

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, March 5, 2014
12:00 p.m. to 2:00 p.m.
Judicial Council Room

PRESENT

Judge Denise Lindberg, Chair
Alison Adams-Perlac, Staff
Judge James Blanch
Mark Field
Sandi Johnson
Karen Klucznik
Judge Brendan McCullagh
Thomas Pedersen, Intern
Judge Michael Westfall
Scott Young

EXCUSED

Professor Jensie Anderson
Professor Jenny Andrus
Linda Jones
John West

1. Welcome and Approval of Minutes

Judge Denise Lindberg

Judge Lindberg welcomed everyone to the meeting.

Ms. Johnson stated that she was present and should be removed from the excused list. Ms. Andrus stated that she was not present and she should be on the excused list.

Ms. Johnson moved to approve the minutes from the previous meeting as amended. Mr. Young seconded the motion and it passed unanimously.

2. Special Verdict Instruction

Committee

Ms. Adams-Perlac stated that the current instructions do not have an instruction addressing special verdict forms, so she drafted a new one. Judge Lindberg agreed that the current instructions do not include such an instruction.

The committee members made suggestions for amendments to the proposed instruction. Ms. Klucznik stated that the instruction is favored toward finding something. Ms. Johnson adding a sentence that states "if you do not find that one or more of the factors have been proven beyond a reasonable doubt do not check any boxes and have the foreperson sign the form." Judge McCullagh

suggested “check a box on the form for every factor that you the jury have unanimously found beyond a reasonable doubt.”

Ms. Klucznik stated that there is law that if there is insufficiency as to one of the variations, the state loses, because it is not clear which one the jury relied on it. Mr. Field stated that if one of the factors must be true in order for it to be an aggravated crime (e.g. sexual abuse of a child), then that factor is an element of the offense, and must be proven beyond a reasonable doubt. Ms. Johnson stated that she disagrees. She said that aggravated sexual abuse of a child says, the defendant committed sexual abuse of a child, and one of the aggravating factors was present. A jury could find that the defendant committed sexual abuse of a child, and they could each rely on a different aggravating factor. She stated that a special verdict form will require that jury be unanimous on the factor as well as the underlying crime. Ms. Klucznik said she thinks murder is the only one where the factors can be mixed and matched. Ms. Johnson stated that if we are using the special verdict form, we need to make clear that each factor must be unanimous.

Ms. Klucznik asked if the committee should look into the unanimity issue before formally approving it. Judge McCullagh stated that if we put it off, we will find that it is all over the place. He stated that this instruction is the most conservative approach. Judge Lindberg stated that this instruction will minimize cases involving factors being overturned on appeal. Ms. Johnson stated that a special verdict form should be used if there are multiple factors. Judge Blanch stated that it is the committee’s job to get the instructions right. Mr. Young stated his agreement and that it is the committee’s job to provide an instruction that is most likely to not be overturned.

Ms. Johnson stated that if the committee provides instructions on the second degree sexual abuse elements instructions, the first degree aggravated sex abuse elements instruction, and the special verdict form, that will cover everything the prosecutor would want to do.

The committee made other changes and amended the instruction as follows:

CR__ Special Verdict Form.

If you determine beyond a reasonable doubt that (DEFENDANT’S NAME) committed (NAME OF RELEVANT OFFENSE), you must complete the special verdict form. Check the box on the form for each factor which you as the jury unanimously find the prosecution has proven beyond a reasonable doubt. Do not check the box for any factor the prosecution has failed to prove beyond a reasonable doubt.

Even if you do not check any boxes, the foreperson must sign the special verdict form.

Ms. Johnson moved to approve the special verdict instruction as amended. Judge McCullagh seconded the motion and it passed unanimously.

3. Sexual Offense Instructions

Committee

The committee discussed Instruction 1614, Aggravated Sexual Abuse of a Child. Judge McCullagh suggested waiting until after the legislative session to address this instruction since there is a bill in the current legislative session that may change “special position of trust.” Judge McCullagh said that would also apply to the special verdict form. He offered to look at the special verdict form in light of any legislative changes.

The committee tabled discussion of Instruction 1614 until after the legislative session.

The committee discussed Instruction 1615. Ms. Adams-Perlac stated that she had not drafted an instruction since the committee had not decided whether one was necessary.

Ms. Adams-Perlac will draft Instruction 1615 with a special verdict form and circulate it for the next meeting.

The committee discussed Instruction 1616, Consent. Ms. Johnson stated her concern with using the term “must” and suggested using some of the language from the consent instruction in *Thompson*, and she read that instruction.

Ms. Andrus stated her concern that the language is complicated and suggested removing language such as “totality.” Judge McCullagh stated that the committee can make the *Thompson* instruction more plain language.

Ms. Johnson suggested using language from the preamble instructions at the beginning of Instruction 1616. Ms. Ms. Klucznik suggested stating, “Defendant has been charged with _____ (CRIME). The prosecution must prove beyond a reasonable doubt that the victim did not consent to the alleged conduct. The victim did not consent to an act if...”

Ms. Johnson suggested leaving the first couple of suggested lines in and then adding “the alleged sexual conduct is without consent of (VICTIM’S NAME) (MINOR’S INITIALS) under any, all, or a combination of the following circumstances...” then listing the factors and adding the ending paragraph from *Thompson*.

Ms. Andrus suggested stating, “lack of consent is not limited to the circumstances listed above.” Judge Lindberg suggested, “In deciding whether there is lack of consent, you are not limited to the above circumstances.” Mr. Field suggested, “you are not limited to the circumstances listed above.” Ms. Kluczik suggested adding “common ordinary meaning of consent.”

The committee discussed other changes to the instruction, including bracketing the factors, and adding a committee note advising individuals using the instruction to include only the relevant factors. The committee amended Instruction 1616 as follows:

CR 1616 Consent. (Reading level 24.8) Approved 03/5/2014

(DEFENDANT’S NAME) has been charged with (name of offense). The prosecution must prove beyond a reasonable doubt that the victim did not consent to the alleged sexual conduct. The alleged sexual conduct is without consent of [(VICTIM’S NAME)] [(MINOR’S INITIALS)] under any, all, or a combination of the following circumstances:

[[(VICTIM’S NAME)] [(MINOR’S INITIALS)] expressed lack of consent through words or conduct];

[(DEFENDANT'S NAME) overcame [(VICTIM'S NAME)] [(MINOR'S INITIALS)] through the application of physical force or violence];

[(DEFENDANT'S NAME) overcame the victim through concealment or by the element of surprise];

[(DEFENDANT'S NAME) coerced the victim to submit by threatening immediate or future retaliation against [(VICTIM'S NAME)] [(MINOR'S INITIALS)] or any person, and [(VICTIM'S NAME)] [(MINOR'S INITIALS)] thought at the time that (DEFENDANT'S NAME) had the ability to carry out the threat];

[[[(VICTIM'S NAME)] [(MINOR'S INITIALS)] did not consent and (DEFENDANT'S NAME) knew [(VICTIM'S NAME)] [(MINOR'S INITIALS)] was unconscious, unaware that the act was occurring, or was physically unable to resist];

[(DEFENDANT'S NAME) knew that as a result of mental illness or defect, [(VICTIM'S NAME)] [(MINOR'S INITIALS)] was incapable at the time of the act of either understanding the nature of the act or of resisting it];

[(DEFENDANT'S NAME) knew that [(VICTIM'S NAME)] [(MINOR'S INITIALS)] submitted or participated because [(VICTIM'S NAME)] [(MINOR'S INITIALS)] believed that (DEFENDANT'S NAME) was [(VICTIM'S NAME)] [(MINOR'S INITIALS)]'s spouse];

[(DEFENDANT'S NAME) intentionally impaired [(VICTIM'S NAME)] [(MINOR'S INITIALS)]'s power to understand or control [(VICTIM'S NAME)] [(MINOR'S INITIALS)]'s conduct by giving [(VICTIM'S NAME)] [(MINOR'S INITIALS)] a substance without [(VICTIM'S NAME)] [(MINOR'S INITIALS)]'s knowledge];

[(MINOR'S INITIALS) was younger than 14 years old at the time of the act];

[At the time of the act, (MINOR'S INITIALS) was younger than 18 years old and (DEFENDANT'S NAME) was (MINOR'S INITIALS)'s parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to (MINOR'S INITIALS)];

[(MINOR'S INITIALS) was 14 years old or older, but younger than 18 years old, and (DEFENDANT'S NAME) was more than three years older than (MINOR'S INITIALS) and enticed or coerced (MINOR'S INITIALS) to submit or participate, under circumstances not amounting to physical force or violence or the threat of retaliation];

[(DEFENDANT'S NAME) was a health professional or religious counselor who committed the act under the guise of providing professional diagnosis, counseling or treatment, and at the time of the act [(VICTIM'S NAME)] [(MINOR'S INITIALS)] reasonably believed the act was for professionally appropriate reasons, so that [(VICTIM'S NAME)] [(MINOR'S INITIALS)] could not reasonably be expected to have expressed resistance].

In deciding lack of consent, you are not limited to the circumstances listed above. You may also apply the common, ordinary meaning of consent to all of the facts and circumstances of this case.

References

Utah Code § 76-5-406.

State v. Thompson, 2014 UT App 14, 318 P.3d 1221.

Committee Notes

When using this instruction, practitioners should include only the factors relevant to the particular case, rather than all factors listed.

Mr. Field moved to approve Instruction 1616, Consent, as amended. Ms. Klucznik seconded the motion and it passed unanimously.

4. Sexual Offense Definitions

Committee

This item was tabled for discussion at the next meeting.

5. Other Business

There was no other business discussed at the meeting.

6. Adjourn

The meeting was adjourned at 1:27 p.m. The next meeting will be held on Wednesday, May 7, 2014 at 12:00 p.m.

