

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE MODEL UTAH JURY INSTRUCTIONS – CRIMINAL

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, January 8, 2014
12:00 p.m. to 2:00 p.m.
Judicial Council Room

PRESENT

Judge Denise Lindberg, Chair
Professor Jensie Anderson
Professor Jennifer Andrus
Judge James Blanch
Mark Field
Sandi Johnson
Linda Jones
Karen Klucznik
Thomas Pedersen, Intern

EXCUSED

Judge Brendan McCullagh
John West
Judge Michael Westfall
Scott Young

1. Welcome and Approval of Minutes

Judge Denise Lindberg

Judge Lindberg welcomed everyone to the meeting. *Ms. Johnson moved to approve the minutes from the previous meeting. Ms. Andrus seconded the motion and it passed unanimously.*

2. Mens Rea Committee Notes

Judge Denise Lindberg

Judge Lindberg discussed the mens rea committee notes that have previously been approved. She stated that Ms. Adams-Perlac agreed to put them together and circulate them to the committee. She stated that she thinks the committee notes are correct. The committee reviewed the notes.

Ms. Johnson stated that she did not remember examples of the crimes being used in the committee note, e.g. murder in 302B. Ms. Klucznik agreed. Ms. Jones stated that the language used was in the previously published committee note. Ms. Jones stated that perhaps it should refer to “intentional murder” instead of just “murder”. Ms. Johnson stated that the note contains references to the statute, so reading them together she would leave it as written.

The committee approved the committee notes to instructions CR 302A, CR 302B, CR 302C, CR 303A, CR 303B, CR 303C, CR 304A, CR 304B, and CR 304C as written.

3. Sexual Offense Instructions

Committee

The committee reviewed the sexual offense instructions. The committee discussed making minor changes to capitalization in the title of the instructions and name of the crime within the

instructions. Ms. Klucznik recommended changing “one or more” to “each and every” as the committee previously agreed in CR 1606. The committee agreed that “one or more” should be changed to “each and every” on the NOT GUILTY portion of each instruction as it is on the GUILTY portion.

Ms. Johnson suggested flipping element 2 and element 3 in CR 1612, so that “intentionally, knowingly, or recklessly” comes before “with the intent to”.

The instructions previously approved stand approved changing “one or more of the elements” to “each and every element” language and flipping element 2 and element 3 in CR 1612.

Ms. Jones suggested breaking down the first bullet on the Aggravated Sexual Abuse of a Child special verdict form into multiple bullets. Ms. Klucznik agreed. Ms. Jones suggested have a separate elements instruction for Aggravated Sexual Abuse of a Child. Ms. Klucznik stated that the special verdict form makes a cleaner record on appeal. Ms. Jones stated that it is confusing if the charge is aggravated, unless the aggravating factor is an element in the elements instruction. Ms. Jones stated that there is a difference between aggravated crimes, and an enhancement. Ms. Klucznik stated that Aggravated Murder is an exception. Judge Blanch stated that a special verdict form instructs on a lesser included offense. Ms. Klucznik stated that defense attorneys have the right to decide whether they want to charge lesser included offenses. Ms. Jones stated that putting it in a special verdict form makes it confusing, because it is not an enhancement. Ms. Johnson stated that it is an enhancement. Ms. Jones stated that aggravated sexual abuse of a child is a higher charge. Ms. Jones stated that there are two statutes, Sexual Abuse of a Child, and Aggravated Sexual Abuse of a Child. Ms. Klucznik stated that she has never seen Aggravated Sexual Abuse of a Child as an enhancement. Mr. Field and Ms. Anderson agreed. Ms. Jones stated that a special verdict form does not communicate a lesser included offense to the jury. Ms. Johnson disagrees that Sexual Abuse of a Child is a lesser included offense of Aggravated Sexual Abuse of a Child.

Ms. Jones stated that the State will typically charge Aggravated Sexual Abuse of a Child, so there should be an elements instruction. She said that if there is a case where Sexual Abuse of a Child is being charged as a lesser included offense, then a special verdict form might be necessary. Ms. Klucznik agreed and stated that it makes the record cleaner. Ms. Jones stated that the special verdict form makes sense if there are multiple possible aggravating circumstances.

Ms. Jones moved to include an elements instruction for Sexual Abuse of a Child and Aggravated Sexual Abuse of a Child, and include a special verdict form on Aggravated Sexual Abuse of a Child. Ms. Adams-Perlac will draft a proposed Aggravated Sexual Abuse of a Child instruction for review at the next meeting. Ms. Klucznik and Ms. Johnson will research whether the issue to determine whether a special verdict form or an instructions form is needed for Aggravated Sexual Abuse of a Child.

The committee discussed Aggravated Sexual Assault. Ms. Jones stated that there is no Sexual Assault statute, and it is unnecessary as stated under *State v. Rudolph*.

Ms. Adams-Perlac will draft an instruction on Aggravated Sexual Assault for review at the next meeting.

Ms. Jones stated that there is still no opinion in the consent case. Ms. Klucznik questioned whether we need to include that a specific definitions only applies for crimes committed after a certain date (since a previous statute might apply to an older offense). The committee determined that it should focus on new statutes and trust attorneys to do their job when an older statute applies.

4. Sexual Offense Definitions

Sandi Johnson

The committee reviewed the sexual offense definitions. Ms. Jones stated these definitions are proposed to be a jury instruction. Ms. Jones asked whether a definition for age is necessary and Ms. Johnson stated that it probably is not. Ms. Jones stated that there is a case that states when the

legislature defines terms those are words with special meanings. She stated that there is case law that when the terms are not defined, you can assume that the jury understands it and will use its ordinary meaning. Ms. Jones is concerned that by defining terms that are not already defined in statute, we are putting them into a box.

Ms. Klucznik stated all we need to determine is which definitions are terms of art. She stated that words like “breast” do not need to be included. However, if there is a definition by statute or by case law, they need be included. The committee determined to remove any that do not have a definition provided by statute or case law.

The committee deleted the age, anus, and breast definitions. The committee limited the definition of “buttocks” “does not include the anus.” The committee deleted the definitions of child.

Ms. Jones discussed “indecent liberties.” Ms. Jones provided a new definition of indecent liberties as follows:

“Indecent liberties” is an act of the same magnitude of gravity as [the act specifically described in the statute]. To determine whether Defendant’s conduct is of equal gravity to [the act described in the statute], consider the totality of the facts and all the surrounding circumstances, including the following factors: (1) the nature of the victim’s participation (whether defendant required the victim’s active participation), (2) the duration of the defendant’s act, (3) the defendant’s willingness to terminate his conduct at the victim’s request, (4) the relationship between the victim and the defendant, and (5) the age of the victim. If after considering all the surrounding circumstances, the conduct is comparable to [the touching that is specifically prohibited], the act qualifies as indecent liberties. *State ex rel. J.L.S.*, 610 P.2d 1294, 1296 (Utah 1980), *State v. Bishop*, 753 P.2d 439 (Utah 1988), *State v. Balfour*, 2008 UT App 410, ¶ 15, 198 P.3d 471.

Ms. Johnson stated that she thinks “genitals” need to be defined. Ms. Jones stated that she agrees and that there is case law defining “genitals”.

Ms. Klucznik and Ms. Jones will find the case and provide it to the committee for the next meeting.

Ms. Klucznik stated that she did not think “sexual intercourse” should be defined. She also stated that “substantial emotional or bodily pain” is a jury question. The committee removed those two definitions. The committee deleted the general definition of “touching”, and referred the reader to touching as defined in each offense. The committee discussed touching and determined that the way it is outlined in each offense is helpful.

Ms. Johnson moved to delete the definitions as indicated above. She stated that penetration and touching need have individual definitions for each of the statutes. Ms. Jones stated that there will be an instruction for each definition, with a committee note if necessary. Ms. Andrus stated that it is common to have definitions together at the end of a document.

Judge Blanch stated that Utah Code section 76-1-601 has many definitions that may need to be included. He stated if we are defining things generally in the future, we need to include all of those definitions, including omission, etc.

5. Other Business

There was no other business discussed at the meeting.

6. Adjourn

The meeting was adjourned at 1:29 p.m. The next meeting will be held on Wednesday, February 5, 2014 at 12:00 p.m.