

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, April 1, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT

Judge James Blanch, Chair
Alison Adams-Perlac, Staff
Mark Field
Sandi Johnson
Linda Jones (via telephone)
Karen Klucznik
Jesse Nix
Judge Michael Westfall (remotely via VIAC)
Scott Young

EXCUSED

Jennifer Andrus
Judge Brendon McCullagh
Thomas Pedersen, Intern

1. Welcome, Approval of Minutes

Judge Blanch

Judge Blanch welcomed everyone to the meeting.
Ms. Jones moved to approve the minutes from the March 4 meeting. Ms. Johnson seconded the motion and it passed unanimously.

2. SVF Unlawful Sexual Conduct with a 16 or 17 year old

Committee

Judge Blanch asked for comment on the special verdict form.

SVF Unlawful Sexual Conduct with a 16 or 17 year old.

(LOCATION) JUDICIAL DISTRICT COURT, [_____ DEPARTMENT,]

IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	SPECIAL VERDICT
Plaintiff,	:	Count (#)
-vs-	:	
(DEFENDANT’S NAME)	:	Case No. (**)
Defendant.	:	

We, the jury, have found the defendant, (DEFENDANT’S NAME), guilty of Unlawful Sexual Conduct with a 16 or 17 Year Old, [as charged in Count ____]. We also unanimously find the following beyond a reasonable doubt (check all that apply):

- The defendant had sexual intercourse with (MINOR’S INITIALS);
- The defendant engaged in any sexual act with (MINOR’S INITIALS) involving the touching, however slight, of the genitals of one person with the mouth or anus of another; and the touching of (MINOR’S INITIALS)’s genitals, mouth or anus involved (MINOR’S INITIALS)’s skin; ~~the genitals of one person and the mouth or anus of another person;~~
- With the intent to arouse or gratify the sexual desire of any person, or with the intent to cause substantial emotional or bodily pain to any person, the defendant caused the penetration, however slight, of the genital or anal opening of (MINOR’S INITIALS) by any foreign object, substance, instrument, or device, including a part of the human body;
- With the intent to arouse or gratify the sexual desire of any person, or with the intent to cause substantial emotional or bodily pain to any person, the defendant touched the skin of (MINOR’S INITIALS)’s anus, buttocks, or any part of (his)(her) (MINOR’S INITIALS)genitals or touched the skin of (FEMALE MINOR’S INITIALS)’s breast; or otherwise took indecent liberties with (MINOR’S INITIALS), or caused (MINOR’S INITIALS) to take indecent liberties with the defendant or another person, regardless of the sex of any participant.

DATED this _____ day of (MONTH), 20(**).

Foreperson

References

Utah Code § 76-5-401.2.
Utah Code § 76-5-407.

Ms. Johnson moved to approve the special verdict form. Ms. Jones seconded the motion and it passed unanimously.

3. Consent Instructions for CR1606 Rape

Committee

Ms. Jones discussed the *mens rea* requirements as stated in *State v. Barela*. She stated that the court suggested that jury instructions must include the *mens rea* element for every element of the offense. To accomplish this, Ms. Jones proposed that the second element of the

instruction, concerning sexual intercourse and consent, begin with “intentionally, knowingly, or recklessly.”

Judge Blanch stated that he was concerned about the readability of “consent” accompanied with *mens rea*. Ms. Jones suggested, “defendant was intentional, knowing, or reckless that (VICTIM’S NAME) did not consent.” Judge Blanch agreed that Ms. Jones suggestion was more precise. Ms. Klucznik suggested, “acted intentionally, knowingly, or recklessly with respect to (VICTIM’S NAME) lack of consent.” Ms. Johnson stated that the statement is still unclear. Ms. Jones suggested, “acted intentionally, knowingly, or recklessly that (VICTIM’S NAME) did not consent.”

Ms. Johnson suggested, “the defendant knew or a reasonable person would have known that the victim did not consent.” She asked why “intentionally” was necessary. Judge Blanch stated that “would have known” is the negligence standard. Ms. Johnson asked for the definition of “recklessly disregarding.” She stated that recklessness involves knowing a risk existed and ignoring the risk. Ms. Jones stated that the jury would receive definitional language of the required *mens rea* requirement. Ms. Klucznik suggested, “acted with intent, knowledge, or recklessness that (VICTIM’S NAME) did not consent.” Ms. Jones stated that this accomplished what the court required in *Barela*.

Mr. Field stated that “acted with intent” that victim did not consent is confusing. Ms. Jones stated that the problem arises because Utah is not a consent state, meaning that a person may have sex with another until the person says no. Judge Blanch asked if the language eliminated the “lack of consent” element because it conflates it with *mens rea*. Ms. Jones suggested separating “lack of consent” into two elements.

Judge Westfall stated that “intentionally” did not make sense in this context. Ms. Johnson stated that a prosecutor would likely proceed under “knowingly or recklessly.” Ms. Klucznik stated that “intentionally” should remain because of the directive in *Barela*. Ms. Jones suggested creating a committee note explaining why practioners should remove “intentionally” in practice.

CR 1606 Rape.

(DEFENDANT’S NAME) is charged [in Count__] with committing Rape [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly had sexual intercourse with (VICTIM’S NAME);
3. Without (VICTIM’S NAME)’s consent; and
4. (DEFENDANT’S NAME) acted with intent, knowledge or recklessness that (VICTIM’S NAME) did not consent.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-402.

Utah Code § 76-5-406.

Utah Code § 76-5-407.

State v. Barela, 2015 UT 22.

Committee Notes

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

Although the committee believes that the applicable mens rea as to element 4 would be knowledge or recklessness, it has included intent based on the Utah Supreme Court's opinion in *State v. Barela*, 2015 UT 22.

Use this instruction with Instruction 1621A, Conduct Sufficient to Constitute Sexual Intercourse for Rape.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

Ms. Jones moved to moved to approve the instruction. Ms. Johnson seconded the motion and it passed unanimously.

4. CR 1608 Object Rape

Committee

Ms. Jones stated that the court in *Barela* and *Bird* stated that *actus reus* elements must be modified by *mens rea*. She stated that the court requires this for each act of every non strict-liability crime. Ms. Klucznik stated that “intentionally, knowingly, or recklessly” is not required because the statute includes a specific intent (“cause substantial emotional or bodily pain”) for this crime. Ms. Jones stated that this does not specify the *mens rea* for “penetration” or “lack of consent,” which is required because it is not a strict liability crime. Ms. Klucznik stated that *mens rea* is not required for penetration because the intent is to “cause substantial emotional or bodily pain.” Ms. Johnson stated that *Barela* extends to rape and not object rape. Ms. Jones stated that the reasoning extends to object rape, especially under *Bird*, which was not a sexual crime case. Ms. Klucznik disagreed with that analysis. Ms. Johnson stated that object rape includes the act and the *mens rea* is the specific intent to “cause substantial emotional or bodily pain.” She stated that rape is different because the only act is penetration. Ms. Klucznik added that the rape statute does not include *mens rea* unlike object rape.

Mr. Field stated that the *mens rea* in object rape is directed at the emotional or bodily pain, not the *actus reus* of penetration. Ms. Klucznik and Ms. Johnson disagreed.

Mr. Field suggested using one sentence for the act of penetration rather than dividing the elements into subparts. Ms. Klucznik and Ms. Johnson agreed.

Judge Blanch suggested adding the *mens rea* language after the list of elements. Ms. Jones stated that this would not comply with *Barela* because the *mens rea* language must be specific to each element. Ms. Johnson stated that this method would be confusing to the jury. She stated that “lack of consent” is difficult because the state must prove the negative (the defendant did not know that the victim did not consent).

CR 1608 Object Rape.

(DEFENDANT’S NAME) is charged [in Count ____] with committing Object Rape [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly caused the penetration, however slight, of ([VICTIM’S NAME][MINOR’S INITIALS])’s genital or anal opening, by any object or substance other than the mouth or genitals;

3. The act was without ([VICTIM'S NAME] [MINOR'S INITIALS])'s consent;
4. (DEFENDANT'S NAME) acted with intent, knowledge or recklessness that ([VICTIM'S NAME] [MINOR'S INITIALS]) did not consent; and
5. (DEFENDANT'S NAME) did the act with the intent to:
 - a. cause substantial emotional or bodily pain to ([VICTIM'S NAME] [MINOR'S INITIALS]); or
 - b. arouse or gratify the sexual desire of any person.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-402.2.
State v. Barela, 2015 UT 22.

Committee Notes

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.
 If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

Ms. Johnson suggested adding a committee note that references CR1621A about sexual intercourse.

Ms. Jones moved to approve the instruction. Mr. Young seconded the motion and it passed unanimously.

5. CR 1607 Rape of a Child

Committee

The committee discussed changing the committee note as follows:

Committee Notes

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

Use this instruction with Instruction 1621B, Conduct Sufficient to Constitute Sexual Intercourse for Rape of a Child.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

Ms. Johnson moved to approve the committee note. Mr. Field seconded the motion and it passed unanimously.

6. CR 1609 Object Rape of a Child

Committee

Mr. Field asked if the instruction, specifically part 2, should be modified to be one sentence like CR1608. Ms. Klucznik suggested removing “instrument or device” because it is included in the definition of object. Mr. Field suggested removing “foreign” from “foreign object.” Ms. Klucznik suggested adding Utah Code 76-5-407 under References. Ms. Johnson suggested changing the last part to “under the age of 14 at the time of the conduct.”

CR 1609 Object Rape of a Child.

(DEFENDANT’S NAME) is charged [in Count ____] with committing Object Rape of a Child [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly caused the penetration or touched the skin, however slight, of (MINOR’S INITIALS)’s genital or anal opening with any ~~foreign object, or substance, instrument or device~~ that is not a part of the human body;
3. With the intent to:
 - a. cause substantial emotional or bodily pain to (MINOR’S INITIALS); or
 - b. arouse or gratify the sexual desire of any person; and
4. (MINOR’S INITIALS) was under the age of 14 ~~13 years old or younger~~ at the time of the conduct.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

- Utah Code § 76-5-402.3.
- Utah Code § 76-5-407.
- State v. Martinez, 2002 UT 60.
- State v. Martinez, 2000 UT App 320.

Committee Notes

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. *See* Special Verdict Form for Prior Conviction or Serious Bodily Injury.

Mr. Field moved to approve the instruction. Ms. Klucznik seconded the motion and it passed unanimously.

7. CR 1610 Forcible Sodomy

Committee

Ms. Jones made the following suggestions based on the changes from CR1606 Rape:

CR 1610 Forcible Sodomy.

(DEFENDANT’S NAME) is charged [in Count ____] with committing Forcible Sodomy [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly committed a sexual act involving any touching of the skin, however slight, of the genitals of one person and the mouth or anus of another;
3. Without (VICTIM’S NAME)’s consent; and
4. (DEFENDANT’S NAME) acted with intent, knowledge or recklessness that (VICTIM’S NAME) did not consent.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-403.

Utah Code § 76-5-407.

State v. Barela, 2015 UT 22.

Committee Notes

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

Although the committee believes that the applicable mens rea as to element 4 would be knowledge or recklessness, it has included intent based on the Utah Supreme Court’s opinion in State v. Barela.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

Mr. Field suggested including the same committee note as in CR1606.

Ms. Jones moved to approve the instruction. Mr. Field seconded the motion and it passed unanimously.

8. CR 1611 Sodomy on a Child

Committee

Ms. Klucznik suggested changing the element 2 to be one sentence.

CR 1611 Sodomy on a Child. Approved.

(DEFENDANT’S NAME) is charged [in Count ____] with committing Sodomy on a Child [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly committed a sexual act with (MINOR’S INITIALS), involving any touching, however slight, of the genitals of one person and the mouth or anus of another, even if accomplished through clothing; and
3. (MINOR’S INITIALS) was under the age of 14 years old at the time of the conduct.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-403.1.

Utah Code § 76-5-407.

State v. Martinez, 2002 UT 60.

State v. Martinez, 2000 UT App 320.

Committee Notes

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. *See* Special Verdict Form for Prior Conviction or Serious Bodily Injury.

Mr. Young moved to approve the instruction. Ms. Johnson seconded the motion and it passed unanimously.

9. CR 1612 Forcible Sexual Abuse

Committee

Ms. Johnson suggested using the consent language from CR1606. Mr. Young suggested “14 years of age or older.”

The committee discussed Instruction 1612 Forcible Sexual Abuse and decided on the following language:

CR 1612 Forcible Sexual Abuse.

(DEFENDANT’S NAME) is charged [in Count ___] with committing Forcible Sexual Abuse [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly:
 - a. ~~Did one or more of the following:~~
 - a. touched the skin of ([VICTIM’S NAME] [MINOR’S INITIALS])’s anus, buttocks, or genitals of ([VICTIM’S NAME] [MINOR’S INITIALS]); or
 - b. touched the skin of ([FEMALE VICTIM’S NAME] [FEMALE MINOR’S INITIALS])’s breast of ([FEMALE VICTIM’S NAME] [FEMALE MINOR’S INITIALS]); or
 - c. took indecent liberties with ([VICTIM’S NAME] [MINOR’S INITIALS]); or
 - d. caused a person to take indecent liberties with (DEFENDANT’S NAME) or another;
 3. Without (VICTIM’S NAME)’s consent;
 4. (DEFENDANT’S NAME) acted with intent, knowledge or recklessness that (VICTIM’S NAME) did not consent;
 - b. ~~Did the act without ([VICTIM’S NAME] [MINOR’S INITIALS])’s consent; and~~
 - 3-5. ~~Did so~~ With the intent to:
 - a. cause substantial emotional or bodily pain to any person, or
 - b. arouse or gratify the sexual desire of any person; and
 - 4-6. ([VICTIM’S NAME] [MINOR’S INITIALS]) was 14 years of age or older at the time of the conduct.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-404.

Utah Code § 76-5-406.

Utah Code § 76-5-407.

State v. Barela, 2015 UT 22.

Committee Notes

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. *See* Special Verdict Form for Prior Conviction or Serious Bodily Injury.

Ms. Jones moved to approve the instruction. Mr. Young seconded the motion and it passed unanimously.

10. Adjourn

Committee

The meeting was adjourned at 1:30 p.m. The next meeting is Wednesday, May 6, 2015.