 Colo. 62, 507 P.2d 875 (1973).

Evidence determines if acquittal of lesser offense necessary upon acquittal of greater. It is the character of the evidence which must control in determining whether the lesser included offense of **assault** with intent to commit rape can stand alone or fall on acquittal of rape. Miera v. People, 164 Colo. 254, 434 P.2d 122 (1967).

Where penalty for conviction limited.A person charged with first degree **assault**, who can establish that he acted in "heat of passion", is constitutionally protected against receiving a greater penalty than he could have received had he caused the death of his victim. People v. Montoya, 196 Colo. 111, 582 P.2d 673 (1978).

Maximum sentence where defendant claims self-defense.A defendant who raises the affirmative defense of self-defense and who was convicted of first degree **assault** should receive no greater sentence than he could have received if he had been convicted of the criminally negligent homicide statute in effect prior to July 1, 1977. People v. Estrada, 198 Colo. 188, 601 P.2d 619 (1979).

One can be guilty of first degree assault but not attempted second degree murder.A jury's verdict of guilty of first degree **assault** under this section is not irreconcilable and inconsistent with its verdict of not guilty on the charge of attempted second degree murder under § 18-3-103. These crimes require different elements of proof, and the jury can find from the very same evidence that an element of one crime is present while an element of another charged crime is absent. People v. Ward, 673 P.2d 47 (Colo. App. 1983).

If first degree assault is committed under heat of passion, it is still a crime of violenceand defendant must be sentenced in accordance with § 16-11-309. People v. Farbes, 973 P.2d 704 (Colo. App. 1998); People v. Ferguson, 43 P.3d 705 (Colo. App. 2001).

indifference cannot be upheld if there is only one victim and one criminal act. People v. Baird, 66 P.3d 183 (Colo. App. 2002).

First degree assault with intent to cause serious bodily injury and first degree assault-extreme indifference are alternative means of committing the same offense;therefore, one of the first degree **assault** convictions must be vacated. People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005).

First degree assault is a per se grave or serious offense. People v. Gee, 2015 COA 151, 371 P.3d 714.

Research References & Practice Aids

Cross references:

For the legislative declaration contained in the 1994 act amending subsection (1)(f), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsection (2)(c), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in SB 20-221, see section 1 of chapter 279, Session Laws of Colorado 2020.

Previous Next