UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING AGENDA

Via WebEx
August 5, 2020 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Blanch
	Jury Unanimity: *State v. Alires*, 2019 UT App 206 and *State v. Case*, 2020 UT App 81 - *Review proposed instruction language*	Discussion / Action	Tab 2	Debra Nelson Karen Klucznik
	DUI and Related Traffic Instructions - *Driving with Measurable Controlled Substance Instruction* - *Automobile Homicide Instruction(s)* - *"Actual physical control" Instruction(s)* - *Criminal Refusal Instruction* - *Remaining Instructions?*	Discussion / Action	Tab 3	Judge McCullagh
	Battered Person Mitigation	Discussion / Action	Tab 4	Karen Klucznik
REVIEW PUBLIC COMMENT ON PUBLISHED INSTRUCTIONS				
	DUI Instructions (1000 series)	Discussion	Tab 5A	Michael Drechsel
	Assault Instructions (1300 series)	Discussion	Tab 5B	Michael Drechsel
	Homicide Instructions (1400 series)	Discussion	Tab 5C	Michael Drechsel
	Sexual Offenses Instructions (1600 series)	Discussion	Tab 5D	Michael Drechsel
	Defense Habitation/Self/Other (500 series)	Discussion	Tab 5E	Michael Drechsel
	Miscellaneous Comments	Discussion	Tab 5F	Michael Drechsel
1:30	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/muji-criminal/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

September 2, 2020	November 4, 2020
October 7, 2020	December 2, 2020

UPCOMING ASSIGNMENTS:
1. Judge McCullagh = DUI; Traffic
2. Sandi Johnson = Burglary; Robbery
3. Karen Klucznik & Mark Fields = Murder
4. Stephen Nelson = Use of Force; Prisoner Offenses
5. Judge Jones = Wildlife Offenses

TAB 1

Minutes – June 3, 2020 Meeting

NOTES:

UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING MINUTES

Via WebEx
June 3, 2020 – 12:00 p.m. to 1:30 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *Chair*	•	
Jennifer Andrus	•	
Melinda Bowen	•	
Mark Field	•	
Sandi Johnson	•	
Judge Linda Jones, *Emeritus*	•	
Karen Klucznik		•
Elise Lockwood		•
Judge Brendan McCullagh		•
Debra Nelson	•	
Stephen Nelson		•
Nathan Phelps	•	
Judge Michael Westfall	•	
Scott Young	•	

GUESTS:

None

STAFF:

Michael Drechsel
Jiro Johnson (minutes)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting. The committee considered the minutes from the May 6, 2020 meeting. Ms. Nelson moved to approve the draft minutes. Mr. Field seconded the motion. The motion passed unanimously.

(2) CR1616A CONDUCT SUFFICIENT TO CONSTITUTE SEXUAL INTERCOURSE FOR UNLAWFUL SEXUAL ACTIVITY WITH A MINOR, UNLAWFUL SEXUAL CONDUCT WITH A 16 OR 17 YEAR OLD, OR RAPE:

Judge Blanch asked that the committee take matters on the agenda out of order, starting with the third agenda item. The committee discussed the need to amend the current instruction CR1616A regarding penetration for offenses involving "sexual intercourse." The committee discussed the proposed instruction language included in the meeting materials.

Ms. Johnson raised a concern that this language, although legally correct, would require a medical person to scientifically identify what the outer folds of the labia are. Other committee members weigh in on this concern. Judge Blanch highlighted that the committee has typically provided definitional instruction based upon

statutory language, but has also done so when case law explicitly provides interpretive direction on the meaning of statutory language. The language proposed in this modification comes from case law.

The committee made one minor grammatical change (removing a comma after the word "however") and added three case citations to the references. With these minor changes, Mr. Young made a motion to adopt the proposed instruction. Ms. Nelson seconded. The Committee voted unanimously to approve the following changes to the language of CR1616A:

CR1616A CONDUCT SUFFICIENT TO CONSTITUTE SEXUAL INTERCOURSE FOR UNLAWFUL SEXUAL ACTIVITY WITH A MINOR, UNLAWFUL SEXUAL CONDUCT WITH A 16 OR 17 YEAR OLD, OR RAPE.

~~For purposes of [Unlawful Sexual Activity with a Minor][Unlawful Sexual Conduct with a 16 or 17 year old][Rape], any sexual penetration, however slight, is sufficient to constitute sexual intercourse.~~
You are instructed that any sexual penetration of the penis between the outer folds of the labia, however slight, is sufficient to constitute "sexual intercourse" for purposes of the offense of [Unlawful Sexual Activity with a Minor] [Unlawful Sexual Conduct with a 16 or 17 Year Old] [Rape].

REFERENCES

Utah Code § 76-5-401
Utah Code § 76-5-401.2
Utah Code § 76-5-402
Utah Code § 76-5-407
State v. Simmons, 759 P.2d 1152 (Utah 1988)
State v. Patterson, 2017 UT App 194
State v. Heath, 2019 UT App 186
State v. Martinez, 2002 UT 80
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.

Last Revised - 06/03/2020

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(3) CR1607 OBJECT RAPE AND *STATE V. HEATH*, 2019 UT APP 186:

Judge Blanch turned the committee's attention to CR1607. The committee discussed the draft language included in the meeting materials. The committee discussed the order of the two bracket options and whether there may be confusion in how the options are ordered. The committee resolved to change the order of the bracketed options as indicated in the approved language below. Mr. Field raised a concern that the term "genital opening" is broader than the term "vaginal opening" in that genital opening includes "the outer fold of the labia." The committee discussed modifications to the language to address this issue. Ms. Nelson felt that the floor of conduct encapsulated by this statute is penetration of the outer folds of the labia (i.e., that it would not be possible to penetrate the vaginal opening without first penetrating the outer folds of the labia). The committee agreed with this assessment and crafted the language of the instruction to address this observation. The committee also discussed whether it was necessary to include a committee note to practitioners that the

instruction would need to me modified in the uncommon circumstance where the "genital opening" at issue under the facts of the case was the male urethral opening. Ultimately, the committee concluded that the language crafted by the committee in element 2 obviated the need to craft a committee note.

Based upon the discussion of the committee, and the resulting changes to the proposed language in the meeting materials, Ms. Nelson moved to approve the modified language (included below). Mr. Field seconded that motion. The committee voted unanimously in support of the motion, and approved the following language:

CR1607 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 anal opening] [([VICTIM'S NAME] [MINOR'S INITIALS])'s genital opening, including the outer folds of the labia]~~([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
State v. Simmons, 759 P.2d 1152 (Utah 1988)
State v. Patterson, 2017 UT App 194
State v. Heath, 2019 UT App 186

COMMITTEE NOTES

~~For a definition of vaginal "penetration" for purposes of this instruction, see *State v. Patterson*, 2017 UT App 194, ¶3 (citing *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988)).~~

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 SVF 1617, Sexual Offense Prior Conviction or SVF 1618, Serious Bodily Injury.

Last Revised – 09/2015 (approved); 12/05/2018 (committee notes amended); 06/03/2020 (element 2 revised, references added, committee note revised)

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(4) CR1615 CONSENT:

Judge Blanch requested that the committee consider changes to CR1615, as necessitated by HB0213 (https://le.utah.gov/~2020/bills/static/HB0213.html) from the 2020 legislative session. Mr. Drechsel explained the draft changes in the meeting materials. The committee engaged in discussion regarding how to best incorporate the new subsection (3) in Utah Code § 76-5-406(3) (lines 79-81).

Ms. Johnson raised a concern that withdrawing consent is not limited to words or conduct but at any time prior to or during a sexual act. Judge Blanch asked are there other methods to give or withdraw consent. Mr. Field gave an example where someone froze during sex and could not use words or conduct. Judge Blanch asked if we remove "through words or conduct" is there a possibility that some conduct becomes criminal that was not made criminal by the statute. Ms. Andrus stated that this change would only make things more readable. Mr. Young argued that "through words or conduct" is in the statute but also is more understandable by jurors who are not likely to use terms like consent when commonly referring to sexual conduct.

After significant back and forth, the committee ultimately determined that it would be best to incorporate the statutory language verbatim, with the following two minor modifications: 1) omitting the words "through words or conduct" (line 81) because the committee could not conceive of any other method whereby consent might be withdrawn; and 2) changing the words "prior to" to "before" (line 81) to improve readability for lay jurors. Ms. Johnson moved to incorporate those changes into the instruction. Ms. Nelson seconded that motion. The Committee voted unanimously in favor of the motion and the motion passed.

The Committee then considered the portion of the instruction discussing erroneous belief that the other person was the alleged victim's spouse. HB0213 expanded this erroneous belief provision from "spouse" to "someone else" (i.e., any person other than the specific person who the alleged victim believed the person to be). The committee discussed changing "erroneously" to "mistakenly" or "incorrectly," as one of those two options was believed to be more understandable to a juror. Ultimately the committee agreed that "incorrectly" was the better option as it avoids introducing the possible value judgment that the concept of "mistake" might introduce into the instruction. Having concluded the discussion, Ms. Nelson made a motion to adopt the changes, and Judge Westfall seconded that motion. The Committee unanimously voted in favor of the motion.

As a result of the two motions on this matter, the entire committee approved the following amended language to CR1615:

CR1615 CONSENT.

(DEFENDANT'S NAME) has been charged with (name of offense). The prosecution must prove beyond a reasonable doubt that [(VICTIM'S NAME)][(MINOR'S INITIALS)] did not consent to the alleged sexual conduct.

Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act. Consent may be initially given but may be withdrawn at any time before or during sexual activity.

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 the victim through the application of physical force or violence;]
- [(DEFENDANT'S NAME) overcame [(VICTIM'S NAME)][(MINOR'S INITIALS)] through concealment or by the element of surprise;]
- [(DEFENDANT'S NAME) coerced [(VICTIM'S NAME)][(MINOR'S INITIALS)] 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;]
- [(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, or for any other reason [(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)] incorrectly believed that (DEFENDANT'S NAME) was ~~[(VICTIM'S NAME][(MINOR'S INITIALS)]'s spouse~~someone else;]
- [(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
Utah Code § 76-5-407
State v. Barela, 2015 UT 22
State v. Thompson, 2014 UT App 14

COMMITTEE NOTES

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

Last Revised – 09/04/2019 (revised); 06/03/2020 (revised for HB0213)

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(5) JURY UNANIMITY AND *STATE V. ALIRES*, 2019 UT APP 206:

The committee entertained a brief discussion on this agenda item. Ms. Nelson recommended that the committee address this on the agenda at the next meeting so that Ms. Nelson and Ms. Klucznik can coordinate and prepare for the discussion. Judge Blanch instructed staff to include this matter on the next meeting agenda.

(6) ADJOURN

At the conclusion of the meeting, the committee discussed whether the committee should meet in July or August (in light of the fact that a meeting earlier in the year was canceled). The committee agreed that there should be no meeting in July (as previously planned). The committee agreed to meet in August (contrary to the previous plan) in order to continue its work on the DUI and jury unanimity instructions. In order to address those items, the committee will need to have certain members present on August 5th who were not able to attend today. Judge Blanch instructed Mr. Drechsel to reach out to the committee members to check for conflicts. If there is no conflict, then Mr. Drechsel will send out the calendar invite and meeting materials to the committee as a whole. The meeting adjourned at approximately 1:22 p.m. The next meeting is tentatively scheduled for August 5, 2020, starting at 12:00 noon (most likely via WebEx).

TAB 2

Jury Unanimity:
State v. Alires / State v. Case

NOTES: At the beginning of 2020, the committee began a discussion of a possible need for a jury unanimity instruction. This concern arose from a review of *State v. Alires*, 2019 UT App 206. Since that time, *State v. Case*, 2020 UT App 81, and State v. Whytock, 2020 UT App 107, were also published. These three opinions have prompted the creation of the following materials.

Committee Note

Jury unanimity is required under the Utah constitution. However, what jury unanimity means appears to depend on the statutory definition of the crime. In particular, Utah's appellate courts have tried to distinguish between elements of a crime--on which a jury must be unanimous as to time, place, and act--and theories of a crime--the means of committing a crime, on which a jury does not have to be unanimous.

The line between elements and theories, however, is not clearly defined in the case law. Furthermore, no case has addressed how the unanimity requirement applies to charges that allow juries to consider whether the aggregate of a defendant's conduct proves a crime. For these reasons, the Committee has not adopted any set unanimity instructions. Rather, the Committee encourages the parties to refer to case law on the matter.

Relevant cases:

State v. Hummel, 2017 UT 19, 393 P.3d 314 (elements vs. theories);
***State v. Whytock*, 2020 UT App 107, ___ P.3d ___**
State v. Case, 2020 UT App 81, ___ P.3d ___
State v. Alires, 2019 UT App 206, 455 P.3d 636

Unanimity when multiple acts are offered to support one offense and each of those acts could have been charged separately:

- (Defendant) is charged [in Count _____] with [crime] [on or about _____] . The State has presented evidence of more than one act to prove that (Defendant) committed this offense. You must not find (Defendant) guilty unless you unanimously find beyond a reasonable doubt that the State has proved that (Defendant) committed at least one of these acts and you all agree on which act or acts he/she committed.

OR

- (Defendant) is charged [in Count _____] with [crime] [on or about _____] . The State has presented evidence of more than one act to prove that (Defendant) committed this offense. To find (Defendant) guilty, you must unanimously find beyond a reasonable doubt that (Defendant) committed at least one of these acts under the circumstances and with the mental state required for the crime and you all agree on which act or acts he/she committed.

QUESTION - What do we do if Defendant is charged with a sex crime based on specific touching but the prosecutor wants to include the "indecent liberties" alternative of guilt?

Unanimity when multiple acts are offered to support multiple offenses:

- (Defendant) is charged with multiple counts of _____. Each count addresses a distinct occurrence of a distinct act. To find (Defendant) guilty on any count, you must all agree on the distinct act that applies to that count. You must further unanimously find beyond a reasonable doubt that (Defendant) committed that act under the circumstances and with the mental state required for the crime.

QUESTION - What do we do if Defendant is charged with sex crimes based on specific touchings but the prosecutor wants to include a single "indecent liberties" alternative of guilt?

Unanimity when multiple acts or mental states (theories) support one offense and the acts/mental states could not have been charged separately (this is the murder by strangulation or poison example):

- (Defendant) is charged with [crime]. The elements of [crime] are defined in Instruction [Number]. To convict (Defendant) of [crime], you must all agree beyond a reasonable doubt that the State has proved each and every element of the crime. However, [crime] can be committed in alternative ways, and you do not have to unanimously agree on the way (Defendant) committed the crime. Similarly, although you must unanimously find beyond a reasonable doubt that (Defendant) acted with one of the mental states defined in the elements instruction, you do not have to all agree on the mental state (Defendant) acted with.

QUESTION - What do we do if Defendant is charged with an attempted crime that falls under this category (like murder, where each attempt arguably could be charged separately)?

TAB 3

DUI and Related Traffic Instructions

NOTES: At the January 2020 meeting, three DUI elements instructions and a special verdict form were approved by the committee for publication:

CR1003 (MB DUI), CR1004 (MA DUI), CR1005 (F3 DUI), and SVF1001

At the May 6, 2020 meeting, the committee agreed that the following instructions would be in order as a result of HB0139[1]:

- actual physical control (and a safe harbor)
- criminal refusal to test

Draft language for those two instructions is included in these materials.

In addition, the remaining draft DUI instructions that have not been reviewed by the committee are:

- refusal of chemical test as evidence
- actual physical control
- alcohol restricted driver
- automobile homicide – mobile device (F3)
- automobile homicide – mobile device (F2)
- automobile homicide (F3)
- automobile homicide (F2)
- driving with measurable controlled substance
- definitions – DUI in general
- svf – dui priors
- svf – automobile homicide w/ priors

[1] https://le.utah.gov/~2020/bills/static/HB0139.html

CR_____ Safe Harbor Actual Physical Control.

In this case, the charges distinguish between "operating" OR being "in actual physical control" of a vehicle. These are separate considerations. Operation of a vehicle is a straightforward matter. Actual physical control is more elusive a concept. This instruction will help you in your deliberation of that issue.

Actual physical control of a vehicle means that a person has the apparent ability to start and move the vehicle. However, Utah law also provides a specific set of circumstances under which a person is NOT in actual physical control of a vehicle.

If all of the following factors are present, then you must find that the Defendant was NOT in actual physical control of the vehicle:

1. (DEFENDANT'S NAME) was asleep in a vehicle;
2. (DEFENDANT'S NAME) was not in the driver's seat;
3. The engine of the vehicle that (DEFENDANT'S NAME) was sleeping in was not running;
4. The vehicle that (DEFENDANT'S NAME) was sleeping in was lawfully parked; and
5. It is evident that (DEFENDANT'S NAME) did not, while under the influence of alcohol and/or another drug or drugs, drive the vehicle to the location where [he][she] was sleeping in it.

Even if your deliberations do not allow you to conclude that the above five numbered factors were present at the time of the alleged offense, remember that it is the prosecution's burden to convince you that the defendant WAS in actual physical control of the vehicle and they must prove that to you beyond a reasonable doubt.

Therefore, I will provide you some other factors that you may consider in determining whether, under the totality of the circumstances presented, the defendant was in "actual physical control" of the vehicle on [DATE].

You may want to consider, among other things:

- Whether the defendant was asleep or wake when discovered;
- The position of the vehicle;
- Whether the vehicle was running;
- Whether the defendant was in the driver's seat;
- Whether the defendant was the sole occupant of the vehicle;
- Whether the defendant was in possession of the vehicle's keys;
- Whether the defendant had the apparent ability to start and move the vehicle;
- How the vehicle got to where it was found.
- Whether the defendant drove it there.

None of these factors is solely determinative of the question, nor is the list all-inclusive of factors you may find helpful in your deliberations.

{Good luck!}

DRAFTER'S NOTE:
The instruction on the previous page is about as good a one as I can think of where the facts of a case suggest that the statutory "safe harbor" is met. There will certainly be cases where there will not be a chance to give the instruction. Among those:
1. Defendant was awake when discovered.
2. Defendant was in the driver's seat when discovered.
3. The engine is running.

If these are the facts presented at trial, I think we can all say that the safe harbor facts aren't going to be there, no instruction.

The parking one might be a little bit squishier. It is a truism to say that whether something is legal is a question of law. So, the court is going to have to make a determination that the vehicle is parked legally, not the jury. That is sometimes grayish, store parking lot late at night, not fully in a stall, etc. I can only say that I would probably make the prosecution cite me a law that says parking where that vehicle was found is illegal, like on a roadway; in front of a fire hydrant, etc. before I wouldn't allow the instruction based on the legally parked prong.

Then there is the fifth prong, "evident from the facts presented" is a weird way to write a law, and whoever at SWAP or Leg Counsel came up with it should be flogged. Every time I come back to it, it reads to me like an affirmative defense, that there must be some evidence that the jury can rely on to find that the vehicle got there by means other than a drunk defendant. I also can credit the argument that if factors 1-4 exist so that the safe harbor comes into play, then the prosecution must prove beyond a reasonable doubt that "it is NOT evident that the defendant didn't drunk drive the vehicle to that spot." The second approach is more consistent with other affirmative type offenses, such as self-defense, but those don't have such weird statutory language.

I sort of ducked the issue in the draft, but I want the committee to weigh in. Then we can do a committee note based on our conclusions about when to give this instruction. It also means we need the old actual physical control instruction too, for when we won't give the safe harbor instruction.

References

Committee Notes

Last Revised - 00/00/0000

CR_____ Actual physical control.

In this case, the charges distinguish between “operating” OR being “in actual physical control” of a motor vehicle. These are separate considerations.

Actual physical control of a motor vehicle means that a person has the apparent ability to start and move a vehicle. The question of whether a person operated or even intends to operate a motor vehicle is irrelevant to whether that person has the present ability to start and move the vehicle.

You must decide from the evidence of this case whether the defendant had the present ability to start and move the vehicle. In determining whether the Defendant had “actual physical control” of a motor vehicle, you are instructed to consider the totality of the circumstances. You may want to consider, among other things:

- whether the Defendant was asleep or awake when discovered;
- the position of the automobile;
- whether the automobile's motor was running;
- whether the Defendant was positioned in the driver's seat of the vehicle;
- whether the Defendant was the vehicle's sole occupant;
- whether the Defendant had possession of the ignition key;
- the Defendant's apparent ability to start and move the vehicle;
- how the car got to where it was found;
- whether the Defendant drove it there.

None of these factors is solely determinative of the question, nor is the list all-inclusive of factors you may find helpful in your deliberations.

References

State v. Barnhart, 850 P.2d 473 (Utah App. 1993)

Committee Notes

Last Revised - 00/00/0000

CR_____ Refusal to Submit to a Chemical Test.

(DEFENDANT'S NAME) is charged [in Count ____] with Refusal to Submit to a Chemical Test [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 on or about [DATE];
2. A court had issued a warrant to draw and test the defendant's blood;
3. The peace officer issued the defendant a warning that a refusal to submit to a chemical test or tests could result in criminal prosecution; and
4. The defendant refused to submit to a test of [his/her] blood.

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.

> ***DRAFTER'S NOTE:***
> *Will have to be given in addition to the DUI or other underlying offense, b/c statute makes plain it doesn't merge, or is any sort of greater included offense (its penalties are higher than the underlying offense).*
> *Of minor interest, " I consent to you testing my blood, just not sticking a needle in my arm to get it out." The statute only criminalizes refusal to test, not refusal to submit. I chose the elements language purposefully.*

References

Committee Notes

Last Revised - 00/00/0000

CR_____ Refusal to test as evidence.

In this case, you must determine whether [DEFENDANT'S NAME], while under arrest, refused to submit to a chemical test or tests. If you determine that [DEFENDANT'S NAME] refused to submit to a chemical test or tests, you may weigh that as part of your considerations in determining whether [DEFENDANT'S NAME] is guilty of operating or in actual physical control of a motor vehicle while:

1. [under the influence of:
   a. alcohol;
   b. any drug; or
   c. a combination of alcohol and any drug;]
2. [having any measurable controlled substance or metabolite of a controlled substance in the person's body;] or
3. [having any measurable or detectable amount of alcohol in the person's body if the person is an alcohol restricted driver as defined under Section 41-6a-529.]

A person operating a motor vehicle in Utah is considered to have given the person's consent to a chemical test or tests of the person's breath, blood, urine, or oral fluids for the purpose of determining whether the person was operating or in actual physical control of a motor vehicle while:

1. having a blood or breath alcohol content statutorily prohibited under Section 41-6a-502, 41-6a-530, or 53-3-231;
2. under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6a-502; or
3. having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6a-517.

The peace officer determines which of the tests are administered and how many of them are administered. If a peace officer requests more than one test, refusal by a person to take one or more requested tests, even though the person does submit to any other requested test or tests, is a refusal.

References

Utah Code § 41-6a-520
Utah Code § 41-6a-524

Committee Notes

Last Revised - 00/00/0000

CR_____ Alcohol Restricted License.

(DEFENDANT'S NAME) is charged [in Count ____] with committing a Violation of Alcohol Restricted License [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. operated or was in actual physical control of a vehicle;
3. while having a measurable or detectable amount of alcohol in [his][her] body; and
4. (DEFENDANT'S NAME) meets at least one of the following:
   a. [is a person under age 21;]
   b. [is a novice learner driver;]
   c. [within the two years prior to [OFFENSE DATE] (DEFENDANT'S NAME) was convicted of:
      i. driving under the influence of alcohol or any drug;
      ii. alcohol-related or drug-related reckless driving;
      iii. impaired driving;
      iv. a local ordinance similar to those referenced in i, ii, or iii; or
      v. a statute or ordinance of this state, another state, the United States, or any of its districts, possessions or territories, which would constitute a violation Utah Code Ann. 41-6a-502;]
   d. [within the two years prior to [OFFENSE DATE] (DEFENDANT'S NAME) has had the person's driving privileges suspended pursuant to Utah Code Ann. 53-3-223 for an alcohol related offense;]
   e. [within the three years prior to [OFFENSE DATE] (DEFENDANT'S NAME) has been convicted of 41-6a-518.2, Driving Without an Ignition Interlock Device;]
   f. [within the last five years (DEFENDANT'S NAME) has had [his][her] driver's privilege revoked for a refusal to submit to a chemical test under Utah Code Ann. 41-6a-520;]
   g. [within the last five years (DEFENDANT'S NAME) has been convicted of a class A misdemeanor violation of 41-6a-502;]
   h. [within the ten years prior to [OFFENSE DATE] (DEFENDANT'S NAME) has been convicted of:
      i. driving under the influence of alcohol or any drug;
      ii. alcohol-related or drug-related reckless driving;
      iii. impaired driving;
      iv. a local ordinance similar to those referenced in i, ii, or iii; or
      v. a statute or ordinance of this state, another state, the United States, or any of its districts, possessions or territories, which would constitute a violation Utah Code Ann. 41-6a-502;
      AND that conviction was for an offense that was committed within ten years of the commission of another such offense for which the defendant was convicted;]
   i. [within the ten years prior to [OFFENSE DATE] (DEFENDANT'S NAME) has had his/her driving privilege revoked for a refusal to submit to a chemical test and that refusal was within ten years after:
      i. a prior refusal to submit to a chemical test under Utah Code Ann. 51-6a-520; or
      ii. a prior conviction for [LIST OFFENSE, which was not based on the same arrest as the refusal]{used because this is a legal determination which will be made by COURT};]
   j. [(DEFENDANT'S NAME) has previously been convicted of automobile homicide under Utah Code Ann. 76-5-207;] or
   k. [(DEFENDANT'S NAME) has previously been convicted of a felony violation of 41-6a-502.]

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 §

Committee Notes

Last Revised - 00/00/0000

DRAFT: 01/08/2020

CR_____ Automobile Homicide Involving Using a Handheld Wireless Communication Device While Driving.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Automobile Homicide Involving Using a Handheld Wireless Communication Device While Driving [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):
   a. operated a motor vehicle on a highway in a negligent manner;
2. While using a handheld wireless communication device to manually:
   a. write, send, or read a written communication, including:
      i. a text message;
      ii. an instant message; or
      iii. electronic mail; or
   b. dial a phone number;
   c. access the Internet;
   d. view or record video; or
   e. enter data into a handheld wireless communication device; and
3. Caused the death of (VICTIM'S NAME); and
4. [That the defense of _____ does not apply.]

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 § 76-5-207.5

Committee Notes

Last Revised - 00/00/0000

Commented [MCD1]: (3)→ Subsection (2) does not prohibit a person from using a handheld wireless communication device while operating a moving motor vehicle:
(a)→ when using a handheld communication device for voice communication;
(b)→ to view a global positioning or navigation device or a global positioning or navigation application;
(c)→ during a medical emergency;
(d)→ when reporting a safety hazard or requesting assistance relating to a safety hazard;
(e)→ when reporting criminal activity or requesting assistance relating to a criminal activity;
(f)→ when used by a law enforcement officer or emergency service personnel acting within the course and scope of the law enforcement officer's or emergency service personnel's employment; or
(g)→ to operate:
(i)→ hands-free or voice operated technology; or
(ii)→ a system that is physically or electronically integrated into the motor vehicle.

DRAFT: 01/08/2020

CR_____ Automobile Homicide Involving Using a Handheld Wireless Communication Device While Driving.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Automobile Homicide Involving Using a Handheld Wireless Communication Device While Driving [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):
   a. operated a motor vehicle on a highway in a criminally negligent manner;
2. While using a handheld wireless communication device to manually:
   a. write, send, or read a written communication, including:
      i. a text message;
      ii. an instant message; or
      iii. electronic mail; or
   b. dial a phone number;
   c. access the Internet;
   d. view or record video; or
   e. enter data into a handheld wireless communication device; and
3. Caused the death of (VICTIM'S NAME); and
4. [That the defense of _____ does not apply.]

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 § 76-5-207.5

Committee Notes

Last Revised - 00/00/0000

Commented [MCD1]: (3)→ Subsection (2) does not prohibit a person from using a handheld wireless communication device while operating a moving motor vehicle:
(a)→ when using a handheld communication device for voice communication;
(b)→ to view a global positioning or navigation device or a global positioning or navigation application;
(c)→ during a medical emergency;
(d)→ when reporting a safety hazard or requesting assistance relating to a safety hazard;
(e)→ when reporting criminal activity or requesting assistance relating to a criminal activity;
(f)→ when used by a law enforcement officer or emergency service personnel acting within the course and scope of the law enforcement officer's or emergency service personnel's employment; or
(g)→ to operate:
(i)→ hands-free or voice operated technology; or
(ii)→ a system that is physically or electronically integrated into the motor vehicle.

CR_____ Automobile Homicide.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Automobile Homicide [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):
   a. operated a motor vehicle in a negligent manner; and
2. Caused the death of (VICTIM'S NAME); and
3. (DEFENDANT'S NAME):
   a. [had sufficient alcohol in [his][her] body that a subsequent chemical test showed that [he][she] had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of the test;]
   b. [was under the influence of [alcohol][any drug][the combined influence of alcohol and any drug] to a degree that rendered [him][her] incapable of safely operating a vehicle; or]
   c. [had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of operation][.][; and]
4. [That the defense of _____ does not apply.]

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 § 76-5-207

Committee Notes

For Second Degree Felony automobile homicide based upon negligent operation of a motor vehicle and a prior conviction as defined in Utah Code § 41-6a-501(2), practitioners should request that the court address the prior conviction in a bifurcated proceeding and, if appropriate, use SVF_____ ("Automobile Homicide with Prior Conviction").

Last Revised - 00/00/0000

CR_____ Automobile Homicide.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Automobile Homicide [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):
    a. operated a motor vehicle in a criminally negligent manner; and
2. Caused the death of (VICTIM'S NAME); and
3. (DEFENDANT'S NAME):
    a. [had sufficient alcohol in [his][her] body that a subsequent chemical test showed that [he][she] had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of the test;]
    b. [was under the influence of [alcohol][any drug][the combined influence of alcohol and any drug] to a degree that rendered [him][her] incapable of safely operating a vehicle; or]
    c. [had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of operation][.][; and]
4. [That the defense of _____ does not apply.]

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 § 76-5-207

Committee Notes

Last Revised - 00/00/0000

CR_____ Driving with Any Measurable Controlled Substance in the Body. (VERSION 1)

(DEFENDANT'S NAME) is charged [in Count ____] with committing Driving with Any Measurable Controlled Substance in the Body [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) intentionally, knowingly, or recklessly
   a. operated a vehicle; or
   b. was in actual physical control of a vehicle; and
2. (DEFENDANT'S NAME):
   a. had any measurable controlled substance or metabolite, other than 11-nor-9-carboxy-tetrahydrocannabinol, of a controlled substance in the person's body.
3. [That the following defenses do not apply:]
   a. [the controlled substance was not involuntarily ingested;]
   b. [the controlled substance was not prescribed by a practitioner for use by (DEFENDANT'S NAME);]
   c.]the controlled substance was not cannabis in a medicinal dosage form or a cannabis product in a medicinal dosage form that the accused legally ingested; or]
   d. [the controlled substance was not otherwise legally ingested.]
4. [That the defense of _____ does not apply.]

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 § 41-6a-517

Committee Notes

Last Revised - 00/00/0000

CR_____ Driving with Any Measurable Controlled Substance in the Body. (VERSION 2)

Before you can convict the defendant of "driving a motor vehicle with a measured amount of a Controlled Substance {DRUG}" you must find from all the evidence and beyond a reasonable doubt each and every one of the following numbered elements of that offense:

1. That on or about [DATE], the defendant;
2. operated or was in actual physical control of a motor vehicle;
3. had a measurable {amount of a} controlled substance or metabolite of a controlled substance, other than 11-nor-9-carboxy-tetrahydrocannabinol, in his/her body; and
4. [DEFENSES:
   a. The substance was {NOT IN}voluntarily ingested by the defendant.
   b. The substance was not prescribed by a practitioner {or recommended by a physician [cannabis offenses prior to 12/04/18]} for use by the defendant.
   c. If the controlled substance was cannabis or a cannabis product, it was not ingested by the defendant in a medicinal dosage form in accordance with the Utah Medical Cannabis Act. [Offenses after 12/04/18].
   d. The substance was not legally ingested.

If, after careful consideration of all the evidence in this case, you are convinced of the truth of each and every one of the foregoing numbered elements beyond a reasonable doubt, then you must find the defendant guilty of "driving a motor vehicle with a measured amount of a Controlled Substance {DRUG}" as charged in the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of that count.

References

Utah Code § 41-6a-517

Committee Notes

Last Revised - 00/00/0000

CR1002 Definitions.

"Serious bodily injury" means bodily injury that creates or causes:
(i) serious permanent disfigurement;
(ii) protracted loss or impairment of the function of any bodily member or organ; or (iii) a substantial risk of death.
[see Utah Code § 41-6a-501(1)(h)]

"Drug" or "drugs" means:
(i) a controlled substance as defined in Section 58-37-2;
(ii) a drug as defined in Section 58-17b-102; or
(iii) any substance that, when knowingly, intentionally, or recklessly taken into the human body, can impair the ability of a person to safely operate a motor vehicle.
[see Utah Code § 41-6a-501(1)(c)]

"Negligence" means simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.
[see Utah Code § 41-6a-501(1)(e)]

"Vehicle" or "motor vehicle" means a vehicle or motor vehicle as defined in Section 41-6a-102; and
(ii) "Vehicle" or "motor vehicle" includes:
(A) an off-highway vehicle as defined under Section 41-22-2; and (B) a motorboat as defined in Section 73-18-2.
[see Utah Code § 41-6a-501(1)(k)]

For MA/F3 DUI:
“Proximate cause” means that:
(1) the person's act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence; and
(2) the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.
There may be more than one cause of the same harm.

References

Committee Notes

Last Revised - 00/00/0000

SVF 1002. Driving Under the Influence – Prior Conviction.

(LOCATION) JUDICIAL DISTRICT COURT, [_____ DEPARTMENT,]
IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. (DEFENDANT'S NAME), Defendant.	**SPECIAL VERDICT** **DRIVING UNDER THE INFLUENCE** **PRIOR CONVICTION** Case No. (*********) Count (#)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Driving Under the Influence of [Alcohol][Any Drug][the Combined Influence of Alcohol and Any Drug], as charged in Count [#]. We also unanimously find the State has proven the following beyond a reasonable doubt (check all that apply):

- ☐ [(DEFENDANT'S NAME) has two or more prior convictions in case number(s) [_____] and [_____] each of which is within 10 years of:
  i. the current conviction; or
  ii. the commission of the offense upon which the current conviction is based;]

- ☐ [(DEFENDANT'S NAME)'s conviction in this case is at any time after a conviction of:
  i. automobile homicide in case number [_____], which was committed after July 1, 2001; or
  ii. felony-level driving under the influence in case number [_____], which was committed after July 1, 2001~~; or~~
  ~~iii. any conviction described in element i. or ii. which judgment of conviction is reduced under Section 76-3-402~~.]
- ☐ None of the above.

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

_____
Foreperson

Committee Notes

Last Revised – 00/00/0000

SVF ____. Automobile Homicide with Prior Conviction.

(LOCATION) JUDICIAL DISTRICT COURT, [_____ DEPARTMENT,]
IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. (DEFENDANT'S NAME), Defendant.	**SPECIAL VERDICT** **AUTOMOBILE HOMICIDE** **WITH PRIOR CONVICTION** Case No. (*********) Count (#)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Automobile Homicide, as charged in Count [#]. We also unanimously find the State has proven the following beyond a reasonable doubt (check all that apply):

- ☐ [(DEFENDANT'S NAME) has a prior conviction for [driving under the influence of alcohol, any drug, or a combination of both][alcohol, any drug, or a combination of both-related reckless driving or a similar local ordinance][impaired driving][driving with a measurable controlled substance][automobile homicide][Utah Code § 58-37-8(2)(g)].]

- ☐ None of the above.

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

_____
Foreperson

Committee Notes

Last Revised – 00/00/0000

TAB 4

Battered Person Mitigation

NOTES: At the May 6, 2020 meeting, Ms. Karen Klucznik agreed to prepare draft materials in response to SB0238[2] "Battered Person Mitigation Amendments." Those materials are included for committee consideration.

[2] https://le.utah.gov/~2020/bills/static/SB0238.html

Draft instructions for Battered Person Mitigation
(Utah Code Ann. §76-2-409, effective May 12, 2020)

Note that the statute defining this mitigation defense does not identify the crimes to which it applies.

Also note that the definitions of "abuse" and "cohabitant" refer to statutes that were amended effective *after* May 12, 2020. This makes the instruction defining those terms very messy.

RELEVANT STATUTES

Utah Code Add. § 76-2-409 (Battered Person Mitigation)

(1) As used in this section:
(a) "Abuse" means the same as that term is defined in Section 78B-7-102.
(b) "Cohabitant" means:
(i) the same as that term is defined in Section 78B-7-102; or
(ii) the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor.

(2)(a) An individual is entitled to battered person mitigation if:
(i) the individual committed a criminal offense that was not legally justified;
(ii) the individual committed the criminal offense against a cohabitant who demonstrated a pattern of abuse against the individual or another cohabitant of the individual; and
(iii) the individual reasonably believed that the criminal offense was necessary to end the pattern of abuse.
(b) A reasonable belief under Subsection (2)(a) is determined from the viewpoint of a reasonable person in the individual's circumstances, as the individual's circumstances are perceived by the individual.

(3) An individual claiming mitigation under Subsection (2)(a) has the burden of proving, by clear and convincing evidence, each element that would entitle the individual to mitigation under Subsection (2)(a).

(4) Mitigation under Subsection (2)(a) results in a one-step reduction of the level of offense of which the individual is convicted.

(5)(a) If the trier of fact is a jury, an individual is not entitled to mitigation under Subsection (2)(a) unless the jury:
(i) finds the individual proved, in accordance with Subsection (3), that the individual is entitled to mitigation by unanimous vote; and
(ii) returns a special verdict for the reduced charge at the same time the jury returns the general verdict.
(b) A nonunanimous vote by the jury on the question of mitigation under Subsection (2)(a) does not result in a hung jury.
(6) An individual intending to claim mitigation under Subsection (2)(a) at the individual's trial shall give notice of the individual's intent to claim mitigation under Subsection (2)(a) to the prosecuting agency at least 30 days before the individual's trial.

Statutes relevant to definition of "abuse"

Utah Code Ann. § 76-2-409(1)(a) (effective May 12, 2020) (the battered person mitigation defense statute)
(1)(a) "Abuse" means the same as that term is defined in Section 78B-7-102.

Utah Code Ann. § 78B-7-102 (1) (effective May 12 to July 1, 2020):
(1) "Abuse" means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.

Utah Code Ann. § 78B-7-102 (1) (effective July 1, 2020):
(1) "Abuse" means, except as provided in Section 78B–7–201, intentionally or knowingly causing or attempting to cause ~~a cohabitant physical harm or intentionally or knowingly placing a cohabitant~~ another individual physical harm or intentionally or knowingly placing another individual in reasonable fear of imminent physical harm.

Utah Code Ann. § 78B-7-201 (same as before May 12, 2020)
(1) "Abuse" means:
(a) physical abuse;
(b) sexual abuse;
(c) any sexual offense described in Title 76, Chapter 5b, Part 2, Sexual Exploitation; or
(d) human trafficking of a child for sexual exploitation under Section 76–5–308.5.

Statutes relevant to definition of "cohabitant"

Utah Code Ann. § 76-2-409(1)(b) (effective May 12, 2020) (the battered person mitigation defense statute)

(1)(b) "Cohabitant" means:

(i) the same as that term is defined in Section 78B-7-102; or

(ii) the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor.

Utah Code Ann. § 78B-7-102(2),(3) (May 12, 2020 to July 1, 2020)

(3)(a) "Cohabitant" means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:

(i) is or was a spouse of the other party;

(ii) is or was living as if a spouse of the other party;

(iii) is related by blood or marriage to the other party as the person's parent, grandparent, sibling, or any other person related to the person by consanguinity or affinity to the second degree;

(iv) has or had one or more children in common with the other party;

(v) is the biological parent of the other party's unborn child;

(vi) resides or has resided in the same residence as the other party; or

(vii) is or was in a consensual sexual relationship with the other party.

(b) "Cohabitant" does not include:

(i) the relationship of natural parent, adoptive parent, or step-parent to a minor; or

(ii) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(4) "Consanguinity" means the same as that term is defined in Section 76-1-601.

Utah Code Ann. § 76-1-601(6) (effective May 12, 2020)

(6) "Consanguinity" means a relationship by blood to the first or second degree, including an individual's parent, grandparent, sibling, child, aunt, uncle, niece, or nephew.

Utah Code Ann. § 78B-7-102(4)(a),(b) (effective July 1, 2020)

~~(2)~~(5)(a) "Cohabitant" means an emancipated ~~person pursuant to~~ individual under Section 15–2–1 or ~~a person~~ an individual who is 16 years of age or older who:

~~(a)~~(i) is or was a spouse of the other party;

~~(b)~~(ii) is or was living as if a spouse of the other party;

~~(c)~~(iii) is related by blood or marriage to the other party as the ~~person's~~ individual's parent, grandparent, sibling, or any other ~~person~~ individual related to the ~~person~~ individual by consanguinity or affinity to the second degree;

~~(d)~~(iv) has or had one or more children in common with the other party;

~~(e)~~(v) is the biological parent of the other party's unborn child;

~~(f)~~(vi) resides or has resided in the same residence as the other party; or

~~(g)~~(vii) is or was in a consensual sexual relationship with the other party.

~~(3)~~(b) Notwithstanding Subsection ~~(2)~~ (4)(a), "cohabitant" does not include:

~~(a)~~(i) the relationship of natural parent, adoptive parent, or step-parent to a minor; or

~~(b)~~(ii) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(6) "Consanguinity" means the same as that term is defined in Section 76-1-601.

Utah Code Ann. § 76-1-601(6) (effective May 12, 2020)

(6) "Consanguinity" means a relationship by blood to the first or second degree, including an individual's parent, grandparent, sibling, child, aunt, uncle, niece, or nephew.

CR___ Special Verdict Form - Battered Person Mitigation

If you find that the State has proved all the elements of [name applicable crime] beyond a reasonable doubt, you must complete the special verdict form titled "Special Verdict Battered Person Mitigation."

- Check ONLY ONE box on the form.
- The foreperson MUST sign the special verdict form.

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and
- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

CR___ Explanation of Battered Person Mitigation Defense

You must consider the battered person mitigation defense only if you find the State has proved all the elements of [name applicable crime] beyond a reasonable doubt. The battered person mitigation defense is a partial defense to [name applicable crime]. The effect of the mitigation defense is to reduce the level of the offense. Your decision will be reflected in the special verdict form titled "Special Verdict Battered Person Mitigation Defense."

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and
- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

CR___ Definition of Battered Person Mitigation Defense

The battered person mitigation defense applies if you unanimously find:

1. The defendant committed an offense that was not legally justified;
2. The defendant committed the defense against a cohabitant;
3. The cohabitant had demonstrated a pattern of abuse against the defendant or another cohabitant; and
4. The defendant reasonably believed the offense was necessary to end the pattern of abuse.

The defendant must prove by clear and convincing evidence that battered person mitigation defense applies. [**Taken from the civil instruction:** To prove something by clear and convincing evidence, the defendant must present sufficient evidence to persuade you to the point that there remains no serious or substantial doubt as to the truth of the fact. Proof by clear and convincing evidence thus requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.]

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and
- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

CR____. Definitions applicable to Battered Persons Mitigation Defense

The following definitions apply to the battered person mitigation defense:

1. "Abuse" means intentionally or knowingly causing or attempting to cause another individual physical harm [**or sexual abuse or sexual exploitation or human trafficking of a child for sexual exploitation (78B-7-201(1)]]** or intentionally or knowingly placing another individual in reasonable fear of imminent physical harm [**or sexual abuse or sexual exploitation or human trafficking of a child for sexual exploitation (78B-7-201(1)]]**.

2. "Cohabitant" means

(a) **[the same as defined in section 78B-7-102]** an emancipated individual **[under Section 15–2–1]** or an individual who is 16 years of age or older who:

(i) is or was a spouse of the other party;

(ii) is or was living as if a spouse of the other party;

(iii) is related by blood or marriage to the other party as the person's individual's parent, grandparent, sibling, or any other person individual related to the person individual by consanguinity or affinity to the second degree;

(iv) has or had one or more children in common with the other party;

(v) is the biological parent of the other party's unborn child;

(vi) resides or has resided in the same residence as the other party; or

(vii) is or was in a consensual sexual relationship with the other party.

(b) the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor.

[78B-7-102(4)(b)] Notwithstanding any of the above definitions, "cohabitant" does not include the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(3) "Reasonable belief" is determined from the viewpoint of a reasonable person in the individual's circumstances, as the individual's circumstances are perceived by the individual.

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and

- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

SVF ____. Battered Person Mitigation Defense

(LOCATION) JUDICIAL DISTRICT COURT, [_____ DEPARTMENT,]
IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
	:	**SPECIAL VERDICT**
Plaintiff,	:	**BATTERED PERSON**
	:	**MITIGATION DEFENSE**
-vs-	:	
		Count (#)
(DEFENDANT'S NAME),		
Defendant.		
		Case No. (**)

Having found the State has proved all the elements of [name applicable crime], as charged in Count [#],

Check ONLY ONE of the following boxes:

☐ We unanimously find (DEFENDANT'S NAME) has proved by clear and convincing evidence that the battered person mitigation defense applies, and thus we unanimously find (DEFENDANT'S NAME) guilty of [name applicable lesser crime].

OR

☐ We do not unanimously find (DEFENDANT'S NAME) has proved by clear and convincing evidence that the battered person mitigation defense applies, and thus we unanimously find (DEFENDANT'S NAME) guilty of [name applicable crime].

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

_____
Foreperson

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the "Special Verdict Battered - Person Mitigation" special verdict form; and
- add the following paragraph at the bottom of the underlying crime's elements instruction:

  "If you are convinced that the State has proved each and every element of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____."

TAB 5

Public Comments on Published Instructions

NOTES: On June 3, 2020, committee staff published a large number of committee-approved instructions and special verdict forms. The public comment period ran from June 3, 2020, through July 19, 2020. During the comment period, 16 individuals provided over 30 comments. Several of the comments identified minor clerical issues that have committee staff has already resolved without need for any committee consideration.

The remaining comments have been grouped into sub-tabs, as follows:

- **Tab 5A – DUI Instructions (1000 series):**
  Elements Instructions (CR1003, CR1004, CR1005) – one comment

- **Tab 5B – Assault Instructions (1300 series):**
  CR1301 – four comments
  CR1302 – two comments
  CR1320 – two comment
  CR1322 – two comments

- **Tab 5C – Homicide Instructions (1400 series):**
  CR1411 – two comments
  CR1451, CR1452, SVF1450 – three comments

- **Tab 5D – Sexual Offenses Instructions (1600 series):**
  CR1601 – three comments
  CR1613, SVF1613 – two comments
  CR1616A – four comments

- **Tab 5E – Defense of Habitation / Self / Others (500 series):**
  CR520 through CR523 – two comments
  CR530 through CR533 – four comments

- **Tab 5F – Miscellaneous Instructions:**
  CR411 – two comments
  In General – one comment

TAB 5A

Public Comment:
DUI Instructions (1000 series)

NOTES: The committee received the following comment related to the committee notes for the three DUI elements instructions (CR1003 – MB, CR1004 – MA, and CR1005 – F3):

Hyrum Hemingway: *"The committee notes are misleading. Contrary to their assertion, it is not 'an open question whether a mens rea is required with respect to the operation of actual physical control element of DUI' for offenses occurring before HB0139 takes effect. The amended committee notes are equally problematic, as they persist in suggesting it is unresolved whether DUI is a strict liability offense for offenses occurring before HB0139.*

"The only authority relied on for the proposition that DUI is not a strict liability offense is State v. Vialpando, 2004 UT App 95, ¶26. In that case, the Court of Appeals considered whether the trial court erred by failing to instruct the jury that the State was required to prove intent in an actual physical control case. The Court ultimate [sic] concluded no such showing was necessary. In reaching its decision, the Court recognized that the plain text of the former DUI statute (Utah Code § 41-6-44) did not contain a mens rea requirement. In the absence of such requirement, the Court fell back on the general presumption in Utah Code § 76-2-102 that in the absence of a specified mens rea for a specific offense, the code requires evidence of intent, knowledge, or recklessness. The decision made no mention of Utah Code § 76-2-101's plain text, which stated, '[t]hese standards of criminal responsibility shall not apply to the violations set forth in Title 41, Chapter 6, unless specifically provided by law.' It is unclear why the Court failed to address this controlling text, as it is simply not acknowledged in any fashion.

"In 2015, the Utah Supreme Court interpreted Utah Code Ann. 76-2-101, holding that "[v]iolations of the Utah Traffic Code . . . are strict liability offenses "unless specifically provided by law." State v. Bird, 2015 UT 7, ¶ 18 (quoting Utah Code § 76–2–101(2)). When Bird is considered with Vialpando, the only logical outcome is that Vialpando's holding that DUI had any mens rea requirement was overruled. Vialpando expressly held that the DUI statute (which has not materially changed since Vialpando was decided) contains no mens rea requirement. Vialpando relied on Utah Code § 76-2-102 for the default mens rea applicable to all criminal offenses that do not contain a mens rea requirement. However, the Supreme Court's decision in Bird makes clear that Vialpando's reliance on Utah Code § 76-2-102 was erroneous. DUI is part of the traffic code. In the absence of anything specifically providing otherwise, Utah Code § 76–2–101(2) renders DUI a strict liability offense.

"Subsequent to Bird, the Court of Appeals has twice interpreted the DUI statute (now Utah Code § 41-6a-502) and Utah Code § 76-2-101(2) as creating a strict liability crime. State v. Thompson, 2017 UT App 183, ¶ 52 ('But driving under the influence of alcohol is a strict-liability crime and therefore does

not have a mens rea requirement.'); State v. Higley, 2020 UT App 45, ¶22 (same). While these two cases were not directly deciding whether it was error to refuse to instruct a jury about whether DUI contains any mental state, there is no reason to believe such a case would result in a different result. The controlling statutes would be the same. And any decision addressing such an argument would have to grapple with Bird, which leaves little room for debate. The Court of Appeals' decisions subsequent to Vialpando, which account for the Supreme Court's interpretation of Utah Code § 76-2-101(2) in Bird, have undermined any persuasive force left in Vialpando, to the extent it suggested DUI is anything other than a strict liability offense.

"If some believe Vialpando's mens rea analysis is still good law, that belief does not have sufficient legal justification to be published in a model jury instruction. Vialpando ignored the legislature's clear direction that the traffic code was exempted from the standards of Utah Code § 76-2-102. Subsequent to the Supreme Court's decision in Bird, the Court of Appeals has twice interpreted the DUI statute and Utah Code § 76-2-101(2) as creating a strict liability offense. Publishing an official model jury instruction stating it is an 'open question' or 'unresolved' gives too much weight to Vialpando and ignores what has happened since.

"Finally, floor remarks from Senator Curtis S. Bramble on March 4 and March 5, 2020, discussing HB0139 clearly state the bill was 'clarifying' and 'clarifies' that DUI was a strict liability offense. Repeated use of the root verb 'clarify' signals the legislature's opinion was that Utah Traffic Code section 502 has always been a strict liability offense. That suggests the legislature meant what it said in Utah Code Ann. § 76-2-101."

TAB 5B

Public Comment:
Assault Instructions (1300 series)

NOTES: ==========

Recklessly attempting assault in Utah

==========

One comment raised the issue of whether it is even possible to "recklessly attempt to assault" in Utah:

Brent Huff: *CR1302 states the elements of Assault to include "Intentionally, knowingly, or recklessly" attempting, with unlawful force or violence, to do bodily injury." Can a person recklessly attempt in Utah?*

In CR1302, CR1303, CR1304, CR1305, CR1306, CR1320, and CR1321 the instructions all read:

1) DEFENDANT'S NAME;
2) Intentionally, knowingly, or recklessly;
3) Attempted . . .

The issue raised in the comment is whether it is even possible for a person to "recklessly attempt" to assault someone in Utah. Utah Code § 76-4-101 says "attempt" =

(1)(a) engaging in conduct constituting a substantial step; AND
(1)(b)(i) intending to commit the crime; OR
(1)(b)(ii) acting with awareness that the conduct is reasonably certain to cause the result (i.e., knowingly)

That is the general attempt statute. But Utah Code § 76-4-301 says that an attempt that is specifically designated in statute (perhaps like the specific mention of "attempt" in the assault statute) prevails over the general attempt statute.

Should these instructions be modified?

==========

CR1301 – Definition changes

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There were a few public comments suggesting minor changes or additional definitions be included in CR1301:

Corey Sherwin: *The one potential assault-related definition the proposed instruction does not have is* ***"act"*** *(UCA 76-1-601(1)). While not frequently in need of explanation, the term "act" has a specific definition under the law and ought to be included in the instruction.*

Janet Lawrence: *In the "Targeting a Law Enforcement Officer" definition, the term* ***"commission of"*** *is not in common usage and is not plain English. I would change "the commission of" to "committing." The* ***"military servicemember in uniform"*** *and* ***"peace officer"*** *definitions refer the jury to sections of the code that are not defined. The jury should not be referring to the code, so these need to be defined. For example, the second element in the "military servicemember in uniform" now worded "a member of the National Guard serving as provided in Section 39-1-5 or 39-1-9" could be worded as "a member of the National Guard who the governor has ordered into active service or who the President of the United States has called into service."*

Katie Ellis: *We could possibly add a few more definitions:*
"Emergency medical service worker" *means a person licensed under Section 26-8a-302. See Utah Code § 76-5-102.7(3)(b).*
"Health care provider" *includes any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital, health care facility, physician, physician assistant, registered nurse, licensed practical nurse, nurse-midwife, licensed direct-entry midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, physical therapist assistant, podiatric physician, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, clinical social worker, certified social worker, social service worker, marriage and family counselor, practitioner of obstetrics, licensed athletic trainer, or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment. See Utah Code §§ 76-5-102.7(3)(c); 78B-3-403.*

Tom Brunker: *Consider removing the definition of* ***"targeting a law enforcement officer."*** *CR1322 presents an elements instruction for aggravated assault involving targeting a law enforcement officer. That could be used as a model for other offenses that involve targeting a law enforcement officer. The statutory language defining targeting a law enforcement officer is hard to follow; repeating that language for the jury is not helpful. Breaking it out into elements, as in CR1322, is helpful.*
If you remove the definition of "targeting a law enforcement officer" from CR1301 and keep the elements instruction for aggravated assault—targeting a law enforcement officer (CR1322), then targeting a law enforcement officer should be eliminated from the special form.

==========

Structure of CR1302 and CR1320 – Assault Enhancements

==========

Tom Brunker: *[On CR1302] CR1302 purports to cover both class B and class A misdemeanor assault. But when there are aggravators at issue that may increase the assault to a class A misdemeanor, the instruction, as written, allows the jury only to either convict or acquit of the higher crime. It should allow for a conviction of the lower crime if the State fails to prove the aggravator.*

The elements instruction says (both before and after the listed elements) that the jury must find that each of the elements applies before it can convict. Elements 3 and 4 list alternative facts that must be found by the jury to enhance the penalty to a class A misdemeanor. If neither of those facts are found, but every other element is found, then the defendant is still guilty of a class B misdemeanor. But as the instruction is written, the jury is required to find the enhancement in order to find the defendant guilty of any assault. In other words, including elements 3 and 4 effectively eliminates class B misdemeanor assault as a crime. Elements 3 and 4 should be handled through a special verdict form rather than the elements instruction.

Tom Brunker: *[On CR1320] The enhancement element on aggravated assault (element 3) raises a similar problem. Again, the elements instruction says (both before and after the listed elements) that the jury must find that each of the elements applies before it can convict. Element 3 lists facts that must be found by the jury to enhance the penalty to a second-degree felony. If none of those facts are found, but every other element is found, then the defendant is still guilty of a third-degree felony. But as the instruction is written, the jury is required to find the enhancement facts in order to find the defendant guilty of aggravated assault. In other words, including element 3 effectively eliminates third degree felony aggravated assault as a crime.*

==========

Feedback on Committee Note to CR1320 re: Cohabitancy Status

==========

Hyrum Hemingway: *The note includes a suggestion that co-habitancy status may require proof of mens rea. This suggestion comes from of an accurate statement, but the statement appears to be a solution in search of a problem that does not exist. The note cites to State v. Barela, 2015 UT 22, ¶26, which stands for the proposition that Utah's "criminal code requires proof of mens rea for each element of a non-strict liability crime." Indeed, Utah Code Ann. 76-2-101 states that for every criminal offense, "a person is not guilty of an offense unless . . . the person acts intentionally, knowingly, recklessly, with criminal negligence . . . or the person's acts constitute an offense involving strict liability."*

However, an offense does not become a domestic violence offense based off any action not already contemplated by the underlying offense. An Aggravated Assault has the same elements as Aggravated Assault – Domestic Violence, except for the identity of the victim. To convict a defendant of a domestic violence offense, the State must prove the underlying offense occurred, and then prove it was "committed by one cohabitant against another." Utah Code Ann. 77-36-1(4). Any consequences of a finding regarding cohabitancy is not based on any action, but solely on status.

The proposed special verdict form for DV offense (SVF 1331) is written in the passive voice, accurately reflecting that whether or not a DV status exists does not depend on any action. However, when mens rea terms are inserted, the form becomes nonsensical:

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of [CRIME(S)], as charged in

Count(s) [#,#,#]. We also unanimously find the State: ¨ has ¨ has not proven beyond a reasonable doubt (DEFENDANT'S NAME) and (VICTIM'S NAME) were intentionally, knowingly, or recklessly cohabitants at the time of [this][these] offense(s)

Whose actions is the jury being asked to assess? What actions are they assessing?

This confusion appears to arise from a mistaken notion that every portion of a criminal offense must include proof of a specific mental state. As noted above, the general rule in the code requires that actions be accompanied with a mental state, unless the offense is one of strict liability.

Attendant circumstances may be an element of a criminal offense. Utah Code Ann. 76-1-501(2). "Attendant circumstances" are those circumstances that may be required to be present for criminal liability in addition to the requisite physical conduct, or actus reus, and the mens rea specified for the offense. State v. Vigil, 842 P.2d 843, 846, n.4 (Utah 1992), overruled on other grounds by State v. Casey, 2003 UT 55. The presence or absence of a cohabitant relationship is best understood as a question of whether a certain attendant circumstance exists. As noted by the Court in Vigil, it is rare for an offense to require a mental state for an attendant circumstance. Id. When an attendant circumstance does require proof of a mental state, the determination is made based off the language of the specific offense. See id. In the absence of any language defining what constitutes a domestic violence offense, the proposed note, while technically accurate, will mislead parties into believing that the code's requirement that actions be accompanied with a mental state extends to attendant circumstances, when no such general requirement is found in the code.

==========

CR1322 – Eliminate duplicative element re: bodily injury?

==========

Blake Hills: *Parts 1b and 2 should be combined to state in 1b that serious bodily injury was caused, since that is the only way to commit the crime.*

Tom Brunker: *The MUJI is confusing because it effectively requires the jury to find both bodily injury and serious bodily. But aggravated assault targeting a law enforcement officer requires serious bodily injury. So element 2 should be eliminated and 1(b) changed to require a finding of serious bodily injury. If the intent was to try to capture both a greater and lesser offense, the better approach would be to suggest in committee notes asking for separate instructions on aggravated assault targeting a law enforcement officer and aggravated assault.*

The relevant elements of that instruction state:

1. (DEFENDANT'S NAME) intentionally, knowingly, or recklessly;
a. committed an act with unlawful force or violence that
b. **caused bodily injury** to (VICTIM'S NAME) by:

[list of methods]; and

2. (DEFENDANT'S NAME)'s actions **caused serious bodily injury**; and

TAB 5C

Public Comment:
Homicide Instructions (1400 series)

NOTES: ==========

CR1411 – Felony Murder: victim as participant

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The committee received two similar comments outlining the need for additional language in the instruction to make clear that the victim cannot be a participant in the underlying felony:

Fred Burmester: *The murder elements instruction is fine with one exception; the victim in the case of felony murder theory must not be a participant in the felony. Thus I think the following language must be added to the elements instruction:*
"d. While engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)],
i. (VICTIM'S NAME), ***[ADD THIS LANGUAGE: "who was not a participant in the predicate offense(s)"]*** *was killed; and…"*

Sean Brian: *(2)(d)(i) Pursuant to Utah Code § 76-5-203(2)(d)(ii), the victim cannot be a party to the predicate offense.*
(2)(d)(ii) A jury may not be able to determine the appropriate level of intent applicable to the predicate offense. The instruction would be clearer if the level of intent were directly stated.

==========

CR1411 – Felony Murder: level of intent

==========

Sean Brian: *(2)(d)(ii) A jury may not be able to determine the appropriate level of intent applicable to the predicate offense. The instruction would be clearer if the level of intent were directly stated.*

==========

CR1450-1452 / SVF1450 – imperfect self-defense

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Tom Brunker: *The [AG's Appellate] Division has seen several cases with defective imperfect self-defense instructions. As the practitioner's note points out, it has been particularly problematic when the instructions try to fold imperfect self-defense into the elements instruction. It has resulted in either misstating who has the burden of proof or potentially misleading the jury into believing that it must reach unanimity on whether the State had failed to disprove imperfect self-defense. So the Division*

agrees that the imperfect self-defense instruction should be separate from the elements instruction.

But the proposed MUJI procedure arguably conflicts with the rules. As relevant here, Utah R. Crim. P. 21(a) requires the jury to enter a verdict of "guilty" or "not guilty of the crime charged but guilty of a lesser included offense." The proposed MUJI procedure, however, results in there being no verdict on the lesser crime.

As proposed, and as relevant here, the jury verdict is either guilty of the greater offense or guilty of the lesser offense for reasons other than imperfect self-defense. The jury is then instructed only to make a finding on imperfect self-defense. But it is not asked to enter a verdict on the lesser crime if it finds in favor of the defendant on imperfect self-defense. So contrary to rule 21's requirement, there is no verdict on the lesser offense.

The parties sometimes agree to bifurcate proceedings so that the jury enters a verdict on a particular crime and the judge decides whether aggravating circumstances that enhance the crime—usually prior convictions—exist. But in that case, the defendant has agreed to waive a jury verdict on the second step. Here, the defendant has not expressly waived the jury verdict on the lesser offense. Rather than entering a verdict on the lesser offense, the jury enters a verdict on the greater offense and only enters a finding that results in a lesser offense.

It may be that the disconnect between the rule and the proposed MUJI won't make a difference. But a fix would eliminate the problem.

A related concern is that the proposed instructions speak in terms of the jury finding the defendant guilty of the greater offense before considering imperfect self-defense. For example, CR 1451 states, "You must consider imperfect self-defense only if you find the defendant guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]." But if the jury ultimately finds that the State has not disproven imperfect self-defense beyond a reasonable doubt, then the defendant is not guilty of the greater crime. We therefore recommend that when describing the jury's finding on the greater offense the instructions should speak in terms of the jury having found that the State proved all the elements of the greater offense, or some similar phrasing, not that the jury has found the defendant guilty of the greater offense. This change would need to be incorporated into CR 1450, 1451, 1452, and the Special Verdict Form.

Sean Brian: *[For SVF1450] "Having found the defendant, (DEFENDANT'S NAME), guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder], as charged in Count [#], Check ONLY ONE of the following boxes:*
[ ] We unanimously find that the State has proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply.
OR
[ ] We do not unanimously find that the State has ***NOT (ADD THIS "NOT")*** *proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply* ***(ADD THIS:) and therefore the level of offense should be reduced****."*
Notes/ Explanation:
The phrasing could be misinterpreted to negate the unanimity requirement, so the "not" is moved so that it clearly modifies "proved."
The emphasis should be placed on the difference between the two options. It may also be helpful to the jury to clarify the consequence of their selection. The verdict form appears to successfully avoid the issue raised in State v. Campos , 2013 UT App 213, 309 P. 3d 1160, where the instruction failed to place the burden of proof on the State.

Fred Burmester: *The proposal to make imperfect self-defense subject to a special verdict has some logic to it in my opinion, but the defense results in a lesser included manslaughter. The supporting practitioners' notes only refer to a court of appeals case Lee and in the end Drej. State v. Lee does not take on the issue straight ahead. It has dicta that the method of the instruction misplaced the burden which is a pitfall I think the MUJI drafters were trying to avoid. Drej does not apply (it is a mitigation case and not an affirmative defense case). The problem is that State v. Shumway, a Supreme Court case, says that you cannot instruct the jury on a specific order of deliberation with a lesser included manslaughter. However, the proposed instruction tells the jury they can only consider the affirmative defense (lesser included manslaughter) if they first find the defendant guilty of murder, a thing I think Shumway prohibits. I have attached the citations for the relevant cases at the bottom of this note. SHUMWAY, 63 P.3d 94; LEE, 318 P.3d 1164; LOW, 192 P.3d 867*

TAB 5D

Public Comments:
Sexual Offenses Instructions (1600 series)

NOTES:

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CR1601 – Definitions: "indecent liberties"

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Blake Hills: *Indecent liberties is specifically defined by 76-5-416.*

Donna Kelly: *Regarding "indecent liberties," where it says "any conduct" I think that should say "any sexual conduct." To leave it as it is would mean that any act with equal seriousness would be a sex crime – so a punch or a slap could be a sex crime.*
Also, Could we include a definition of "penetration" and of "touching" here? That way, we could make clear the differences between those terms for the elements of adult crimes and child crimes.

==========

CR1601 – Definitions / CR1613: use of "victim"

==========

Blake Hills: *As to the new committee note, I suppose the definition could use the term "alleged victim." I don't see how else it could be phrased without approaching ridiculousness.*

Robert Denny: *The committee notes for CR1601 and CR1613 state that the committee considered the use of the word "victim" in light of State v. Vallejo, 2019 UT 38, ¶¶99-103, but that it chose to preserve the language used in the statutes. It then opines that "[a]ny attempt to alter the instruction in an effort to avoid the use of the word 'victim' appears to impermissibly change the meaning of the statute."*
Rather than commenting on whether replacing the word "victim" would impermissibly change the meaning of the statute, the committee notes should simply mention State v. Vallejo, and the Supreme Court's concern with the word "victim." I suggest that the comment should read as follows, "In Vallejo, the Supreme Court 'recognize[d] the gravity of referring to witnesses as victims during a trial.' Attorneys should consider Vallejo's concerns in determining how to word this instruction."

==========

CR1613 / SVF1613 – Aggravated Sexual Abuse of Child

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Clint Heiner: *The language should delete the Aggravated Sexual Abuse of a Child from the […] area because they found the person guilty of Sexual Abuse of a Child, it is by checking one of the following boxes that makes it aggravated.*

In reviewing this comment, staff supposes that the commenter was suggesting that the "[Aggravated Sexual Abuse of a Child]" option in the introductory paragraph for SVF1613 be removed. All of the options that follow that introductory paragraph are the ways in which Sexual Abuse of a Child would be aggravated. The assumption is that the defendant would not be guilty of Aggravated Sexual Abuse of a Child until **after** the findings in that SVF were made.

==========-

CR1616A "Sexual Intercourse" for certain offenses

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Clint Heiner: *Why are we saying "sexual penetration" of the penis. Doesn't sexual penetration limit that definition? For example part (c) can be not only for sexual purpose but also, to cause substantial emotional or bodily pain…. Of course there is the issue of power and control as well…?*

Donna Kelly: *Where it says "between the outer folds of the labia" I would change that to say simply "genitals" to be consistent with all the other statutes*

Robert Denny: *The revised jury instruction seems to add more confusion and strays from the statutory language. The phrase "sexual penetration of the penis" could be interpreted several different ways. Moreover, adding language to jury instructions from cases addressing the sufficiency of the evidence, such as State v. Heath, has previously been recognized as problematic. The instruction should track the language of the statute, and only state that "any sexual penetration, however slight, is sufficient to constitute sexual intercourse." This is how the instruction was previously written.*

Tony Graf: *I echo Donna's comments with the exception of "between the outer folds of the labia". I believe that this definition is important and should be included as it is the same language being requested for Object Rape. In addition, I believe that this same language should be included in the special verdict form for SVF1613, CR1601 and CR613 to be consistent with the other proposed changes.*

TAB 5E

Public Comments:
Defense Habitation/Self/Others (500 series)

NOTES: ==========

CR520-CR523 – Defense of Habitation

==========

James Vilos: *The last paragraph of CR522 may confuse the burden as stated in CR523 (beyond a reasonable doubt). Therefore, the last paragraph of CR522 should use "prove beyond a reasonable doubt" instead of "showing" and "proving" without reference to "reasonable doubt."*

Tom Brunker: *The instructions track the statutory language, but we noted that some of the language seemed antiquated, and the Committee may want to consider referring the statute to the Criminal Code Evaluation Task Force.*
For example, the defense applies when the defendant reasonably believes that the victim has entered the habitation "for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation." The MUJI does substitute "threatens" for "offer[s]" personal violence. But it's unclear what kind of "being" is anticipated other than a "person."
Also, I assume that the statute intends to provide a defense when the victim damages or threatens to damage the habitation, but typically that kind of damage or threat would not be called an assault or threat of violence.
Further, the definition of habitation comes from case law; there is no statutory definition. And it applies to a place that the defendant inhabits "peacefully." There is, however, no requirement that the victim inhabit the place "lawfully." So someone who is squatting in an abandoned building "peacefully" may have this defense available to them when they use force against another squatter, even though both are trespassers.
On the presumption of reasonableness (CR522), the list under #2 has three sub-points stated in the disjunctive, but some of the sub-points include more than one item also stated in the disjunctive. We recognize that those group related items, but we think it would be a little clearer to break each one out into a sub-point.

==========

CR530-CR533 – Defense of Self or Others

==========

James Vilos: *CR530 does not incorporate all the language of the self-defense statute 76-2-402(3)(ii) beginning w/ "unless" in cases where the felony committed by the defendant may not have anything to do with the act of self-defense.*

Tom Brunker: *[On CR530] Sometimes the instruction uses "another" alone; and sometimes it uses "another person." "Another person" is clearer.*
Also, the statute makes the defense available to someone committing or fleeing from committing a

felony if the use of force is "a reasonable response to factors" unrelated to the felony. The instruction does not include this contingency. Instead, it relegates the issue to the committee note, and suggests that the parties "should consider" modifying the statutory language when that is at issue. We think this should not be relegated to a committee note. Rather, the instruction should include optional language to cover that contingency when it arises. And when it applies, we think that it's something that the jury should be instructed on, not something that the parties should just consider.

Tom Brunker: *[On CR533] The statute includes a component that is missing from the instruction—a failure to retreat cannot be considered in deciding reasonableness. 76-2-402(4)(b). That should either be added here or in CR531 (the factors for determining imminence and reasonableness).*

David Ferguson: *The proposed rules related to Defense of Self or Others bring up "combat by agreement" several times without a definition. And the term pops up in places where it assumes that people understand what it means, e.g. CR530. Maybe there's not an easy fix based on what I assume is a lack of clarity in either statute or caselaw on the topic. That said, I don't really see that it fits where it's at, either.*

TAB 5F

Public Comments:
Miscellaneous Instructions

NOTES: ==========

In General

==========

Brent Huff: *Why has the term "person" been replaced with the term "Defendant?" This seems intentionally prejudicial.*

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CR411 – 404(b) Evidence

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Tom Brunker: *The language in the brackets would be clearer if it were reworded to be "practitioners must specify a proper non-character purpose such as motive, intent, etc., whether the evidence is to prove or disprove that purpose, and the issues to which that purpose applies." Ambiguity issues have arisen when the jury is not instructed how to use the 404(b) evidence. For example, in a self-defense case, instructing the jury that the 404(b) evidence is to be used "for the limited purpose of self-defense" is ambiguous when it's being offered "for the limited purpose of rebutting a claim of self-defense." Or if the defendant argues mistake or accident, the instruction should say "for the limited purpose of rebutting a claim of mistake or accident." And if the evidence is to prove motive, it should say "for the limited purpose of proving motive."*

David Ferguson: *The proposed rule substitute's Rule 404's "a person's character or character trait" with just "character trait." It also omits the Rule's language of "on a particular occasion."*

I think there's something different between "a person's character" and a "character trait." The former speaks to the quality of the person, the latter speaks to an aspect of that person. To illustrate the difference, improper 404(b) evidence may include a statement like, "the defendant is a drunk." Assuming that the statement is inadmissible, it appears to me to be inadmissible because it says something about the character of the person as a drunk, not the trait of drunkenness. I worry that a jury might not appreciate the scope of "character trait" to be as broad as to include "a person's character." Both terms should be included.

Secondly, I can see how, in cases that involve multiple counts over a period of time, the words "on a particular occasion" (which are found in 404) might not fit. But the proposed wording loses some clarity without that phrase. The idea behind the rule is that you can't hold someone's past against them in this instance. And the words "on a particular occasion" help to anchor that the concern is biasing jurors towards convicting on propensity of action, not just pattern of who the defendant is. There may be other solutions here, but omitting "on a particular occasion" loses some meaning without any obvious benefit of clarity.