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

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
November 7, 2018 – 12:00 p.m. to 1:30 p.m.

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *Chair*	•	
Jennifer Andrus		•
Mark Field		•
Sandi Johnson		•
Judge Linda Jones		•
Karen Klucznik	•	
Judge Brendan McCullagh	•	
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall	•	
Scott Young	•	
VACANT – Criminal Defense Attorney		
VACANT – Criminal Defense Attorney		
VACANT – Criminal Law Professor		

GUESTS:

None

STAFF:

Michael Drechsel
Jiro Johnson (minutes)

(1) WELCOME AND APPROVAL OF MINUTES:

The committee considered the minutes from the October 3, 2018 meeting.
Mr. Phelps moves to approve the minutes from last meeting.
Second from Mr. Young
The motion passed unanimously.

(2) PROPOSED COMMITTEE NOTE RE: CONTROLLED SUBSTANCE INSTRUCTIONS:

Judge Blanch discussed the reasoning for returning to this topic and asked Mr. Phelps to discuss the issues arising with controlled substances. Mr. Phelps made explanation regarding the situation to refresh the recollection of the committee members. Judge McCullagh expressed concern with bending Utah jury instructions to accommodate federal courts. Judge McCullagh also discussed the types of scenarios that come before the immigration courts, primarily if someone pleads to "possession of marijuana or spice" as a resolution to the case (not stating specifically which substance is involved), the fact that spice is not a controlled substance on the federal schedule

leaves the immigration court barred from discerning which substance was actually at issue for the purposes of the immigration court. Ms. Klucznik questioned whether an item is a controlled substance has a separate jury instruction. Judge Blanch said that back in October 2015 the Committee opted to combine the instructions so that the controlled substance instruction includes what schedule a controlled substance is and the specific name of the involved substance as elements of the crime. Mr. Young stated that the committee had previously agreed about the instruction now in effect and so the issue is whether the Committee should revisit that decision and either add a note to the instruction that Utah law does not require finding a specific controlled substance by the jury or change the instruction. Ms. Klucznik questioned whether having a jury instruction that identifies a controlled substance as a specific schedule of drug, without a jury deciding that issue, would prevent an immigration court from connecting a controlled substances charge to the controlled substance in the separate instruction.

Judge Blanch stated the options were that the instruction could be redone to avoid this unintended federal outcome or just leave the instruction alone. Ms. Klucznik said it may be best to leave this instruction alone because this is a Utah issue and we shouldn't involve ourselves in sorting out potential federal matters. Judge McCullagh expressed his preference for not having a comment. Mr. Phelps reminded the committee that the type of controlled substance is not an element for a crime. Mr. Drechsel stated that a jury could find that a drug is a controlled substance without coming to agreement as to the type of drug, say cocaine or heroin, and still convict. Judge McCullagh pointed out that those are in different schedules so that is a bad example. Mr. Young stated that our job is to simplify the jury instructions and felt that modifying the instruction may not be the Committee's purpose. Judge Blanch asked what would be the best solution if a change were to happen, a comment, or reverting the instruction back to two instructions, which would be accomplished by deleting the following language (marked with a strikeout) from the current version of CR1203:

> CR1203 Possession of a Controlled Substance.
> (DEFENDANT'S NAME) is charged [in Count ___] with committing Possession of a Controlled Substance [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 and knowingly;
> 3. Possessed ~~(NAME OF CONTROLLED SUBSTANCE/COUNTERFEIT SUBSTANCE), a~~ schedule [I] [II] [III] [IV] [V] [controlled substance] [counterfeit substance][; and]
> 4. [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.

This method would then require a second instruction that stated "(NAME OF CONTROLLED SUBSTANCE) is a Schedule [I] [II] [III] [IV] [V] controlled substance."

Mr. Phelps moved to have the committee reconsider the previous vote approving the current instruction. That motion was seconded by Mr. Young, in order to at least allow the committee the opportunity to continue to debate the need for action. Mr. Phelps, Young, and Nelson were in favor, Ms. Klucznik and McCullagh voted no.
The motion to reconsider the previous decision passed. The committee then continued to discuss the matter. After the discussion was exhausted, Mr. Phelps motioned to amend the instruction by having it read "Possessed a schedule [I][II][III][IV][V] [controlled substance] [counterfeit substance] [; and]". That motion failed for lack of a second. Judge Blanch thanked the committee for the time it spent on this issue.

(3) ASSAULT INSTRUCTIONS:

Ms. Klucznik asked to return to the special verdict definitions to query why "residence" was included in the definitions since it didn't appear elsewhere in the instructions. The committee pointed out that "residence" DID appear elsewhere in the instructions and thus needed to be defined. Ms. Klucznik was also concerned that "reside" had definitional language for dwelling permanently, but the "residence" language includes language for a

temporary dwelling place. Ms. Klucznik then wondered whether the jury has to be unanimous for finding that a defendant was a cohabitant with a victim in the special verdict form. The committee addressed these issues through discussion.

At 12:54pm, Judge Westfall joined the meeting via telephone, having been involved in court hearings and unavailable to participate until this time. Mr. Drechsel updated Judge Westfall regarding who was present in the meeting and what the committee was presently discussing.

The committee then discussed the decision to not include the DV language in the elements instruction, and what the result of a hung jury on the issue of cohabitant status would be. The committee discussed that sometimes, if there was no unanimous decision regard the cohabitant status, the prosecutor may simply decide it is not worth re-trying that specific issue to a new jury and would simply proceed on the non-DV assault. Judge McCullagh stated that the cohabitant finding would be important in DV cases filed in district court because those cases are class A misdemeanors (or greater) due to being enhanced based on prior domestic violent convictions for a defendant AND being a current case involving new DV. In that way, the DV is more like an element of the offense, though the committee agreed that the instructions should still be structured to use a special verdict form for the cohabitant status. Ms. Klucznik asked if there are other enhanced crimes where a special verdict form is used. Mr. Nelson stated that he has used a similar instruction format (primary offense and special verdict form) for other enhancements.

Judge Blanch discussed the three instructions regarding Assault under Tab 3 of the meeting materials.
The first was the definition of Assault involving Substantial Bodily Injury instruction. Ms. Klucznik noted that the DV notation is not necessary at this point because of the special verdict form for cohabitants. The committee agreed and Mr. Drechsel eliminated the DV brackets in the three draft instructions currently under consideration at this meeting. Mr. Drechsel also removed that same bracketed "[DV]" language from the instructions approved at the previous meeting. This will require the committee to review those instructions at the next meeting in December and re-approve them. Mr. Drechsel added a final cumulative review of all assault-related instructions to the next agenda to accomplish this purpose.

In terms of the "assault involving substantial bodily injury" instruction, Judge McCullagh stated that the Committee may be structuring the instructions incorrectly. He explained that in his view there is only one offense of "assault" which can be sentenced at a higher degree (a class A misdemeanor) when the result of the assault is substantial bodily injury. This point was discussed by the committee, which ultimately decided that although Judge McCullagh's point is correct, in practice the parties typically don't approach the case in that way. Instead, they often will request a lesser included offense instruction (for assault) if it seems warranted under the circumstances of the case. Judge McCullagh also agreed with this assessment.

The Committee discussed whether the mens rea element only applied to "committed an act with unlawful force or violence" or to all of the elements. In this instruction, it was agreed that the mens rea requirement is only in regard to the action taken and not the result achieved.

At this time (1:27 p.m.), it was necessary for Mr. Nelson to leave the meeting for a prior commitment.

Ms. Klucznik questioned whether element 4 for self-defense required the burden language and was concerned that it de-emphasized the prosecution's burdens for elements 1-3 and also noted that the references must eliminate the code provisions for domestic violence. The committee agreed that it was better to be absolutely clear about the burden and standard of proof related to defenses (if any) so that language will remain in the instructions. Judge Blanch requested that the elements for 2 and 2(a) be combined and that the domestic violence code citations be removed from the references. The committee agreed. As a result of the discussion, the committee proposed the following language:

CR_____ Assault – Causing Substantial Bodily Injury [DV].

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Causing Substantial Bodily Injury [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 committed an act with unlawful force or violence;
3. The act caused substantial bodily injury to (VICTIM'S NAME).
4. [The prosecution has proven beyond a reasonable doubt 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 § 76-5-102(3)(a)

Committee Notes
In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated mens rea (intentional, knowing, or reckless). Practitioners should review State v. Barela, 2015 UT 22.

Last Revised –11/07/2018

Mr. Young motioned to adopt those edits, Judge McCullagh seconded.
Committee unanimously voted to alter the instructions as request by Judge Blanch.

(4) HB 102 – USE OF FORCE AMENDMENTS:

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the December meeting.

(5) OBJECT RAPE / DEFINITION OF PENETRATION:

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the December meeting.

(6) IMPERFECT SELF-DEFENSE INSTRUCTION:

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the December meeting.

(7) ADJOURN

The meeting adjourned at approximately 1:35 p.m. The next meeting will be held on December 5, 2018, starting at 12:00 noon.