

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

PRESENT

Judge Denise Lindberg, Chair
Alison Adams-Perlac
Professor Jennifer Andrus
Judge James Blanch
Mark Field
Sandi Johnson
Linda Jones
Karen Klucznik
Judge Brendan McCullagh
John West
Judge Michael Westfall

EXCUSED

Diane Abegglen
Professor Jense Anderson
Scott Young

1. Welcome and Approval of Minutes

Judge Denise

Lindberg

Judge Lindberg welcomed the committee. She introduced Judge James Blanch, Judge Michael Westfall, and Professor Jennifer Andrus as new members of the committee.

Judge Lindberg discussed the goal of the committee to make sure the instructions are as plain language as possible. She stated her goal that the instructions be drafted at reading level of grade 9.

The new members of the committee discussed their interest in the committee, and committee members introduced themselves to the new members.

Mr. West moved to approve the minutes from the September 9, 2013 meeting. Ms. Johnson seconded the motion and it passed unanimously.

2. Committee Note on Construction of Lindberg Criminal Jury Instructions

Judge Denise

This item was tabled for discussion at the next meeting.

3. Child Sex Offenses and Strict Liability

Alison Adams-Perlac

Ms. Adams-Perlac discussed the research she did on child sex offenses and strict liability. She stated that she reviewed *State v. Martinez*, 2002 UT 80, 52 P.3d 1276, *State v. Martinez*, 2000 UT 320, 14 P.3d 114, and Utah Code section 76-2-304.5. She stated that the *Martinez* cases suggest that the age element of a child sex offense is strict liability, even if the act itself is not. Based on her research, she thinks some of the approved instructions on these offenses will need to be amended so that the general intent language does not apply to the age element.

Ms. Jones stated that she thinks there are sexual offenses against minors that are strict liability crimes. She thinks *Martinez* identifies the sexual offense as a strict liability crime. She agreed with Ms. Adams-Perlac's research that there may be some sexual assault statutes that do not require proof of mens rea. Ms. Klucznik agreed that the age element is strict liability.

Ms. Jones stated that there is case law that says when you have a mental state element, it goes to all of the elements of the crime, but she thinks that rape of a child and object rape of a child are strict liability crimes. Ms. Johnson stated that strict liability goes to the intent of the defendant, and the jury still needs to find that the victim is under the age of 14. She stated that she thinks the instructions have been drafted so that the general intent language goes to the act, and does not apply to the age element. Ms. Jones stated that she thinks some of these offenses are strict liability so that intent does not need to be proven with regard to the act, but that you only need to prove that the defendant had sex with someone under the age of 14. Ms. Johnson stated that she would rather the instruction state the general intent language.

Ms. Klucznik stated that the statute states that a mental state is required unless the statute specifically states strict liability. She stated that none of these statutes speak in terms of strict liability. Ms. Jones stated that there is an argument a prosecutor could make that it is a strict liability crime, and there is an argument a defense attorney could make that it requires a mental state. She asked whether the committee needs to alert the judges and attorneys using these instructions that the mens rea is unclear. She suggested putting the mental state in brackets with a committee note stating that the statute does not specify the mental state, but there are cases that raise questions of strict liability, and that it may need to be resolved.

Ms. Adams-Perlac stated that the way she read the statute with the case law, it is strict liability only as to the age element. Ms. Jones stated that she thinks *Martinez* only addressed age, because that was the issue in the case. There are cases that state whatever the mental state is, it goes to all of the elements of the offense.

Judge McCullagh stated that the committee had this argument at the beginning of their discussion of sexual offenses. He stated that these statutes have second non-mens rea intents, for example, with the intent to cause emotional pain or with the intent to arouse or gratify. Ms. Klucznik stated that the committee's decision turned on case law. Ms. Jones stated that we also have a statutory element in those crimes that specify intent, that indicate that those crimes are not strict liability.

Judge Lindberg stated that at the very least, there should be something in a committee note to explain the concern. Ms. Klucznik stated that she would be concerned about have such a note. Ms. Jones stated that if it is not clear to us, we can either pass on the instruction, or we should alert everyone that we do not know the answer here.

Judge Westfall stated that he does not think the appellate court in *Martinez* had the ability to rewrite the code, and if the legislature has said that there has to be intent, it would be inappropriate to interpret *Martinez* to override the legislature. Ms. Jones stated her agreement, but said that she is focusing on those statutes that do not have a specific mental state indicated.

Ms. Jones stated the rape of a child instruction, as an example. She stated that she thinks rape of a child is a strict liability crime. She stated that it does not require that the person did it intentionally, knowingly, or recklessly. She said that it is a crime to have sex with a 14 year old, even if it was not done intentionally. Ms. Klucznik stated that all these statutes must be read with the general intent statute.

Ms. Jones stated that under *W.P.C. v. State*, 1999 UT App 35, Utah Code section 76-5-402.1 when considered as part of the criminal code as a whole “clearly evinces a legislative intent to impose strict liability on any person having sexual intercourse with a child under the age of 14.” Ms. Jones stated that she thinks this case answers the question, and suggested striking the general intent language.

Judge Blanch stated that he thinks the instruction is ambiguous because it sounds like the intent language goes to the age element as well as the act.

The committee examined the *W.P.C.* case. The case is referring over to the age statute, stating that under age minors cannot consent. Judge McCullagh suggested rewording the instruction so that it is clear that the general intent language does not apply to the age element.

The committee discussed “under 14 years of age”. Ms. Johnson stated that reading it this way may make a juror think that it includes 14 year olds. Professor Andrus stated that a juror would associate it with 14 instead of 13. Mr. West stated that if age is an issue, the lawyers will be on top of it, and suggested that the committee use the language of the statute.

Ms. Adams-Perlac stated that the committee may need to depart from the language of the statute in many cases, to ensure that the instructions are understandable to jurors. Judge Lindberg stated that the charge from the Supreme Court was to do just that.

Judge Blanch suggested using “13 or younger”. Professor Andrus stated that would likely be easier for a juror to associate with under 14 years of age. Ms. Klucznik suggested going back to the original language. Judge McCullagh suggested doing the same, but creating a definition for “under 14 years of age.”

The committee amended the proposed rape of a child instruction as follows:

CR 16__ Rape of a child.

The defendant, _____(NAME), is charged [in Count__] with 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. That the defendant_____ (NAME);
2. Intentionally, knowingly, or recklessly had sexual intercourse with [MINOR’S INITIALS].
3. [MINOR’S INITIALS] was under 14 years of age at the time of the offense.

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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant, NOT GUILTY.

Ms. Adams-Perlac checked the grade reading level with the proposed changes, and it was 9.4.

Judge Lindberg stated that the committee needs to include an instruction that defines “under 14 years of age.” Mr. West asked if it should be in a committee note. Judge Lindberg stated that it should be in an instruction. Ms. Johnson suggested that it go in a general definitions instruction page for the sexual assault instructions.

Ms. Johnson will develop proposed general definitions for the sexual assault instructions.

4. Sexual Offense Instructions

Committee

a. Sodomy on a Child

The committee then discussed the Sodomy on a Child instruction. Ms. Jones suggested combining elements 2 and 3. The committee discussed that the standard is “under 14 years of age”, and that “or younger” is unnecessary. Ms. Johnson suggested removing “regardless of the sex of either participant”. Judge McCullagh suggested adding “committing” before the crime in the first sentence to make it grammatically correct.

Judge Lindberg stated that the format for the earlier instructions needs to be standardized with the current instructions.

Judge Westfall asked if the location should be included as an element of the crime. The committee discussed that the location and jurisdiction are not an element under the statute. Judge Westfall also asked whether the specific intent language applies, for example, “with intent to cause sexual gratification.” Judge Lindberg stated that the specific intent only applies to certain crimes as stated in the statute.

Judge Lindberg stated that she typically separates the general intent language from the act element in her instructions. Ms. Klucznik stated that it is improper to do it in this case, because the general intent would apply to the age element.

Ms. Jones suggested having two elements: 1. the defendant, a. intentionally, knowingly, or recklessly; b. committed an act with [MINOR’S INITIALS]; and 2. [MINOR’S INITIALS] was under 14 years of age at the time of the offense.

The committee discussed whether the instruction should be reformatted back to three elements. Ms. Klucznik stated that the 1 and 2 elements would be one thought, and the third would be a complete thought.

Judge Westfall suggested reversing a. and b. He stated that it would make the “and” less awkward. Professor Andrus stated that it would also make them complete thoughts.

Ms. Klucznik asked why the committee’s uses brackets. Ms. Jones stated that brackets are used for optional language. Ms. Klucznik stated that “on or about” should also be in the DATE bracket. Ms. Klucznik suggested adding “committing” before the crime in the first sentence. Ms. Adams-Perlac asked if “committing” should be added to the MUJI elements template. The committee agreed that it should be.

Judge Westfall asked whether the date is an essential element. The committee agreed that it is not. Ms. Johnson stated that it is important to include the date to show that the minor was under 14 years of age on the date of the offense.

Ms. Adams-Perlac asked if the committee would like her to update the MUJI elements template.

The committee discussed whether “committing” should be in brackets or not, and determined that it should not be in brackets.

Judge Lindberg stated that the parentheses change should be made to the standard template and be changed throughout the instructions. Ms. Klucznik stated that “on or about” should also be within the DATE brackets.

CR 16__ Sodomy on a child.

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

1. That the defendant, (NAME);
 - a. committed a sexual act with (MINOR’S INITIALS), involving the genitals of one person and the mouth or anus of another; and
 - b. did so intentionally, knowingly, or recklessly; and

2. [MINOR’S INITIALS] was under 14 years of age at the time of the offense;

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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

Ms. Jones moved to adopt the proposed rule as amended above, and also moved that Ms. Adams-Perlac would change brackets to parentheses on MINOR’S INITIALS. Ms. Klucznik seconded the motion, and it passed unanimously.

Mr. West will develop a definition of “under 14 years of age” and send it to Ms. Johnson.

b. Sexual Abuse of a Child

The committee discussed the Sexual Abuse of a Child instruction. Ms. Jones stated that this instruction needs to be revised to conform to the Rape of a Child and Sodomy on a Child instructions. Ms. Klucznik suggested modifying one of the instructions, revising the others to conform, and then bringing these instructions back for discussion at the next meeting.

Ms. Jones moved to conform the Rape of a Child, Object Rape of a Child, and Sexual Abuse of a Child with the Sodomy on a Child instructions.

Ms. Adams-Perlac stated that the instructions are typically published as a package, since the committee may make amendments to some of the earlier proposed instructions in a group based on discussions about later proposed instructions in a group. She also stated that it is helpful to approve the instructions, and then review the whole package prior to publication. Judge Blanch agreed that if the instructions come out once in a while, people are more inclined to review them.

The committee agreed that the instructions should be published in a package, as opposed to individually, and that the committee should review the entire set once more prior to publication.

c. Forcible Sexual Abuse

Mr. West asked if this instruction needs to state that the person is “14 years of age or older”, or if it can just state “person.” Ms. Jones agreed with Mr. West. She stated that it is confusing, and the language does not add anything. Ms. Johnson suggested creating an element 5, stating “person was 14 years of age or older at the time of the act.”

Ms. Klucznik stated that the lines should be removed. Ms. Adams-Perlac stated that the lines are part of the standard template and asked if the standard template should be revised. The committee agreed that it should be.

Ms. Adams-Perlac will update the MUJI elements template and conform the Sodomy on a Child instruction to it. Judge Lindberg and Ms. Adams-Perlac will then work to standardize these instructions and to conform them to the Sodomy on a Child instruction. They will make sure they all conform to the revised MUJI elements template, and they will circulate them for the next meeting.

CR 16__ Forcible sexual abuse.

The defendant, _____ (NAME), is charged [in Count__] with 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, based on the evidence:

1. The defendant _____ (NAME);
2. With the intent to cause substantial emotional or bodily pain to any person, or with the intent to arouse or gratify the sexual desire of any person;
3. Intentionally, knowingly, or recklessly:
 - a. Touched the anus, buttocks, or genitals of a person;
 - b. Touched the breast of a female;
 - c. Took indecent liberties with a person; or
 - d. Caused a person to take indecent liberties with the actor or another;
4. Without consent of the other person.

5. (VICTIM'S INITIALS) was 14 years of age or older at the time of the offense.

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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

Judge Westfall left the meeting.

Ms. Jones stated that her consent case has been argued and they are awaiting a decision from the appellate court.

d. Aggravated Sexual Abuse of a Child

The committee discussed this special verdict form. Judge Blanch stated that it should say “having unanimously found”, instead of unanimously guilty. Ms. Johnson stated that the heading on the Unlawful Sexual Conduct with a 16 or 17 year old should be used for the beginning of this special verdict form.

Ms. Adams-Perlac will update this form as requested by the committee and will circulate it for the next meeting.

e. Penetration or Touching Sufficient to Constitute Offense

This instruction was tabled for further discussion at the next meeting.

5. Sexual Offenses Instruction Table

Alison Adams-Perlac

This table was provided to the committee to show which sexual offense instructions have been completed, and which ones need to be done.

6. Other Business

The next meeting will be held on Wednesday, November 6, 2013.

7. Adjourn

The meeting was adjourned.