

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, December 4, 2013
12:00 p.m. to 2:00 p.m.
Judicial Council Room

PRESENT

Judge Denise Lindberg, Chair
Alison Adams-Perlac, Staff
Professor Jennifer Andrus
Judge James Blanch
Mark Field
Sandi Johnson
Linda Jones
Judge Brendan McCullagh
Scott Young
Thomas Pedersen, Intern

EXCUSED

Professor Jensie Anderon
Karen Klucznik
John West
Judge Westfall

1. Welcome and Approval of Minutes

Judge Denise Lindberg

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

2. Mens Rea Instructions Revised

Judge Denise Lindberg

Judge Lindberg discussed the proposed mens rea instructions. She stated that in practice neither side has liked the current mens reas instructions, because the language is too stripped down. She stated that she has combined the versions as to conduct and as to the result of conduct, and that there have been no objections. Judge Lindberg asked whether the committee should substitute the combined instructions for the currently separated instructions.

Ms. Jones stated that *Hutchings*, 2012 UT 50, is a case where either intent or knowing was the element, and only one aspect of it was, and the trial court gave an instruction on the wrong aspect, and the Supreme Court ruled that was error. She stated that there are occasions when a criminal defense lawyer can articulate why it should be one specific intent as opposed to the combination. She suggested that we continue with 302A and 302B and add a 302C with them combined, so that all options are on the table. Mr. Field asked whether the combination would be confusing. Ms. Jones stated that she does not think it is confusing. She stated that there are attorneys out there who understand which intent applies. Some attorneys do not understand this, and they end up defaulting to a combination. She

suggested keeping them separate, and adding a new instruction with the combination for those cannot articulate which one applies.

Judge Lindberg stated that there have been problems with the bare-bones instruction. Ms. Jones gave the example of felony homicide. She stated that it does not fall in the typical intent category – you intend the robbery, but not the homicide. She stated that combining them on felony homicide may be sending the wrong message, but maybe it is important to have them combined and break it out for the jury how the intent applies to the robbery and the result applies to the homicide.

Mr. Field stated that giving a combined instruction could end up being error by the judge if the focus should only be on intent as to the result or the conduct. Judge Lindberg is concerned with the opposite scenario, where two separate instructions are given one as to result, and one as to conduct when only one applies. Ms. Jones agreed with Judge Lindberg and stated that scenario existed in *Hutchings*. Ms. Jones stated that she is not suggesting that a combined instruction not be included, but that the committee should keep all of the options on the table for judges and lawyers.

The committee reviewed *Hutchings*. Ms. Jones stated that *Hutchings* is a case where the wrong variation was used. Having a combined instruction would avoid that problem. She stated that by only leaving the combined instruction, we are making a decision for judges and lawyers that they should be making.

Judge Blanch stated that the combined instruction would be legally correct, but that it might confuse the jury. It covers all the bases, but it is confusing. He has always thought it would be better, if you are confident that you are using the correct one, if you only have an alleged offense that involves intent as to conduct or as to result, but not as to both. Judge Lindberg stated that the attorneys uniformly express discomfort with the current instructions and routinely resort back to the statutory definitions. Ms. Jones stated that she agreed, and that her proposal was only to keep the current instructions and add the new combined instruction to them.

Judge Lindberg stated that she would recommend a further modification. She stated that since the combined one would be used most often, she would make it 302A, and move the result instruction to 302B and the conduct instruction to 302C. Judge Blanch agreed, stating that often instructions as to both conduct and to result are necessary. He said there is a temptation to err on the side of having both. Judge Lindberg stated that the statutory definition includes both, so people seem comfortable having both.

Mr. Field pointed out that the committee note stated that the jury must be instructed as to which instruction applies to which count. The committee note seems to say that you have to point out to the jury which mens rea applies to which offense. Ms. Johnson agreed. She stated that if there are crimes like aggravated assault, there should be a separate instruction that says “as to intentionally causing serious bodily injury, it must be the defendant’s specific intent to cause serious bodily injury.”

Ms. Johnson stated if the committee does it this way, we will have *Hutchings* again. Unless you have a different instruction telling the jury which mens rea instructions goes with which offense, no matter how they are divided up, the wrong one may be applied. Judge Lindberg stated that the committee should develop such an instruction. Judge McCullagh suggested addressing it through a special verdict form, for example, “having found the defendant guilty of aggravated assault, we also find beyond a reasonable doubt the defendant intentionally caused serious bodily injury.” He stated that you would have the same verdict finding which gets you the second instead of the third. Ms. Johnson stated that she does not have objections to doing it separately. However, she stated that for these types of case the committee will not be able to solve the problem in the intent instructions, as it will also need to be addressed in the aggravated assault instructions.

Judge Blanch stated that he thinks if you have different offenses with different types of intent, it is appropriate to craft the instruction so that it is clear which intent applies to which offense and which element. He stated that he would not want it to be put in a special verdict form as you mess up in terms of shifting the burden, and for that reason he would want the special verdict form to be as simple as possible. He stated if there were two different offenses and one went to conduct and one went to result, he would want to instruct the jury separately on them, and not just mash them together. Mr. Young stated that you would decide to do that on a case by case basis.

Ms. Johnson stated that she is fine with having 302A, B, and C as Ms. Jones suggested, but that in the future we need to make sure to deal with it in the aggravated assault instructions. She also suggested that the committee note state, “crimes or elements within a crime”, since the intent can apply to specific elements.

Mr. Field stated that it is sometimes confusing whether result or conduct applies. Ms. Jones stated that the default is intent as to result, and that the rare circumstance is conduct. She stated that is why it makes sense to have it blended, but keep the options open so that the parties can argue which instructions are proper in their case. Judge Blanch stated that having the three options does not clear up the confusion.

Ms. Adams-Perlac stated that she would be willing to draft an instruction that provides for two different mens reas applying, and the parties would have to plug in the specific element or crime. Ms. Jones stated doing so is beyond the committee’s charge. She stated that the committee’s charge is to identify the elements and if there is a disagreement, parties can appeal it to the appellate courts. She stated that the three options is an improvement from the two options. Ms. Adams-Perlac stated that the instruction would provide sample language where multiple intents apply, not make the decision for the parties. She stated that 302A is going to confuse a jury. Judge Blanch stated that 302A is confusing, but it is not ambiguous, and it does not answer the question about which of the two applies. He stated that the problem is that it is not clear which is the actual intent requirement. Judge McCullagh stated that he is not in favor of the combined instruction. He stated that using a combined instruction runs the risk of the jury not getting there. He stated that a jury should be given either the results instruction or the conduct instruction. Judge McCullagh stated that the committee now has the opportunity to make it clear. Judge Lindberg disagreed that a combined instruction should not be provided. She stated that it is very difficult to get attorneys to work through whether the results or the conduct intent applies. Ms. Johnson stated that the statute includes both results and conduct for intent, so that until the legislature changes the statute, it should include both.

Mr. Field stated that he would like to review the committee note. Ms. Johnson stated that the committee note could state, “some crimes or elements within a crime with a mens rea... jurors must be specifically instructed as to the definition of intentionally which applies to the crime or the elements of the crime they are considering.” Ms. Jones stated that the first paragraph of the committee note covers the concerns of the combined instruction, and the second paragraphs are fine with regard to the individual ones.

Regarding to the Intentional instructions, Ms. Jones moved to adopt a combined instruction as 302A, with the committee note containing the first paragraph, to adopt a result instruction as 302B with the paragraph in the committee note relating to result, and a conduct instruction as 302C, with the paragraph in the committee note relating to conduct. Judge McCullagh seconded the motion, and it passed unanimously. Ms. Adams-Perlac will make the agreed upon revisions and circulate the committee note.

Regarding the Knowledge instructions, Ms. Jones moved to adopt a combined instruction as 303A, with the committee note containing the first paragraph, to adopt a result instruction as 303B with the paragraph in the committee

note relating to result, and a conduct instruction as 303C, with the paragraph in the committee note relating to conduct. Ms. Johnson seconded the motion, and it passed unanimously.

Regarding the Reckless instructions, Ms. Jones moved to adopt a combined instruction as 304A, with the committee note containing the first paragraph, to adopt a result instruction as 304B with the paragraph in the committee note relating to result, and a conduct instruction as 304C, with the paragraph in the committee note relating to conduct. Ms. Johnson seconded the motion, and it passed unanimously.

3. CR 301

Committee

The committee discussed the language at the end of the elements instruction, CR 301. Ms. Jones stated that she wanted to make sure that the instruction was not suggesting to the jury that an element has to be disproved beyond a reasonable doubt. She stated that she does not have concerns with the “each and every” language.

The instructions previously approved stand approved changing “one or more of the elements” to “each and every element” language.

4. Sexual Offense Instructions

Committee

The committee discussed CR 1605, unlawful sexual conduct with a 16 or 17 year old, and whether paragraph 4 should be modified. Ms. Jones stated that the instruction would only include 4a or 4b, so it will be less confusing for the jury than it is as currently written. The instruction remained as written and previously approved.

The committee discussed CR 1607, rape of a child. The instruction remained as written and previously approved. The committee also discussed CR 1608 object rape, and made minor changes to the instruction’s punctuation. The instruction remained as written and previously approved. The committee discussed CR 1609, object rape of a child. Ms. Andrus stated that subparagraphs should begin with a lower case letter if they are to read as part of a full sentence. The instruction remained as written and previously approved.

The committee discussed CR 1610, forcible sodomy. Ms. Jones questioned whether all the parentheses and brackets would be confusing to judges and attorneys. The instruction remained as written and previously approved.

Ms. Adams-Perlac stated that she is on the Bar Summer Convention Committee and said that if anyone is interested in doing a CLE on how to use the jury instructions she could pass that information on to the committee. She stated that it would not even have to be through the Bar Convention. Judge Lindberg suggested putting a CLE together with the Litigation Section. Judge McCullagh suggested doing a training session at the SWAP training for prosecutors and for the Utah Association of Criminal Defense Lawyers.

Judge Blanch stated that part of the problem is that attorneys bring the instructions to court as hard copies, so they cannot be manipulated. Mr. Field stated that judges should require it of the parties. Ms. Johnson stated that the judge should direct the attorneys to email the instructions to the clerks, or to bring them on a thumb drive.

The committee discussed CR 1611, sodomy on a child. The instruction remained as written and previously approved.

The committee discussed CR 1612, forcible sexual abuse. Ms. Johnson suggested changing “of a person” to “([VICTIM’S NAME] [MINOR’S INITIALS])” throughout the instruction. Judge Lindberg

suggested dividing paragraph 1 into subparagraphs a and b. Judge Lindberg suggested changing “actor” to (DEFENDANT’S NAME).

Ms. Jones suggested going back to the original language on 3d, because the defendant could cause indecent liberties taken with the victim or cause the victim to take indecent liberties with another person. Mr. Field thinks 3d means causing the victim to take indecent liberties with the defendant or another, but if it is written that way, then we are making substantive decisions. Ms. Johnson suggested that 3d remain as written.

Judge Blanch moved to approve the instruction as amended. Judge McCullagh seconded the motion and it passed unanimously.

5. Definitions

Sandi Johnson

This agenda item was tabled for discussion at the next meeting.

6. Other Business

There was no other business discussed at the meeting.

7. Adjourn

Judge McCullagh moved to adjourn the meeting. Mr. Field seconded the motion and it passed unanimously. The next meeting will be held on Wednesday, January 8, 2014 at 12:00 p.m.