

MINUTES

STANDING COMMITTEE ON THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, June 1, 2016
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT

Judge James Blanch, Chair
Keisa Williams, Staff
Sandi Johnson
Linda Jones
Karen Klucznik
Judge Brendon McCullagh
Steve Nelson
Jesse Nix
Nathan Phelps

EXCUSED

Jennifer Andrus
Mark Field
David Perry
Judge Michael Westfall
Scott Young

1. Welcome

Judge Blanch

Judge Blanch welcomed everyone to the meeting. He reported that the committee would begin to implement term limits to give additional people the opportunity to serve on the committee. He stated that members of the current committee would begin their two-year term and replacements would begin in one year.

Judge Blanch asked the committee for discussion on the proposed instruction for Possession of Drug Paraphernalia. He stated that the version presented at the May meeting was not finalized. He asked committee members to review the finalized instructions for approval.

Ms. Jones moved to approve the instruction for Possession of Drug Paraphernalia. Ms. Klucznik seconded the motion and it passed unanimously.

Judge Blanch asked the committee for discussion on the proposed instruction for Definition of Drug Paraphernalia.

Ms. Jones moved to approve the instruction for Definition of Drug Paraphernalia. Mr. Phelps seconded the motion and it passed unanimously.

2. Drug Offense Instructions

Committee

(a) Factors Relevant to Identifying Drug Paraphernalia

Ms. Klucznik presented proposed language to the committee and stated that most of it used statutory language.

Ms. Johnson stated that the inclusion of item 13, “whether the object is subject to Section 58-37a-5,” was circular. Ms. Jones suggested a committee note recommending to practitioners that they should exclude 58-37a-5 because it is circular. Ms. Johnson stated that she was reluctant to remove a statutory reference. She suggested a committee note saying, “If you’re relying on item 13, further jury instructions are needed.” Ms. Jones suggested including the words of 58-37a-5, “if the item is used to plant, propagate, cultivate, grow... a controlled substance into the human body.” Ms. Johnson expressed concern that Ms. Jones’ suggestion did not include intent language. Ms. Klucznik stated that the intent element would be included in the elements instruction. Ms. Johnson stated that if a defendant was charged with child endangerment for exposing a child to drug paraphernalia, the language in 58-37a-5 would be helpful because it lists unlawful acts and an elements instruction would be unnecessary.

Ms. Johnson suggested leaving the statutory reference and referring the jury to the definitional instruction of “Definition of Drug Paraphernalia.” Ms. Jones suggested removing item 13 because item 15 is a catch-all that encompasses item 13. She also suggested leaving item 13 and including a strong committee note to practitioners suggesting that a further instruction is necessary.

Judge Blanch asked if item 2, prior convictions, was unconstitutional as a legislative amendment to Rule 404(b). Ms. Johnson stated that the legislature determined that prior convictions are relevant and a 403 analysis would still be necessary. Ms. Klucznik stated that if prior convictions are excluded under 404(b), the practitioner should remove item 2.

The committee proposed the following instruction and committee note:

CR _____. Factors Relevant to Identifying Drug Paraphernalia.

In determining whether an object is drug paraphernalia, you should consider:

- [(1) statements by an owner or by anyone in control of the object concerning its use;]
- [(2) prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to a controlled substance;]
- [(3) the proximity of the object, in time and space, to a direct violation of this chapter;]
- [(4) the proximity of the object to a controlled substance;]
- [(5) the existence of any residue of a controlled substance on the object;]
- [(6) instructions whether oral or written, provided with the object concerning its use;]
- [(7) descriptive materials accompanying the object which explain or depict its use;]
- [(8) national and local advertising concerning its use;]
- [(9) the manner in which the object is displayed for sale;]
- [(10) whether the owner or anyone in control of the object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;]

[(11) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;]

[(12) the existence and scope of legitimate uses of the object in the community;]

[(13) whether the object is subject to Section 58-37a-5;]

[(14) expert testimony concerning its use; and]

(15) Any other logically relevant factor.

Note: The Committee considers (13) to be circular if included in this jury instruction. In most cases, the use of CR _____. Definition of “Drug Paraphernalia” is sufficient and should eliminate the need to use (13). But if the parties intend to include (13), additional jury instructions will be necessary to eliminate the statutory reference and explain the pertinent concept to the jury.

References

Utah Code § 58-37a-4

Mr. Phelps moved to approve the instruction for Factors Relevant to Identifying Drug Paraphernalia. Mr. Nelson seconded the motion and it passed unanimously.

(b) Constructive Possession

Ms. Klucznik presented three proposed instructions to the committee that originated from her subcommittee. The first instruction did not reference reasonable doubt (preferred by a prosecutor on the subcommittee), the second instruction referenced reasonable doubt at the beginning (preferred by a prosecutor on the subcommittee), and the third instructions referenced reasonable doubt at the end of the instruction (preferred by a defense attorney on the subcommittee).

Ms. Johnson stated that the phrase “reasonable inference” is unclear. Ms. Kluznik stated that the language came from case law. Ms. Johnson stated that she has never seen a jury instruction include “reasonable inference.” Judge Blanch stated that the jury instruction for direct vs. circumstantial evidence references inferences that a jury can make. Ms. Johnson suggested using language from 58-37-2 instead of “The State may prove that element by proving constructive possession of the [controlled substance] [paraphernalia].”

Ms. Kluznik asked if reasonable doubt language was needed. Ms. Johnson stated that if the “reasonable inference” is deleted, reasonable doubt language was unnecessary. She stated that this instruction is a list and does not need reasonable doubt language. Judge Blanch suggested including it at the beginning of the instruction.

Judge Blanch asked the committee if the instruction needed further discussion. Ms. Jones and Ms. Kluznik stated that they would request additional time to finalize the instruction. The committee agreed to table the issue and discuss the instruction during the September meeting.

3. Adjourn

Committee

The meeting was adjourned at 1:45 p.m. The next meeting is Wednesday, September 7, 2016.