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, February 7, 2018
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT	**EXCUSED**
Judge James Blanch, Chair	Professor Jenny Anderson
Nancy Sylvester, Staff	Keisa Williams, Staff
Mark Field	David Perry
Sandi Johnson	Judge Brendon McCullagh
Judge Linda Jones	Judge Michael Westfall
Karen Klucznik	
Steve Nelson	
Jesse Nix	
Nathan Phelps	
Scott Young	

1. Welcome **Judge Blanch**

Judge Blanch welcomed everyone to the meeting. He stated that he spoke with the Judicial Council and reported the accomplishments of the committee. He clarified that because the committee did not have a quorum in January, the committee could not meet and vote on proposed language. Therefore, the committee did not have minutes from a January meeting.

Mr. Nelson moved to approve the minutes from the November 2017 meeting. Mr. Field seconded. The minutes were approved.

2. CR109B. Further Admonition about Electronic Devices **Committee**

Judge Blanch stated that he received a comment from a judge regarding language in the electronic device instruction, specifically that post-trial investigations are common. He stated that the judge said that post-trial investigations are not common. Judge Blanch recommended modifying the instruction to state “if post-trial investigations reveal…” Ms. Johnson stated that because investigations can occur during trial, “post-trial” should be removed. Mr. Nelson stated that the jury should be informed that an investigation could occur.

Judge Jones stated that post-trial investigations are commonly done by private practitioners. She stated that the current version of the instruction is not incorrect and it sends a

powerful message to the jury. Ms. Klucznik stated that post-trial investigations are not the only way to investigate improper activities. Mr. Nelson stated that post-trial investigations are done in certain situations, like a hung jury or mistrial. Judge Blanch stated that the language about the frequency of post-trial investigations should be modified. Mr. Young stated that "scaring" the jury members may be a good tool to ensure improper activities do not occur. Ms. Johnson recommended, "Post-trial investigations can occur. If improper activities are discovered at any time, they will be brought to my attention and the entire case might have to be retried or ultimately dismissed."

CR109B Further admonition about electronic devices [Opening].

Jurors have caused serious problems during trials by using electronic devices – such as phones, tablets, or computers - to research issues or share information about a case. You may be tempted to use these devices to investigate the case or to share your thoughts about the trial with others. Don't. While you are serving as a juror, you must not use electronic devices for these purposes, just as you must not read or listen to any sources outside the courtroom about the case or talk to others about it.

You violate your oath as a juror if you conduct your own investigation or if you communicate about this trial with others, and you may face serious personal consequences if you do. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "Tweet" or text about the trial; do not use electronic devices to gather or send information on the case; do not post updates about the trial on Facebook pages; do not use Wikipedia or other internet information sources, etc. Even using something as seemingly innocent as "Google Maps" or a dictionary to look up terms can result in a mistrial.

Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court and not on other sources of information.

Post-trial investigations can occur. If improper activities are discovered at any time, they will be brought to my attention and the entire case might have to be retried at substantial cost.

Mr. Young moved to approve the instruction. Ms. Klucznik seconded. The instruction was approved.

3. Defense of Habitation **Committee**

Judge Blanch presented justification instructions that were prepared prior to the meeting.

<u>Instruction 33: Defense of Habitation</u>

Judge Jones suggested bracketing gender pronouns. Judge Blanch recommended removing gender pronouns when possible. Judge Jones recommended using “person.” Ms. Johnson recommended using “defendant” when referring to the defendant and “person” when referring to others. The committee agreed.

Ms. Johnson and Ms. Klucznik recommended replacing “offer of personal violence” to “threat of personal violence” because the meaning is the same. The committee agreed.

CR____. Defense of Habitation.

You must decide whether the defense of Defense of Habitation applies in this case.

Under that defense, the defendant is justified in using force against another when and to the extent the defendant reasonably believes that force is necessary to:

1. Prevent the other person’s unlawful entry into the habitation; or
2. Terminate the other person’s unlawful entry into the habitation; or
3. Prevent the other person’s attack upon the habitation; or
4. Terminate the other person’s attack upon the habitation.

The defendant is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:

1. The other person’s entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and the defendant reasonably believes:
    a. That the other person’s entry is attempted or made for the purpose of assaulting or threatening personal violence to any person, dwelling, or being in the habitation; and
    b. That the force is necessary to prevent an assault or threat of personal violence; or
2. The defendant reasonably believes
    a. That the other person’s entry is made or attempted for the purpose of committing a felony in the habitation; and
    b. That the force is necessary to prevent the commission of the felony.

References:

Utah Code § 76-2-405

State v. Karr, 364 P.3d 49 (Utah App. 2015)

State v. Walker, 391 P.3d 380 (Utah App. 2017)

State v. Mitcheson, 560 P.2d 1120 (Utah 1977)

State v. Moritzsky, 771 P.2d 688 (Utah App. 1989)

State v. Patrick, 217 P.3d 1150 (Utah App. 2009)

Committee Note:

This instruction should be used with instructions 34, 35, 36, and 41 *(Need to update with actual instruction numbers)*

<u>Instruction 34: Defense of Habitation – Presumption</u>

CR____. Defense of Habitation – Presumption. Approved 2/7/18
The person using force or deadly force in defense of habitation is presumed to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry:

1. is unlawful and
2. Is made or attempted
   a. by use of force, or in a violent and tumultuous manner; or,
   b. surreptitiously or by stealth; or,
   c. for the purpose of committing a felony.

The prosecution may defeat the presumption by showing that the entry was 1) lawful or 2) not made or attempted by use of force, or in a violent and tumultuous manner; or surreptitiously or by stealth; or for the purpose of committing a felony. The prosecution may also rebut the presumption by proving that in fact the defendant's beliefs and actions were not reasonable.

References:
Utah Code § 76-2-405
State v. Karr, 364 P.3d 49 (Utah App. 2015)
State v. Walker, 391 P.3d 380 (Utah App. 2017)
State v. Mitcheson, 560 P.2d 1120 (Utah 1977)
State v. Moritzsky, 771 P.2d 688 (Utah App. 1989)
State v. Patrick, 217 P.3d 1150 (Utah App. 2009)

Committee Note:
This instruction should be used with instructions 33, 35, 36, and 41 *(Need to update with actual instruction numbers)*

Instruction 35: Defense of Habitation – Prosecution's Burden

Judge Blanch stated that all the options in the instruction are from statutory language. The committee agreed that under *Karr*, the factors are disjunctive.

Ms. Klucznik stated that the presumption does not have to be disproved beyond a reasonable doubt. Ms. Johnson asked if *State v. Karr* requires the State to disprove the elements of the defense beyond a reasonable doubt. Judge Blanch stated that *Karr*, in paragraph 11, states that the prosecution may defeat the presumption by "refuting" either of the two presumption-creating elements or "rebutting" by proving that the defendant's actions were not reasonable.

Judge Jones stated that the State must disprove either condition, not both. She provided an example of an estranged husband entering a home to reclaim property. If the wife considers the entry by her estranged husband unlawful and shoots her estranged husband with a gun, the wife would be charged with murder but can claim the defense of habitation. The State must prove that the estranged husband's entry was lawful, or not made with force, or the wife's actions were not reasonable.

Ms. Kluzcnik disagreed and stated that the presumption is rebutted by showing that the defendant's entry was unlawful or entry was not made with force. Then the State must also

prove, beyond a reasonable doubt, that the defendant's actions and beliefs were unreasonable. She stated the first two rebut the presumption and the third disproves the defense.

Ms. Johnson suggested using the language in *Karr* that the State may rebut any of the elements and then say, "the State may rebut the presumption by proving that the defendant's actions were unreasonable."

Ms. Klucznik stated that we presume the defendant acted reasonably if the elements are met, but if those elements are not met, then there is no presumption; the State must still disprove, beyond a reasonable doubt, that the defendant's actions were unreasonable.

Judge Jones asked if "refuting" and "not applying the presumption" have the same meaning. Mr. Young stated that when "proving" is used, he assumes it is beyond reasonable doubt. Ms. Klucznik asked what is required to rebut a presumption. Mr. Field stated that "refuting" does not sound like proving beyond a reasonable doubt.

Judge Blanch stated that a presumption is difficult to understand. Despite the confusion of the presumption, he asked the committee if they agreed that an instruction should be created that conforms to *Karr*. The committee agreed. Mr. Young recommended using language directly from *Karr* because the committee could not agree to meaningful and understandable language for the instruction. The committee created an instruction and used language directly from *Karr.*

Judge Jones stated that it does not make sense that the State rebuts a presumption of reasonableness by showing it is unreasonable. She suggested using, "the State must rebut the reasonableness of the presumption" and laying out the elements.

Ms. Klucznik recommended removing language stating the "prosecution must still disprove the defense beyond a reasonable doubt."

Mr. Phelps stated that the first two elements do not defeat the presumption; they mean that the presumption does not apply. He stated that even with the presumption, the State can rebut it. Ms. Klucznik stated that this is likely why the court used "defeat" and "rebut." She stated that the presumption can be defeated by showing that it does not apply.

Judge Jones stated that "once the presumption applies" is confusing language because the State can defeat the presumption by showing that it does not apply. Mr. Young recommended removing the gender pronouns and use "defendant" and "person."

CR____. Defense of Habitation - Prosecution's Burden.
The defendant carries no burden to prove the defense of Defense of Habitation. In other words, the defendant is not required to prove [he/she] was justified in using force or force likely to cause death or serious bodily injury. Rather, the prosecution must prove beyond a reasonable doubt that the defendant was not justified in using force or force likely to cause death or serious bodily injury. The prosecution carries the burden of proof beyond a reasonable doubt. If the prosecution has not carried this burden, then you must find the defendant not guilty.

References:
Utah Code § 76-2-405
State v. Karr, 364 P.3d 49 (Utah App. 2015)
State v. Walker, 391 P.3d 380 (Utah App. 2017)
State v. Mitcheson, 560 P.2d 1120 (Utah 1977)
State v. Moritzsky, 771 P.2d 688 (Utah App. 1989)

State v. Patrick, 217 P.3d 1150 (Utah App. 2009)

Committee Note:
This instruction should be used with instructions 33, 34, 36, and 41 *(Need to update with actual instruction numbers)*

Ms. Klucznik moved to approve instruction 33, 34, and 35. Ms. Johnson seconded. The instructions were unanimously approved.

4. Defense of Habitation – Definition

Ms. Johnson recommended removing the gender pronoun and use "defendant." Because habitation can vary and can include a tent, Ms. Klucznik recommended using "including, but not limited to." The committee agreed.

CR____. Habitation Definition.
The defense of Defense of Habitation is not limited to a habitation the defendant owns. The defense may apply to whatever place the defendant may be occupying peacefully as a substitute home or habitation, including but not limited to a hotel, motel, or where the defendant is a guest in another person's home.

References:
Utah Code § 76-2-405
State v. Mitcheson, 560 P.2d 1120 (Utah 1977)

Committee Note:
This instruction should be used with instructions 34, 35, and 41 *(Need to update with actual instruction numbers)*

Mr. Phelps moved to approve the instruction. Ms. Klucznik seconded. The instruction was unanimously approved.

5. Defense of Habitation – Reasonableness Committee

Ms. Johnson recommended removing language about "actual danger." Judge Jones asked if the last two sentences come from caselaw. Ms. Klucznik asked if there is a definition of reasonableness. She stated that reasonableness is not usually defined unless it is defined by statute. Judge Blanch stated that practitioners have asked for an instruction concerning the objective standard of reasonableness. Ms. Johnson stated that Utah Code 76-2-103 partly defines reasonableness, including recklessness and criminal negligence. Judge Blanch recommended including the citation in the instruction.

Ms. Klucznik stated that the instruction is a correct statement of law and volunteered to research a definition of "reasonableness."

Ms. Klucznik moved to approve the instruction, with the exception of the "reasonableness" definition that she will draft for the next meeting. Mr. Field seconded. The instruction was unanimously approved.

6. Adjourn **Committee**

The meeting was adjourned at 1:25 p.m. The next meeting is Wednesday, March 7, 2018.