

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

Judicial Council Room (Executive Dining Room), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
August 7, 2019 – 12:00 p.m. to 1:30 p.m.

MEMBERS:	PRESENT	EXCUSED	GUESTS:
Judge James Blanch, <i>chair</i>	•		None
Jennifer Andrus		•	
Mark Field		•	
Sandi Johnson	•		STAFF:
Judge Linda Jones, <i>emeritus</i>	•		Michael Drechsel
Karen Klucznik		•	Jiro Johnson (minutes)
Judge Brendan McCullagh	•		Minhvan Brimhall (recording secretary)
Stephen Nelson		•	
Nathan Phelps	•		
Judge Michael Westfall		•	
Scott Young	•		
Jessica Jacobs	•		
Elise Lockwood	•		
Melinda Bowen	•		

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee and began by introducing his clerk to the committee.
The committee considered the minutes from the June 5, 2019 meeting.
Judge Jones moved to approve the minutes.
Judge McCullagh seconded.
The motion passed unanimously.

Judge Blanch focused the committee's attention to several recent appellate decisions that reference the committee's work: State v. Eyre, 2019 UT App 129, fn. 3; and State v. Silva, 2019 UT 36, fn. 8.

(2) APPROVAL OF CR411 INSTRUCTION RE 404(B):

The committee returned to its consideration of possible edits to CR411 in light of State v. Lane. The committee discussed the language from the previous meeting, which was included in the meeting materials. Ms. Johnson joined the committee at 12:16pm.

Ms. Jacobs raised a concern about the committee note's direction about when an instruction from the judge should be given regarding 404(b) evidence. Judge McCullagh and Ms. Johnson stated that there is already language in the notes for parties wishing to refrain from issuing an instruction when 404(b) evidence is admitted at trial.

Mr. Phelps and Judge Blanch noted that after *Lane*, the best solution may be to acknowledge that more information should be given to explain how 404(b) evidence is specifically relevant a non-character purpose in the case. Judge Blanch also was concerned that such information could be interpreted by a jury as judicial endorsement for some particular logical inference(s) included in the instruction, which might be prejudicial to a defendant.

Ms. Lockwood argued that perhaps the instruction should be designed to explain why the prosecutor introduced the 404(b) evidence for a specific purpose. Judge Blanch felt that it may be more appropriate to err on the side of ensuring the jury knows what inferences are NOT permissible for the 404(b) evidence.

The committee agreed that doctrine of chances language should be removed from the instruction and that "element(s)" should be changed to "issue(s)."

After all discussion was concluded, and other minor language corrections were made, the final language of the instruction was as follows:

You (are about to hear) (have heard) evidence that the defendant [insert 404(b) evidence] (before) (after) the act(s) charged in this case. This evidence (is) (was) not admitted to prove a character trait of the defendant or to show that (he) (she) acted in a manner consistent with that trait. You may consider this evidence, if at all, for the limited purpose of [practitioners must specify proper non-character purpose such as motive, intent, etc. and to which issue(s) it applies]. Keep in mind that the defendant is on trial for the crime(s) charged in this case, and for (that) (those) crime(s) only. You may not convict the defendant simply because you believe (he) (she) may have committed some other act(s) at another time.

References

Utah R. Evid. 105.
Utah R. Evid. 404(b).
Huddleston v. United States, 485 U.S. 681, 691-92 (1988).
State v. Forsyth, 641 P.2d 1172, 1175-76 (Utah 1982).
State v. Lane, 2019 UT App 86.
State v. Bell, 770 P.2d 100 (1988).
29 Am. Jur.2d Evidence § 461.

Committee Notes

When used, this instruction must be modified in accordance with *State v. Lane* and *State v. Bell*. Further, this instruction, if given, should be given at the time the 404(b) evidence is presented to the jury and, upon request, again in the closing instructions. Under Rule 105, the court must give a limiting instruction upon request of the defendant. The committee recognizes, however, that there may be times when a defendant, for strategic purposes, does not want a 404(b) instruction to be given at the time the evidence is introduced. In those instances, a record should be made outside the presence of the jury that the defendant affirmatively waives the giving of a limiting instruction.

404(b) allows evidence when relevant to prove any material fact, except criminal disposition as the basis for an inference that the defendant committed the crime charged. See *State v. Forsyth*. In the rare instance where, after the jury has been instructed, a party identifies another proper non-character purpose, the court may give additional instruction.

If the 404(b) evidence was a prior conviction admitted also to impeach under Rule 609, see instruction CR409.

If the instruction relates to a witness other than a defendant, it should be modified.

Judge McCullagh moved to approve the instruction for CR411 at 12:31

Ms. Johnson seconded.

The Committee Unanimously approved.

(3) FINAL CONSIDERATION AND APPROVAL OF ASSAULT INSTRUCTIONS:

Ms. Johnson turned to the assault instructions and special verdict forms. She advocated having one instruction for misdemeanor assaults, with the additional elements for pregnant or substantial bodily injury bracketed in the instruction, and one instruction for aggravated assault, with bracketed additional elements. In addition, there is a single special verdict form for practitioners that feel a special verdict form is the appropriate method for instructing the jury in any particular case. After agreeing on this organizational hierarchy, the committee addressed and approved the following **Misdemeanor Assaults** instructions:

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault [against a Pregnant Person][that Caused 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
 - a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
 - b. Committed an act with unlawful force or violence that
 - i. caused bodily injury to (VICTIM'S NAME); or
 - ii. created a substantial risk of bodily injury to (VICTIM'S NAME).
3. [The act caused substantial bodily injury to (VICTIM'S NAME).]
4. [(VICTIM'S NAME) was pregnant, and (DEFENDANT'S NAME) had knowledge of the pregnancy.]
5. [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.

COMMITTEE NOTES

In cases involving domestic violence, practitioners should include a special verdict form (SVF1331) and instructions defining cohabitant (CR1330 and CR1331).

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.

Judge Jones left the meeting at 12:44 p.m.

Judge McCullagh moved to use the above language to replace the three previous instructions (MB Assault, MA Assault on Pregnant Person; and MA Assault involving Substantial Bodily Injury).

Ms. Jacobs asked a stylistic concern about how the instruction would be titled on the MUJI website. The committee agreed that this collective instruction should be titled "Misdemeanor Assaults."

Mr. Young left at 12:50 p.m.

Ms. Johnson seconded.

The motion was approved unanimously.

The committee then turned to the **Assault Against a School Employees** instruction:

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a School Employee [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. Knowing that (VICTIM'S NAME) was an employee or volunteer of a public or private school;
3. Intentionally, knowingly, or recklessly
 - a. [attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]
 - b. [committed an act with unlawful force or violence that
 - i. caused bodily injury to (VICTIM'S NAME); or
 - ii. created a substantial risk of bodily injury to (VICTIM'S NAME); or]
 - c. [threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or]
 - d. [made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);]
4. (VICTIM'S NAME) was acting within the scope of (his)(her) authority as an employee or volunteer of a public or private school; and
5. [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

Judge McCullagh moved to approve this instruction, Ms. Lockwood seconded. The committee unanimously approved.

The committee then moved to the **Assault Against a Peace Officer** instruction:

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a Peace Officer [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. Knowing that (VICTIM'S NAME) was a peace officer;
3. Intentionally, knowingly, or recklessly
 - a. [attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]
 - b. [committed an act with unlawful force or violence that
 - i. caused bodily injury to (VICTIM'S NAME); or
 - ii. created a substantial risk of bodily injury to (VICTIM'S NAME); or]

- c. [threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or]
- d. [made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);]
- 4. [(DEFENDANT'S NAME):
 - a. [Has been previously convicted of a class A misdemeanor or a felony violation of Assault Against a Peace Officer or Assault Against a Military Servicemember in Uniform;]
 - b. [Caused substantial bodily injury;]
 - c. [used a dangerous weapon; or]
 - d. [used means or force likely to produce death or serious bodily injury]]
- 5. (VICTIM'S NAME) was acting within the scope of (his)(her) authority as a peace officer; and
- 6. [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 § 76-5-102.4(2)(a)

COMMITTEE NOTES

If the case requires instruction on more than one subpart under element 4, practitioners are advised to use separate elements instructions or a special verdict form (SVF1301), as these subparts result in different levels of offense.

Depending on the facts of the case, practitioners should carefully consider removing element 4.a. from this elements instruction and instead use a special verdict form in a bifurcated proceeding.

Judge McCullagh moved to approve, Ms. Lockwood seconded. The instruction was unanimously approved.

The committee then turned to the **Assault Against a Military Servicemember in Uniform** instruction:

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a Military Servicemember in Uniform [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
 - a. [attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or]
 - b. [committed an act with unlawful force or violence that
 - i. caused bodily injury to (VICTIM'S NAME); or
 - ii. created a substantial risk of bodily injury to (VICTIM'S NAME); or]
 - c. [threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or]
 - d. [made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);]
- 3. [(DEFENDANT'S NAME);
 - a. [has been previously convicted of a class A misdemeanor or a felony violation of Assault Against a Peace Officer or Assault Against a Military Servicemember in Uniform;]

- b. [caused substantial bodily injury;]
- c. [used a dangerous weapon; or]
- d. [used means or force likely to produce death or serious bodily injury]]
- 4. (VICTIM'S NAME) was on orders and acting within the scope of authority granted to the military servicemember in uniform; and
- 5. [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 § 76-5-102.4(2)(b)

COMMITTEE NOTES

If the case requires instruction on more than one subpart under element 3, practitioners are advised to use separate elements instructions or a special verdict form (SVF1301), as these subparts result in different levels of offense.

Depending on the facts of the case, practitioners should carefully consider removing element 3.a. from this elements instruction and instead use a special verdict form in a bifurcated proceeding.

Judge Blanch asked for approval, unanimous approval given by the committee.

The committee then turned to the **Assault by a Prisoner** instruction:

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault by Prisoner [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. Intending to cause bodily injury;
- 3. Intentionally, knowingly, or recklessly
 - a. attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
 - b. committed an act with unlawful force or violence that
 - i. caused bodily injury to (VICTIM'S NAME); or
 - ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
- 4. At the time of the act (DEFENDANT'S NAME) was
 - a. in the custody of a peace officer pursuant to a lawful arrest; or
 - b. was confined in a [jail or other penal institution][a facility used for confinement of delinquent juveniles] regardless of whether the confinement is legal; and
- 5. [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 § 76-5-102.5

Judge McCullagh move to approve, Ms. Jacobs seconded. The committee unanimously approved.

The committee then turned to the **Aggravated Assault** instruction:

(DEFENDANT'S NAME) is charged [in Count ____] with committing Aggravated Assault [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
 - a. attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
 - b. made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
 - c. committed an act with unlawful force or violence that
 - i. caused bodily injury to (VICTIM'S NAME); or
 - ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. (DEFENDANT'S NAME)
 - a. [used a dangerous weapon; or]
 - b. [committed an act that interfered with the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
 - i. applying pressure to the neck or throat of (VICTIM'S NAME); or
 - ii. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
 - c. [used other means or force likely to produce death or serious bodily injury];
4. [(DEFENDANT'S NAME)'s actions
 - a. [resulted in serious bodily injury; or]
 - b. [impeding the breathing or circulation of blood of (VICTIM'S NAME) produced a loss of consciousness; or]
 - c. [targeted a law enforcement officer and resulted in serious bodily injury]; and
5. [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 § 76-5-103

COMMITTEE NOTES

If the case requires instruction on more than one subpart under element 4, practitioners are advised to use separate elements instructions or a special verdict form (SVF1301), as these subparts result in different levels of offense.

In cases involving domestic violence, practitioners should include a special verdict form (SVF1331) and instructions defining cohabitant (CR1330 and CR1331).

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.

Judge McCullagh moved to approve and Mr. Phelps seconded. The committee unanimously approved.

The committee then moved to the **Aggravated Assault by a Prisoner** instruction:

(DEFENDANT'S NAME) is charged [in Count ____] with committing Aggravated Assault By Prisoner [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
 - a. attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
 - b. made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
 - c. committed an act with unlawful force or violence that
 - i. caused bodily injury to (VICTIM'S NAME); or
 - ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. (DEFENDANT'S NAME)
 - a. [used a dangerous weapon; or]
 - b. [committed an act that interfered with the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
 - i. applying pressure to the neck or throat of (VICTIM'S NAME); or
 - ii. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
 - c. [used other means or force likely to produce death or serious bodily injury];
4. [(DEFENDANT'S NAME) intentionally caused serious bodily injury];
5. At the time of the act (DEFENDANT'S NAME) was
 - a. in the custody of a peace officer pursuant to a lawful arrest; or
 - b. was confined in a [jail or other penal institution][facility used for confinement of delinquent juveniles] regardless of whether the confinement is legal; and
6. [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 § 76-5-103.5

Judge McCullagh moved to approve and Ms. Jacobs seconded. The committee unanimously approved the instruction.

The committee then turned to the **Special Verdict Form** for assault offenses:

(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
ASSAULT**

Case No. (*****)

Count (#)

[FOR ASSAULT AGAINST PREGNANT PERSON / ASSAULT CAUSING SUBSTANTIAL BODILY INJURY:]

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Assault, 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) caused substantial bodily injury.]
- ☐ [(VICTIM'S NAME) was pregnant, and (DEFENDANT'S NAME) had knowledge of the pregnancy.]
- ☐ None of the above.

[FOR ASSAULT AGAINST A PEACE OFFICER:]

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Assault Against a Peace Officer, 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 been previously convicted of Assault Against a Peace Officer or Assault Against a Military Servicemember in Uniform.]
- ☐ [(DEFENDANT'S NAME) caused substantial bodily injury.]
- ☐ [(DEFENDANT'S NAME) used a dangerous weapon.]
- ☐ [(DEFENDANT'S NAME) used other means or force likely to produce death or serious bodily injury.]
- ☐ None of the above.

[FOR ASSAULT AGAINST A MILITARY SERVICEMEMBER IN UNIFORM:]

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Assault Against a Military Servicemember in Uniform, 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 been previously convicted of Assault Against a Peace Officer or Assault Against a Military Servicemember in Uniform.]

- ☐ [(DEFENDANT’S NAME) caused substantial bodily injury.]
- ☐ [(DEFENDANT’S NAME) used a dangerous weapon.]
- ☐ [(DEFENDANT’S NAME) used other means or force likely to produce death or serious bodily injury.]
- ☐ None of the above.

[FOR AGGRAVATED ASSAULT:]

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

- ☐ [The act resulted in serious bodily injury.]
- ☐ [The act that impeded the breathing or the circulation of blood of (VICTIM’S NAME) produced a loss of consciousness.]
- ☐ [The act targeted a law enforcement officer and resulted in serious bodily injury.]
- ☐ None of the above.

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

Foreperson

Judge McCullagh moved to approve and Ms. Lockwood seconded. The committee unanimously approved.

The committee applauded Ms. Johnson’s great efforts in this project. The committee directed staff to publish the approved instructions on the MUJI website.

(4) DUI AND RELATED TRAFFIC INSTRUCTIONS:

Judge McCullagh noted that he may make further revisions to the DUI and related traffic instructions before the next meeting. If he does, he will provide those to staff for dissemination in the meeting materials. The questions he would like committee input on is whether a *mens rea* should be included in these instructions and input on how these instructions should be structured in light of the various ways to commit DUI under the statute. His method has been to have a DUI instruction and special verdict forms for each enhanced “layer of the onion.” There will also be a refusal instruction forthcoming. On the first issue, before Judge Jones left the meeting, she had noted that she has been including a *mens rea* in her instructions.

(7) ADJOURN

The Committee then concluded its business at approximately 1:30 p.m. The next meeting will be held on September 4, 2019, starting at 12:00 noon.