

**FALSE SWEARING [INCONSISTENT STATEMENTS]  
(N.J.S.A. 2C:28-2c)**

Defendant in Count(s) \_\_\_\_\_ is charged with false swearing. Our law provides that a person who made inconsistent statements under oath or equivalent affirmation within the period of the statute of limitations, one of which was false and not believed by the defendant, is guilty of a crime.<sup>1</sup> Here, the State alleges that (defendant) committed false swearing by having made [subsequently sworn to the truth of] [subsequently affirmed] the following statements, one of which was false and not believed by (defendant) to be true:

**[REFER TO STATEMENTS]**

To find (defendant) guilty of false swearing, the State must prove the following elements beyond a reasonable doubt:

1. That (defendant) made certain statements;
2. That those statements were made within the period of the statute of limitations;
3. That those statements were inconsistent with each other;
4. That (defendant) made those statements knowingly;
5. That one of those statements was false and not believed by (defendant) to be true when (he/she) made it; and
6. That defendant made the statements under oath or equivalent affirmation [OR, IF APPLICABLE, that (defendant) [subsequently swore to] [affirmed] the truth of the previously made statements while under oath or equivalent affirmation].

First, the State must prove beyond a reasonable doubt that (defendant) made certain statements. A statement means any representation, including a representation of opinion, belief, or other state of mind only if the representation clearly relates to a state of mind apart from or in addition to any facts which are the subject of the representation.<sup>2</sup>

Second, the State must prove beyond a reasonable doubt that the statements were made

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<sup>1</sup> In State v. Bzura, 261 N.J. Super. 602, 610 (App. Div. 1993), the Appellate Division "construe[d] N.J.S.A. 2C:28-2a and N.J.S.A. 2C:28-2c to define separate offenses with distinct elements." Only subsection 2a, however, declares that one who violates its terms "is guilty of a crime of the fourth degree." Therefore, rather than quoting subsection 2c verbatim, an amalgam of the two sections is used to provide a short summary of the crime charged.

<sup>2</sup> N.J.S.A. 2C:27-1(i).

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within the period of the statute of limitations. This means that the statements had to have been made on or after (give appropriate date).

Third, the State must prove beyond a reasonable doubt that the statements made by (defendant) are inconsistent with each other.

Fourth, the State must prove beyond a reasonable doubt that (defendant) made the statements knowingly. A person acts knowingly with respect to the attendant circumstances of (his/her) conduct if (he/she) is aware that such circumstances exist, or is aware of a high probability of their existence. "Knowing" or "with knowledge" or equivalent terms have the same meaning.

Knowledge is a condition of the mind. It cannot be seen. Often, it can only be determined by inferences from conduct, words or acts. A state of mind is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. Therefore, it is not necessary, members of the jury, that the state produce witnesses to testify that an accused said (he/she) knowingly did something. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of (his/her) acts and (his/her) conduct, and from all (he/she) said and did at the particular time and place, and from all of the surrounding circumstances.

Fifth, the State must prove beyond a reasonable doubt that one of the statements was false and not believed to be true by (defendant) when (he/she) made it.<sup>3</sup> It is not necessary for the State to prove which statement was false. Rather, the State need only prove that one of the statements was false and not believed by (defendant) to be true. It is not necessary that you all agree that the same statement was false in order to convict (defendant) of false swearing, provided that each of you is satisfied beyond a reasonable doubt that at least one of the statements was false and that (defendant) did not believe it to be true at the time it was made.<sup>4</sup>

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<sup>3</sup> Bzura, 261 N.J. Super. at 610. In Bzura, the defendant allegedly made six separate statements. The Court, noting the distinction between the crimes alleged in N.J.S.A. 2C:28-2a and c, respectively, reversed the conviction for false swearing because the trial court's instructions did not adequately reflect that distinction and, therefore, may have prevented the jury from reaching unanimity. That jury instruction would have permitted some jurors to vote to convict by finding that one of defendant's six statements was false, while permitting other jurors to vote to convict by finding the kind of inconsistency between the two sets of statements that establishes that one of them had to be false and not believed to be true. Id. at 614-615. If defendant is charged and tried under both subsections of N.J.S.A. 2C: 28-2, the trial judge should distinguish carefully between the two types of false swearing as to each statement alleged.

<sup>4</sup> See Model Penal Code, §241.1, Comment (1980), p. 37, n. 112.

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(Defendant's) belief that the statement was not true may be established by proof of (defendant's) actual knowledge that the statement was untrue, or by proof of such facts from which it might reasonably be inferred that (defendant) did not believe that the statement was true. I have previously explained to you what "knowingly" means. There is no criminal liability, however, for inadvertent misstatements, such as (defendant's) misunderstanding of a statement or a question or an unconscious slip of the tongue.

Sixth, the State must prove beyond a reasonable doubt that the statements were given under oath or equivalent affirmation [OR, IF APPLICABLE, that defendant subsequently [affirmed] [swore to] the truth of the previously made statement while under oath or equivalent affirmation]. Any device employed to demonstrate the special importance of the promise of honesty, that is, the seriousness of the demand for honesty, constitutes an oath or equivalent affirmation.<sup>5</sup>

The State must prove each of these elements beyond a reasonable doubt. If the State has failed to prove any of these elements beyond a reasonable doubt, your verdict must be not guilty of this charge. If, on the other hand, the State has proven each of these elements beyond a reasonable doubt, your verdict must be guilty.

**AFFIRMATIVE DEFENSE OF RETRACTION (WHERE APPLICABLE)**<sup>6</sup>

As part of his/her denial of guilt, (defendant) asserts that he/she retracted a falsification. If (defendant) retracted the false statement in the course of the proceeding or matter in which it was made before the proceeding or matter ended, without having caused irreparable harm to anyone, then he/she is not guilty of false swearing. To retract means to take back what was said; to recant. The State has the burden of proving beyond a reasonable doubt that (defendant) did not retract (his/her) false statement.

If the State has failed to prove beyond a reasonable doubt that (defendant) did not retract [attempt to retract] (his/her) statement during the course of the proceeding and before causing

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<sup>5</sup> WHERE THE MANNER IN WHICH THE OATH OR AFFIRMATION WAS ADMINISTERED IS IN ISSUE: "It is not a defense to false swearing that the oath or affirmation was administered or taken in an irregular manner. A document that purports to be made under oath or affirmation shall be considered as under oath if it is subsequently presented as being so verified regardless of any technical irregularities in the effectiveness of the oath for legal purposes." See N.J.S.A. 2C:28-1c

<sup>6</sup> As to affirmative defenses generally, see N.J.S.A. 2C:1-13.

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irreparable harm to any party, then (he/she) should be found not guilty of false swearing. However, if the State has proven beyond a reasonable doubt that (defendant) did not retract [attempt to retract] (his/her) false statement, and the other above enumerated elements of the offense have also been proven beyond a reasonable doubt, then you must return a verdict of guilty on this charge.