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

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
October 2, 2019 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Blanch
	CR1320 Aggravated Assault - *Mens rea on element #3?*		Tab 2	Judge Blanch
	DUI and related instructions - *DUI Offenses* - *SVF for DUI Offenses* - *Definitions* - *"Actual physical control"* - *Refusal to test as evidence* - *Alcohol restricted license* - *State v. Bird, 2015 UT 7* - *State v. Vialpando, 2004 Utah App. 95* - *State v. Barnhart, 850 P.2d 473 (Utah App. 1993)* - *Utah Code §76-2-101(2)*		Tab 3	Judge McCullagh
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):

November 6, 2019 | December 4, 2019

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 from September 4, 2019 Meeting

NOTES:

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
September 4, 2019 – 12:00 p.m. to 1:30 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *Chair*	•	
Jennifer Andrus	•	
Melinda Bowen		•
Mark Field	•	
Jessica Jacobs		•
Sandi Johnson	•	
Judge Linda Jones, *Emeritus (joined at 1:00 p.m.)*	•	
Karen Klucznik	•	
Elise Lockwood		•
Judge Brendan McCullagh	•	
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young		•

GUESTS:

None

STAFF:

Michael Drechsel
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

After approximately 10 minutes of preliminary conversation on the second agenda item, Judge Blanch welcomed the committee to the meeting.
The committee then considered the minutes from the August 7, 2019 meeting.
Mr. Phelps moved to approve the draft minutes, with the previously identified amendment.
Judge McCullagh seconded the motion.
The motion passed.

(2) <u>STATE V. VALLEJO</u>, 2019 UT 38, ¶¶ 90-100 AND USE OF TERM "VICTIM" IN MUJI:

The committee began this conversation as they meeting was beginning as part of casual conversation about the agenda topics. After approving the minutes, the committee continued its conversation about the use of the word "victim" in the MUJI instructions. The committee considered every instance of "victim" currently in the MUJI instructions, including those that are bracketed and intended to be replaced by those using the model instructions with the actual name of the alleged victim.

The committee agreed to the following minor changes to the current instructions / special verdict form:

CR1404 – Aggravated Murder Elements When Extreme Emotional Distress is at Issue
• Change element 5, as follows: "That the defendant did not cause the death of ~~the victim~~ [VICTIM'S NAME] under the influence of extreme emotional distress for which there is a reasonable explanation or excuse."

CR1601 – Definitions
• Add additional Committee Note, as follows:
In regard to in subpart 2.a. and 2.b. of the definition of "dangerous weapon," the committee considered the use of the word "victim" in light of State v. Vallejo, 2019 UT 38, ¶¶ 99-102, but chose to preserve the language set forth in the statute. Any 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.

CR1613 – Aggravated Sexual Abuse of a Child
• Add additional Committee Note, as follows:
In regard to subpart 5.f., the committee considered the use of the word "victims" in light of State v. Vallejo, 2019 UT 38, ¶¶ 99-102, but chose to preserve the language set forth in the statute. Any attempt to alter the instruction in an effort to avoid the use of the word "victims" appears to impermissibly change the meaning of the statute.

CR1615 – Consent
• Change the instruction, as follows:
"[(DEFENDANT'S NAME) overcame ~~the victim~~ [VICTIM'S NAME][MINOR'S INITIALS] through concealment or by the element of surprise];" and
"[(DEFENDANT'S NAME) coerced ~~the victim~~ [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];"

SVF1613 – Aggravated Sexual Abuse of a Child
• Add additional Committee Note, as follows:
In regard to the ninth aggravating factor ("similar sexual act upon two or more victims"), the committee considered the use of the word "victims" in light of State v. Vallejo, 2019 UT 38, ¶¶ 99-102, but chose to preserve the language set forth in the statute. Any attempt to alter the instruction in an effort to avoid the use of the word "victims" appears to impermissibly change the meaning of the statute.

Ms. Klucznik moved to approved these changes. Judge McCullagh seconded the motion. The motion passed unanimously.

(3) DUI AND RELATED TRAFFIC INSTRUCTIONS:

Judge Blanch turned the time over to Judge McCullagh to explain an overview of the materials he prepared in connection with this agenda item. Judge McCullagh began by stating that he had not included a mens rea as an element of the DUI instructions. The reason for that is because Utah Code § 76-2-101(2) states: "These standards of criminal responsibility do not apply to the violations set forth in Title 41, Chapter 6a, Traffic Code, unless specifically provided by law." Ms. Klucznik raised the case State v. Bird, 2015 UT 7. The committee discussed the implications of that case, including the terms "attempt" and "receive" at issue in the case and whether those terms are sufficiently similar to words in the DUI statutes to warrant similar concerns regarding mens rea in these instructions. Committee members mentioned various experiences where mens rea was required or not required in different contexts related to instructions similar to those at issue in this agenda item.

Judge Jones joined the meeting and noted that she requires a mens rea in her instructions in relation to the "operate or actual physical control" element. She noted that State v. Vialpando, 2004 UT App 95 is, in part, what

prompts her to draw this conclusion. Judge Blanch asked that the committee table this particular issue until the next meeting so that the various materials can be adequately digested by the committee members. Ms. Klucznik proposed that the instructions should be drafted consistent with the statutory language, with a committee note to flag the issue for practitioners. The committee agreed that this issue is unresolved in the case law and the committee is not in a position to definitively resolve the matter. Judge McCullagh offered to draft a committee note on this issue and have it provided to the committee for the next meeting. Judge Blanch made the assignment.

Judge McCullagh then continued his explanation of the materials he had prepared for this agenda item, including a detailed description of the DUI instruction located in the meeting materials. Judge McCullagh then explained that his preferred approach has been to use this DUI instruction and then use special verdict forms for any MA or F3 version of DUI that builds off of this initial instruction. The committee discussed the general structure of the DUI instruction and specific language for the various elements. The committee then returned to the perennial question of whether to structure the instructions with the aggravating factors that dictate the different levels of offense as bracketed options in a single elements instruction or whether these instructions should rely upon special verdict forms for the higher degree varieties of DUI. Ms. Johnson encouraged the committee to use the method employed in the assault instructions. Judge Blanch instructed staff to draft up the DUI instruction in that way for the next meeting.

The committee then discussed the remaining instructions that Judge McCullagh had included in the meeting materials. Several committee members explained that most of the remaining instructions were not advisable in their opinions because they tend to either tell the jury how to interpret evidence; are geared only toward sufficiency of the evidence; or are cherry-picked statements of case law that are used for argument purposes. Ms. Johnson suggested that a refusal instruction may be appropriate to include. Judge Blanch suggested that "actual physical control" also may lend itself to an instruction because it has become a legal term of art based on case law (including State v. Barnhart, 850 P.2d 473 (Utah App. 1993)).

(4) ADJOURN

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on October 2nd, 2019, starting at 12:00 noon.

TAB 2

Mens Rea for Element #3 of Aggravated Assault (CR1320)

NOTES:

CR1320 Aggravated Assault.

(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]; and
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.

Last Revised – 08/07/2019

TAB 3

DUI and related instructions

NOTES:

CR_____ Driving Under the Influence of Alcohol, Drugs, or Combination.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Driving Under the Influence of [Alcohol][Any Drug][the Combined Influence of Alcohol and Any Drug] [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; 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 or actual physical control][.][; and]
4. [(DEFENDANT'S NAME):]
    a. [inflicted bodily injury upon [VICTIM'S NAME] as a proximate result of having operated the vehicle in a negligent manner;]
    b. [had a passenger under 16 years of age in the vehicle at the time of the offense;]
    c. [was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense;]
    d. [at the time of this offense, also violated Section 41-6a-714 (entering leaving highway at location other than entrance/exit);]
    e. [inflicted serious bodily injury upon [VICTIM'S NAME] as a proximate result of having operated the vehicle in a negligent manner;]
    f. [has two or more prior convictions, 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;]
    g. [the conviction in this case is at any time after a conviction of:
        i. automobile homicide under Section 76-5-207 that was committed after July 1, 2001;
        ii. a felony violation of Section 41-6a-502 or a statute previously in effect in this state that would constitute a violation of Section 41-6a-502 that was committed after July 1, 2001; or
        iii. any conviction described in element g.i. or g.ii. which judgment of conviction is reduced under Section 76-3-402.]

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-502

Committee Notes

The committee recognizes that in the realm of DUI, courts often give instructions at the request of the parties that comment on the sufficiency, or relative quality of types of evidence (field sobriety tests, intoxilyzer "bookend" instructions, etc.). It is the conclusion of the committee that these instructions are disfavored. The instructions risk the jury concluding that the court favors, or disfavors, a particular subset of evidence. As such, the committee has concluded that these instructions run afoul of the Utah Supreme Court's admonition

that trial courts, in jury instructions, should not comment upon the evidence. See State v. Pappacostas, 407 P.2d 576 (Utah 1965).

The committee recognizes that there are open questions of law with respect to whether a mens rea requirement is required with respect to the "actual physical control" variant of DUI. See Utah Code § 76-2-101(2) (no mental state generally required for traffic offenses); but see State v. Vialpando, 2004 UT App 95, ¶ 26. HOW DO WE VOTE?

The committee has included in this instruction all available aggravating factors that increase the level of offense. An alternative method of instructing the jury can be achieved by removing all of element 4 from this instruction and using the instruction in conjunction with special verdict form (SVF _____ - Driving Under the Influence Offenses) to establish the aggravating factors. The special verdict form method may be preferable in a case where the defendant's actions result in bodily injury, serious bodily injury, or death to multiple victims.

Last Revised - 00/00/0000

SVF ____. Driving Under the Influence 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** **DRIVING UNDER THE INFLUENCE** Case No. (*********) Count (#)

[FOR CLASS A MISDEMEANOR DUI:]

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) inflicted bodily injury upon [VICTIM'S NAME] as a proximate result of having operated the vehicle in a negligent manner;]
- ☐ [(DEFENDANT'S NAME) had a passenger under 16 years of age in the vehicle at the time of the offense;]
- ☐ [(DEFENDANT'S NAME) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense;]
- ☐ [(DEFENDANT'S NAME) at the time of this offense, also violated Section 41-6a-714 (entering leaving highway at location other than entrance/exit);]
- ☐ None of the above.

[FOR THIRD DEGREE FELONY DUI:]

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) inflicted serious bodily injury upon [VICTIM'S NAME] as a proximate result of having operated the vehicle in a negligent manner;]

- ☐ [(DEFENDANT'S NAME) has two or more prior convictions, 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 under Section 76-5-207 that was committed after July 1, 2001;
  ii. a felony violation of Section 41-6a-502 or a statute previously in effect in this state that would constitute a violation of Section 41-6a-502 that was committed after July 1, 2001; or
  iii. any conviction described in element g.i. or g.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
Pursuant to Utah Code § 41-6a-502(3), if the case involves multiple victims that suffered bodily injury or serious bodily injury under Utah Code § 41-6a-502 or death under Utah Code § 76-5-207, a separate special verdict form should be used for each victim.

Last Revised – 00/00/0000

CR_____ 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)]

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 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

345 P.3d 1141
Supreme Court of Utah.

STATE of Utah, Petitioner,
v.
Dustin Lynn BIRD, Respondent.

No. 20120906.
|
Jan. 23, 2015.

Synopsis

Background: Defendant was convicted in the Third District Court, Salt Lake Department, William W. Barrett, J., of failure to respond to an officer's signal to stop. Defendant appealed. The Court of Appeals, 286 P.3d 11, reversed and remanded for new trial. State's petition for certiorari review was granted.

Holdings: The Supreme Court, Parrish, J., held that:

trial court should have given mens rea instruction on charge for failure to respond to respond to an officer's signal to stop, and

failure to respond to respond to officer's signal to stop required finding that defendant knowingly received visual or audible signal from police officer to stop his vehicle, and that he must have intended to flee or elude officer.

Judgment of Court of Appeals affirmed.

Lee, J., filed dissenting opinion.

Attorneys and Law Firms

***1143** Sean D. Reyes, Att'y Gen., Karen A. Klucznik, Asst. Att'y Gen., Salt Lake City, for petitioner.

Linda M. Jones, Noella A. Sudbury, Salt Lake City, for respondent.

Justice PARRISH authored the opinion of the Court, in which Chief Justice DURRANT, Justice DURHAM, and Judge ELIZABETH HRUBY–MILLS joined.
Justice LEE authored a dissenting opinion.

Having recused himself, Associate Chief Justice NEHRING does not participate herein; Judge ELIZABETH HRUBY–MILLS sat.

On Certiorari to the Utah Court of Appeals

Justice PARRISH, opinion of the Court:

INTRODUCTION

¶ 1 On certiorari, we are asked to review the court of appeals' ruling that the trial court erred by not providing a mens rea jury instruction for the charge of failure to respond to an officer's signal to stop under Utah Code section 41–6a–210. We are also asked to determine whether the court of appeals erred by failing to provide guidance on remand regarding a correct jury instruction. We affirm the court of appeals, but exercise our discretion to provide such guidance.

BACKGROUND

¶ 2 On the evening of October 12, 2009, Salt Lake City police officer Alma Sweeny was patrolling the Glendale area in an unmarked police vehicle. Officer Sweeny drove past a blue Ford Mustang and observed that the driver, Dustin Lynn Bird, and the passenger looked "nervous" and appeared to be "ducking down in the vehicle." Officer Sweeny decided to follow the Mustang and observed the driver and the passenger leaning over, causing the vehicle to swerve. The Mustang approached a stop sign and slowly rolled through it without coming to a complete stop. Officer Sweeny thereafter activated the lights in his police vehicle. The Mustang immediately slowed in speed but did not pull over. Officer Sweeny testified that "[t]here were several safe places" to pull over, but the Mustang continued driving and turned onto a different street. After making the turn, the Mustang slowed down and pulled to the curb as though it were going to stop, but then quickly pulled away and continued driving for approximately half a block before stopping. While the Mustang was still rolling to a stop, the passenger exited the vehicle and began running. Officer Sweeny stopped his vehicle behind the Mustang, stepped out, and walked toward the Mustang. After seeing the passenger flee, he returned to his vehicle without saying anything to Mr. Bird. He then drove past the Mustang and around the corner, where he parked the police vehicle and pursued the passenger on foot.

¶ 3 After apprehending the passenger, Officer Sweeny observed the Mustang pull quickly away from the curb and drive off. Officer Sweeny called for backup. Shortly thereafter, another officer located the Mustang and activated his lights. The second officer testified that Mr. Bird stopped "immediately." Mr. Bird was then taken into custody and later charged with failure to respond to an officer's signal to stop (failure to respond), a third degree felony under section 41–6a–210 of the Utah Code. That statute provides that "[a]n operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not: ... attempt to flee or elude a peace officer by vehicle or other means." UTAH CODE § 41–6a–210(1)(a).

¶ 4 Mr. Bird's case was tried to a jury. At the close of evidence, the trial court presented ***1144** the proposed jury instructions to the parties. After reviewing the instructions, defense counsel objected to the elements instruction for the failure-to-respond charge on the grounds that it did not "outlin[e] the mental state" required for the offense and that the requisite mental state "need[ed] to be defined for the jury." The trial court disagreed, asserting, "I think it's got the elements here." Defense counsel continued to press for an instruction that included a mental state of either willfully or recklessly. Although the State conceded to a "low knowingly" mental state, the court disagreed, ending the colloquy by stating to defense counsel, "You've made your record, I've denied it." The court thereafter adopted the following instruction, which tracked the statutory language:

> The defendant, Dustin Lynn Bird is charged with Failure to Respond to Officer's Signal to Stop. You cannot convict him of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:
>
> 1. That on or about October 12th, 2009;
>
> 2. the defendant, Dustin Lynn Bird;
>
> 3. did operate a motor vehicle, and;
>
> 4. having received a visible or audible signal from a peace officer to bring the vehicle to a stop;
>
> 5. did attempt to flee or elude a peace officer by vehicle or other means.

In its closing, the prosecution argued that the jury "[did] not have to look in to the defendant's mind" to determine his culpability. The jury returned a guilty verdict.

¶ 5 Mr. Bird timely appealed his conviction to the court of appeals where he argued that the trial court erred "when it failed to instruct the jury on the mental state required for conviction of failure to respond to an officer's signal to stop." *State v. Bird,* 2012 UT App 239, ¶ 8, 286 P.3d 11, *cert. granted,* 298 P.3d 69 (Utah 2013). The court of appeals agreed with Mr. Bird, reversing the trial court. *Id.* ¶ 17. Although the court of appeals remanded Mr. Bird's case to the trial court for a new trial, it did not provide guidance for the trial court on remand. It asked the trial court "to determine in the first instance what the contents of any requested mental state instruction should be." *Id.* ¶ 17 n. 6.

¶ 6 We granted the State's petition for certiorari. We have jurisdiction pursuant to Utah Code section 78A–3–102(3)(a).

STANDARD OF REVIEW

¶ 7 "On certiorari, we review the decision of the court of appeals for correctness" and may affirm its decision "on any ground supported in the record." *Collins v. Sandy City Bd. of Adjustment,* 2002 UT 77, ¶ 11, 52 P.3d 1267 (internal quotation marks omitted).

ANALYSIS

I. MR. BIRD PRESERVED HIS OBJECTION TO THE JURY INSTRUCTION

¶ 8 The State first argues that the court of appeals erred in finding that Mr. Bird preserved his objection. It contends that Mr. Bird did not preserve his mens rea argument because his only request to the trial court was "that the mental states [intentionally, knowingly, or recklessly] be added to the elements instruction," whereas on appeal, Mr. Bird argues that the trial court should have defined the terms "receive" and "attempt." In response, Mr. Bird asserts that his argument on appeal is not that the trial court should have defined "receive" and "attempt," but rather that it should have identified the requisite mental state for the jury because the mens rea implications of the terms "receive" and "attempt" are unclear. Mr. Bird also argues that continuing to pursue his objection in the trial court would have been futile in light of the court's comment to Mr. Bird that "[he had] made [his] record." We agree with the court of appeals and hold that Mr. Bird sufficiently preserved his jury instruction objection.

¶ 9 First, the State misconstrues Mr. Bird's argument on appeal. Although his brief includes a discussion of the terms "receive" and "attempt," the essence of his argument on appeal is that these terms incorporate a mens rea element into the failure-to-respond offense. Mr. Bird has not argued that "receive" and "attempt" should have ***1145** been defined to the jury, but instead that the jury should have been instructed on the mental states embodied by these terms. In short, Mr. Bird's argument on appeal is the same argument he made to the trial court.

¶ 10 Second, Mr. Bird presented his argument to the trial court in a clear manner. To preserve an issue, counsel must raise the issue in the trial court "in such a way that the trial court has an opportunity to rule on that issue." *Pratt v. Nelson,* 2007 UT 41, ¶ 15, 164 P.3d 366. We look to three factors to determine whether the trial court had such an opportunity: (1) whether the issue was raised in a timely fashion, (2) whether it was raised specifically, (3) and whether the party "introduce[d] supporting evidence or relevant legal authority." *Id.*

¶ 11 In this case, Mr. Bird's objection was timely. Defense counsel raised the objection at her first opportunity to object to the proposed jury instructions. The objection was also specific. The State attempts to characterize Mr. Bird's objection as overly narrow. But counsel objected on the grounds that she did not "see anything outlining the mental state," and argued that "there needs to be [an] explanation that [Mr. Bird acted] ... recklessly or willfully." In short, Mr. Bird specifically objected to the lack of a mens rea instruction for the failure-to-respond offense as a whole. Finally, although defense counsel did not introduce relevant

legal authority, counsel was given only a brief moment to review the statute-based language in the jury instructions and make her objection. Where there was not an opportunity to gather relevant legal authority, it is sufficient—for preservation purposes—that counsel relied on the statutory language in making her objection.

¶ 12 In sum, we conclude the issue was preserved for appeal because Mr. Bird presented his argument to the trial court in a way that gave the court an opportunity to rule on the issue. Thus, we turn to the merits.

II. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON THE REQUIRED MENS REA

¶ 13 The court of appeals held that the trial court erred by not defining the required mental state for each element of the failure to respond charge under Utah Code section 41–6a–210(1)(a). The failure-to-respond statute provides, "An operator who *receives* a visual or audible signal from a peace officer to bring the vehicle to a stop may not: ... *attempt* to flee or elude a peace officer by vehicle or other means." UTAH CODE § 41–6a–210(1)(a) (emphasis added). The court of appeals explained that the terms "receive" and "attempt" indicate that the offense "incorporates its own set of mental state requirements on which [Mr.] Bird was entitled to a jury instruction." *State v. Bird,* 2012 UT App 239, ¶ 15, 286 P.3d 11. It acknowledged that these are common terms, but reasoned that "the criminal law mens rea implications of those terms would [not] necessarily be obvious to a jury." *Id.* ¶ 16 n. 5. We agree with the court of appeals and hold that the trial court erred in not instructing the jury on the mens rea requirement for the failure-to-respond charge.

A. Mens Rea Is a Basic Element of an Offense and Requires an Instruction

¶ 14 The general rule for jury instructions is that "an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." *State v. Bluff,* 2002 UT 66, ¶ 26, 52 P.3d 1210 (internal quotation marks omitted). A mens rea element is an "essential element of [an] offense." *State v. Cobo,* 90 Utah 89, 60 P.2d 952, 959 (1936). Thus, failure to instruct the jury as to the required mens rea, when it is an element of the crime, is reversible error.

¶ 15 A trial court should provide the jury with a mens rea instruction when a criminal statute includes terms that have mens rea implications. In *State v. Stringham,* 957 P.2d 602, 609 (Utah Ct.App.1998), for example, the defendant was convicted of communications fraud, but the court of appeals reversed and remanded for a new trial because the trial court failed to instruct the jury on the mens rea element. *Id.* It explained, "It is too long a reach to suggest the jury divined that defendant had to act intentionally ***1146** because such a level of volition is inherent in the concept of 'devis[ing] a scheme.' " *Id.* (alteration in original).

¶ 16 Of particular concern is an instruction that leaves the erroneous impression that a crime is one of strict liability, when it in fact contains a mens rea element. In *State v. Pearson,* the defendant had been convicted of failure to disclose a transaction to a government employer. 1999 UT App 220, ¶ 1, 985 P.2d 919. The court of appeals reversed the conviction, reasoning that "[b]y selectively applying the mens rea to some, but not all, of the elements of the offense, the jury could easily have believed defendant was strictly liable for [the remaining element]." *Id.* ¶ 12.

¶ 17 An appropriate jury instruction must also distinguish between the general and specific intent requirements of an offense. *State v. Potter,* 627 P.2d 75, 78 (Utah 1981). In *Potter,* we remanded for a new trial "[b]ecause the instructions given ... failed to explain adequately the distinction between the general and specific intent requirements." *Id.* Thus, a trial court must instruct the jury on the proper mens rea for the offense charged. And the instruction must identify the mens rea implicated by the statutory language, must include a mens rea for all elements, and must distinguish between general and specific intent.

B. The Required Mens Rea for Failure to Respond

¶ 18 In this case, both parties agree that the failure-to-respond offense includes a mens rea element. Violations of the Utah Traffic Code, such as this, are strict liability offenses "unless specifically provided by law." UTAH CODE § 76–2–101(2). In this case, however, the terms "receive" and "attempt," which are contained in the statutory language, indicate that this crime includes some level of mental appreciation. What the parties dispute is whether a jury instruction that simply lists the statutory elements of the offense is sufficient to alert the jury to the mens rea element.

¶ 19 The State argues that because the terms "receive" and "attempt" are terms of common usage, it was unnecessary to instruct the jury as to the meaning of these terms. We agree that the jury would have understood the plain meaning of the terms "receive" and "attempt." But we cannot assume that the jury understood the mens rea implications of these terms. Indeed, mens rea is a "legal term of art" that ought to be explicitly explained to a jury. *See State v. Jeffs,* 2010 UT 49, ¶ 43, 243 P.3d 1250.

¶ 20 We can expect a lay juror to understand that the term "receive" contemplates a level of knowledge. *See* WEBSTER'S NEW COLLEGE DICTIONARY 1195 (2007) (including among the definitions of "receive," "to apprehend mentally; get knowledge of or information about"). Therefore, a juror would likely have perceived that the "receives a visual or audible signal from a peace officer" element of the offense requires knowledge of the peace officer's signal. But we cannot assume that a juror would recognize the significance of this knowledge requirement as an essential mens rea element. Thus, it was error for the trial court not to instruct the jury that the charge included a knowingly mens rea element and define what would satisfy that element.

¶ 21 The trial court's error in not including a mens rea instruction is even more apparent in the context of the "attempt to flee or elude a police officer" element. The term "attempt" carries a distinct meaning in criminal law that we cannot expect a lay juror to understand without instruction. The common dictionary definition of attempt is "to try, solicit," or "to make an effort to do, get, have, etc." *Id.* at 91. In contrast, the statutory definition of attempt means something more than to try or make an effort. As explained in Utah Code section 76–4–101(1), attempt means to "engage[ ] in conduct constituting a substantial step toward commission of the crime" and to "intend [ ] to commit the crime." Thus, the statutory meaning of attempt connotes a conscious decision with more specific action than does the common dictionary definition of the term.

¶ 22 Although the term "attempt" implicates a mental state requirement, it does not necessarily indicate the applicable level of mens rea. For example, the crime of assault, like failure to respond, includes attempt ***1147** as one of its elements. UTAH CODE § 76–5–102(1) ("Assault is ... an attempt, with unlawful force or violence, to do bodily injury to another...."). But we have explained that the assault statute itself does not prescribe the requisite mental state. *State v. Hutchings,* 2012 UT 50, ¶ 12, 285 P.3d 1183. In other words, the requisite mens rea is not apparent from the statute's use of the term "attempt." Utah Code section 76–2–102 explains that "intent, knowledge, or recklessness shall suffice to establish criminal responsibility" "when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability." Thus, intent, knowledge, or recklessness must "be found to establish criminal responsibility" in the context of assault. *Id.* ¶ 12.

¶ 23 In the context of the failure-to-respond offense, the "attempt to flee or elude" element implicates an intentional mens rea. To flee or elude means something more than to merely leave or depart; the terms indicate action with a specific purpose. *See* WEBSTER'S NEW COLLEGE DICTIONARY 540 (2007) (defining "flee" as "to run away or escape"); *Id.* at 463 (defining "elude" as "to avoid or escape from by quickness, cunning, etc."). Because the act of fleeing or eluding requires a conscious decision to escape or avoid, one could not recklessly flee from a peace officer. Although a person might act recklessly by *departing* from a police stop without the police officer's permission, the person would not be *fleeing* unless it were his intention to escape or avoid the police officer. To attempt to flee or elude, therefore, requires that the actor leave in an effort to escape or avoid a peace officer. Thus, the trial court should have instructed the jury that an "attempt to flee or elude" requires an intentional mental state.

¶ 24 In sum, the court of appeals correctly held that the trial court erred in denying Mr. Bird a mens rea jury instruction because the instruction given to the jury did not specify the essential mens rea elements of the failure-to-respond charge.

III. GUIDANCE FOR REMAND

¶ 25 The State also argues that the court of appeals erred by not providing guidance on remand. We disagree. Although appellate courts have the discretion to provide guidance on remand, they are not required to do so. *Compare* State v. Low, 2008 UT 58, ¶ 61, 192 P.3d 867 (exercising our discretion to provide guidance), *with* State v. Verde, 2012 UT 60, ¶ 62, 296 P.3d 673 (deferring to the trial court's "superior position" in matters of evidence and withholding guidance). Thus, it was not error for the court of appeals to ask the trial court to determine, in the first instance, the proper mens rea instruction.

¶ 26 We, however, choose to provide such guidance. If the State recharges Mr. Bird, we direct the trial court to instruct the jury that Mr. Bird must have knowingly "received a visual or audible signal from a police officer" and must have intended "to flee or elude a peace officer." And the trial court should also include an instruction defining the knowing and intentional mental states.

CONCLUSION

¶ 27 We affirm the court of appeals' reversal of Mr. Bird's conviction because the trial court erred in failing to instruct the jury on the mens rea requirements of section 41–6a–210 of the Utah Code. On remand, the trial court should instruct the jury as to the mens rea required for each of the elements of the failure-to-respond charge.

Justice LEE, dissenting:

¶ 28 I respectfully dissent from the majority's determination of reversible error in the district court's failure to give an instruction clarifying the *mens rea* implications of the elements of the offense set forth in Utah Code section 41–6a–210(1)(a). Perhaps such an instruction would have aided the jury somewhat, by clarifying the import of the elements of (a) "receiv[ing] a visual or audible signal from a peace officer," and (b) "attempt[ing] to flee or elude a peace officer by vehicle or other means." UTAH CODE § 41–6a–210(1)(a). But the question presented is not whether the judges of this court ***1148** would have accepted a request to give such an instruction. It is whether the district judge's failure to give the instruction was error, and whether any such error would have made any difference to the outcome.

¶ 29 I would affirm on two grounds. First, I would uphold the jury instruction as given on its own terms, as the ordinary meaning of the terms of the instruction adequately conveyed a fair understanding of the *mens rea* issues identified by the majority. Second, I would hold that any purported error in the instruction as given was harmless, having no " 'reasonable likelihood' " of affecting the outcome of the proceedings. *State v. Powell*, 2007 UT 9, ¶ 21, 154 P.3d 788.

¶ 30 It is an over-generalization to say that "[a] trial court should provide the jury with a mens rea instruction when a criminal statute includes terms that have mens rea implications." *Supra* ¶ 15. Our cases seem to me to stand for a more modest principle. Instead of broadly mandating separate *mens rea* clarifications of all "terms that have mens rea implications," we have simply required that the jury be fairly and accurately instructed on all elements (whether *mens rea* or *actus reus*) of any offense. [1] And we have hastened to add that "the trial court does not err in refusing to give a requested instruction if the point is properly covered in other instructions presented to the jury." [2]

1 *See* State v. Maestas, 2012 UT 46, ¶ 148, 299 P.3d 892 (explaining that we review jury instructions "in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case"); State v. Roberts, 711 P.2d 235, 239 (Utah 1985) (stating "the general rule" that "an accurate instruction upon the basic elements of an offense is essential").

2 *State v. James,* 819 P.2d 781, 799 (Utah 1991).

¶ 31 The instruction given in this case easily satisfied these standards. First, the instruction conveyed the requirement of *knowledge* of the peace officer's signal. It did so by requiring the jury to find that the defendant "*received* a visible or audible signal from a peace officer." As the majority acknowledges, the *knowledge* requirement is inherent in the common, ordinary understanding of the verb *receive. See supra* ¶ 20 (citing WEBSTER'S NEW COLLEGE DICTIONARY 1195 (2007), defining "receive" as "apprehend mentally; get knowledge of or information about").

¶ 32 Second, the instruction also conveyed the requirement of *intent* to flee or evade. That requirement was again inherent in the common, ordinary meaning of the terms of the district court's instruction. Here the operative terms are "attempt," which "is 'to try, solicit,' or 'to make an effort to do, get, have, etc.,'" *supra* ¶ 21 (citing WEBSTER'S NEW COLLEGE DICTIONARY 91 (2007)); and "flee" or "evade," which mean, respectively, "run away or escape," and "avoid or escape from by quickness, cunning, etc.," *supra* ¶ 23 (citing WEBSTER'S NEW COLLEGE DICTIONARY 540, 463).

¶ 33 The elements of "receiv[ing]" a signal and of "attempt[ing] to flee or elude a peace officer" thus gave the jury a fair and accurate understanding of the *mens rea* elements of the offense of failure to respond under Utah Code section 41–6a–210. The majority's analysis only confirms this conclusion. It does so by reciting the above definitions of the operative terms of the statute—*receive, attempt, flee,* and *evade*—and by conceding that these terms accordingly conveyed the essential notion of the *knowledge* and *intent* elements of the offense in question. *Supra* ¶ 20 (conceding that "a juror would likely have perceived that the 'receives a visual or audible signal from a peace officer' element of the offense requires knowledge of the peace officer's signal"); *id.* ¶ 23 (acknowledging that "the 'attempt to flee or elude' element implicates an intentional mens rea"). That should be the end of our analysis. The jury was fairly instructed, and we should affirm the conviction on that basis. 3

3 *See Philpot v. State,* 268 Ga. 168, 486 S.E.2d 158, 160–61 (1997) (dismissing defendant's argument that the trial court improperly failed to define terms "knowingly" and "great risk" because "the terms ... are ordinary terms found in common usage and understood by people of common and ordinary experience ... and need not be specifically defined in the charge to a jury"); *People v. McCleod,* 55 Cal.App.4th 1205, 1216, 64 Cal.Rptr.2d 545 (1997) (upholding the inclusion of the common term "residence" in a jury instruction without additional elaboration, stating that a court "need only give explanatory instructions when terms used in an instruction have a technical meaning peculiar to the law" (internal quotation marks omitted)).

***1149** ¶ 34 The majority's justifications for overturning the jury verdict are unpersuasive. As to the *knowledge* implications of the instruction given to the jury, I accept that we do not know for certain whether a "juror would recognize the *significance* of" the statutory "knowledge requirement as an essential mens rea element." *Supra* ¶ 20 (emphasis added). But the majority has not identified any sense in which the ordinary meaning of "receive" would fall short of giving the jury a full sense of the *knowledge* element of the offense in question. Instead it has vaguely suggested that the jury *might not get it,* and concluded that "[t]hus it was error" not to provide further explanation in a more detailed instruction. *Supra* ¶ 20. This turns the operative burden of persuasion on its head.

¶ 35 To succeed in establishing a basis for reversal, *the defendant* bears the burden of demonstrating that the instruction in question falls short of the goal of fairly and accurately stating the law (and of indicating that the error is likely to have made a difference in the outcome, a separate problem discussed below, *infra* ¶ 13). *Powell,* 2007 UT 9, ¶ 21, 154 P.3d 788. The court inverts that standard by reversing on the basis of a vague insistence that the jury might not have "recognize[d] the significance" of the instruction's reference to "receiv[ing] a visual or audible signal from a peace officer." *Supra* ¶ 20. I dissent from a decision that seems to me to ignore our cases regarding the operative burden of persuasion.

¶ 36 The majority's analysis of the *intent* implications of the instruction in question is similarly problematic. If the ordinary meaning of "attempt to flee or elude ... requires that the actor leave in an effort to escape or avoid a peace officer," *supra* ¶ 23, then defendant Bird has failed to carry his burden of proof that the instruction as given fell short of giving a fair and accurate description of the law to the jury. That is a sufficient basis for affirming the jury verdict in this case.

¶ 37 The court does not clearly identify any precise shortcoming of the *intent* implications of the instruction in question. But in discussing the statutory term *attempt,* the court appears to draw a distinction between (a) "[t]he common dictionary definition of attempt," as "to try, solicit, or to make an effort to do, get, have, etc."; and (b) the legal sense of the *inchoate crime of attempt,* which requires "a substantial step toward commission of the crime." *Supra* ¶ 21 (internal quotations omitted). And in discussing this distinction, the court suggests that "the *statutory meaning of attempt* connotes a conscious decision with more specific action than does the common dictionary definition of the term." *Supra* ¶ 21 (emphasis added).

¶ 38 If the majority is suggesting that the "substantial step" element of the inchoate crime of *attempt* should have been included in the instruction as given, then I dissent from that conclusion. For one thing, I see no basis for treating the failure to stop offense as inchoate. It is not defined in terms of a "substantial step" toward a choate offense. It appears instead to be a crime in itself. So there is no reason to read the "substantial step" sense of an inchoate *attempt* into this state. In any event, that notion of *attempt* was neither preserved in the district court nor argued on appeal. So if the failure to instruct on "substantial step" is the shortcoming that the court sees in the instruction in question, it is a defect of the court's own imagining. And if that is not the problem, then the court has failed to identify any distinction between the common, ordinary sense of the terms of the district court's instruction and the *mens rea* requirements delineated in the majority opinion.

¶ 39 Finally, even assuming some minor, unarticulated distinction between the ordinary meaning of "receiv[ing] a visual or audible signal" and the *knowledge* required by the majority, or between "attempt[ing] to flee or elude a peace officer" and the *intent* requirement set forth by the court, we should still affirm Bird's conviction on harmless error grounds. Under settled law, Bird bears the burden of establishing that any error in the instruction in question was reasonably likely to affect the outcome in this case. *See State v. Vargas,* 2001 UT 5, ¶ 39, 20 P.3d 271 ***1150** (stating that it is the defendant's burden to establish that the error is harmful). In my view he has utterly failed to carry that burden. Given the common, ordinary sense of the operative terms of the instruction given to the jury in this case, I would also hold that any arguable shortcoming in failing to elaborate on the *mens rea* elements of the offense was harmless.

All Citations

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89 P.3d 209
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Victor VIALPANDO, Defendant and Appellant.

No. 20020405–CA.
|
April 1, 2004.

Synopsis

Background: Defendant was convicted in the Third District Court, West Valley Department, Pat B. Brian, J., of driving under the influence of alcohol (DUI). Defendant appealed.

Holdings: The Court of Appeals, Thorne, J., held that:

trooper possessed requisite reasonable articulable suspicion sufficient to justify initial detention of defendant, and

trial court's admission of results of defendant's alcohol breath test was not an abuse of discretion.

Affirmed.

Attorneys and Law Firms

***211** Shannon N. Romero, Salt Lake City, for Appellant.

Alicia H. Cook, Salt Lake City, for Appellee.

Before Judges GREENWOOD, ORME, and THORNE.

OPINION

THORNE, Judge:

¶ 1 Victor Vialpando appeals his conviction for driving under the influence of alcohol, a class B misdemeanor, in violation of Utah Code Annotated section 41–6–44 (1998). We affirm.

BACKGROUND

¶ 2 In the early morning hours of July 2, 2000, Trooper Jeffery Plank of the Utah Highway Patrol was patrolling the west side of Salt Lake County. As he drove northbound on 3200 West, the trooper noticed two people involved in a confrontation. A man, whom the trooper eventually identified as Vialpando, was chasing a woman across 3200 West and down the street. The trooper heard shouting from one or both of them. It was obvious to the trooper that the woman was not being playful, but was in fact fleeing from Vialpando. Suspecting possible violence, the trooper activated his overhead lights, sounded his siren, and

looked for the closest opportunity to turn around. Soon thereafter, Vialpando abandoned the chase and crossed the street. The woman then left the scene. After crossing the street, Vialpando walked into a nearby parking lot where he got into a parked car. After observing what had occurred, the trooper pulled directly behind Vialpando's car. The trooper then approached Vialpando to ask about the confrontation.

¶ 3 As he approached Vialpando's car, the trooper noted that Vialpando was seated in the driver seat, the keys were in the ignition, the headlights were on, and Vialpando's seatbelt was secured. He then proceeded to question Vialpando. However, before Vialpando answered any of the trooper's questions, the trooper noticed that Vialpando's eyes were bloodshot and that he smelled strongly of alcohol. As Vialpando attempted to answer the trooper's questions, the trooper noticed that Vialpando's speech was slurred.

¶ 4 Consequently, the trooper asked Vialpando to get out of the vehicle and to submit to a few, routine field sobriety tests. Vialpando complied. In the trooper's opinion, Vialpando failed each test. The trooper therefore arrested Vialpando for driving under the influence of alcohol, handcuffed him, and read him his *Miranda* rights. He also asked whether Vialpando would submit to an intoxilyzer test.[1] Vialpando consented. The trooper placed him in the patrol car's front seat and proceeded to drive to the Sorenson Center—one of the central testing points within Salt Lake County. During the drive, sometime before 1:45 a.m., Vialpando told the trooper that he needed to vomit. The trooper stopped the car, opened the passenger side door, and allowed Vialpando to vomit outside. At 1:45 a.m., after Vialpando had finished vomiting, and after the trooper had ***212** ensured that his mouth and throat were clear of foreign matter, the trooper continued toward the Sorenson Center.

1 Vialpando was also charged with possession of an open container in a vehicle, in violation of Utah Code Annotated section 41–6–44.20 (1998); however, for reasons unclear from the record, he was not tried on this charge.

¶ 5 The trooper arrived at the Sorenson Center a few minutes before two o'clock in the morning, sat Vialpando down, and prepared the intoxylyzer machine for Vialpando's test. After running the tests required to ensure that the machine was operating properly, the trooper tested Vialpando. According to the machine printout, Vialpando breathed into the machine at 2:00 a.m. and his blood alcohol volume was .175—well above the legal limit in Utah.

¶ 6 Vialpando was subsequently tried and convicted of driving under the influence of alcohol, and sentenced to 180 days in jail, which was suspended, twelve months of probation, and a $1,300.00 fine. He now appeals.

ISSUES AND STANDARDS OF REVIEW

¶ 7 Vialpando presents three arguments on appeal. He first argues that the trial court erred in denying his motion to suppress the evidence of his intoxication because the trooper lacked the requisite reasonable articulable suspicion necessary to initially detain him. "In reviewing a trial court's ruling on a motion to suppress evidence, we will not overturn its factual findings absent clear error. The trial court's legal conclusions, however, we review for correctness." *State v. Valenzuela,* 2001 UT App 332, ¶ 8, 37 P.3d 260 (quotations, citations, and alteration omitted).

¶ 8 Vialpando next argues that the trial court erred in admitting the results of his intoxilyzer test. We review a trial court's decision to admit or preclude evidence to determine whether the court acted within its permitted range of discretion. *See Salt Lake City v. Garcia,* 912 P.2d 997, 999 (Utah Ct.App.1996).

¶ 9 Finally, Vialpando argues that the jury instructions concerning "actual physical control" were incorrect as a matter of law. Consequently, the jury was improperly instructed and Vialpando erroneously convicted. We review a trial court's jury instructions on the elements of the crime for correctness. *See American Fork v. Carr,* 970 P.2d 717, 719 (Utah Ct.App.1998).

ANALYSIS

¶ 10 Vialpando first argues that the trooper lacked reasonable articulable suspicion sufficient to justify the initial detention.

> In determining whether the [trooper] had a reasonable articulable suspicion to justify [Vialpando's initial] detention, we "look to the totality of the circumstances ... to determine if there was an objective basis for suspecting criminal activity." In considering the totality of the circumstances, we " 'judge the officer's conduct in light of common sense and ordinary human experience ... and we accord deference to an officer's ability to distinguish between innocent and suspicious actions.' "

State v. Beach, 2002 UT App 160, ¶ 8, 47 P.3d 932 (ellipses in original) (citations omitted). [2]

[2] It is understood, of course, that any detention, regardless of the justification, must be limited in scope and duration to the circumstances that prompted the detention. *See State v. Godina–Luna,* 826 P.2d 652, 654 (Utah Ct.App.1992) (stating "the length and scope of the detention must be strictly tied to and justified by the circumstances which rendered its initiation permissible" (quotations, citations, and alterations omitted)). Moreover, it is axiomatic that once the officer's suspicion has been alleviated the officer must allow the detainee to go on his way without further interference by the officer. *See State v. Humphrey,* 937 P.2d 137, 143 (Utah Ct.App.1997) (acknowledging that detentions resulting from a reasonable suspicion of criminal activity are focused on confirming or dispelling the suspicion that prompted the detention); *Godina–Luna,* 826 P.2d at 654–55 (stating "[o]nce the reasons for the [temporary detention] have been satisfied, the individual must be allowed to proceed on his or her way"); *see also Terry v. Ohio,* 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968). Although these rules do not control the outcome in the instant case, we highlight them to ensure that this case creates no misunderstanding concerning their viability.

¶ 11 Here, the trooper testified that on July 2, 2000, he was patrolling his regular area on the west side of Salt Lake County. After midnight, as he drove along 3200 West, near the South Frontage road, he witnessed Vialpando chasing a woman across 3200 ***213** West. The trooper further testified that he heard yelling and described the situation in terms of an altercation, a confrontation, and a fight. Under these circumstances, the trooper concluded that the woman might be in danger.

¶ 12 From these facts, we have no difficulty concluding that the trooper's initial detention of Vialpando was reasonable. The incident took place after midnight. It was dark, and nothing surrounding the chase would lead a person to conclude it was playful. Instead, the trooper saw Vialpando chasing a woman across the street while the woman attempted to flee. The trooper also heard one or both of the people yelling during the chase. Among the legitimate suspicions that arise under these facts is domestic violence. [3] Thus, the trooper's witnessing of the late night chase, involving a woman who clearly did not welcome the pursuit, coupled with the clear indication that the chase was not playful, fully supports the trooper's suspicion that something criminal had occurred or was about to occur. Accordingly, the trooper's decision to temporarily detain Vialpando while investigating the situation was reasonable.

[3] It is of no little consequence that domestic violence has come to be recognized as a heightened concern for both police officers and society in general. *See State v. Comer,* 2002 UT App 219, ¶¶ 21–26, 51 P.3d 55 (noting that reports of domestic violence can create the foundation for a probable cause determination), *cert. denied,* 59 P.3d 603 (Utah 2002).

¶ 13 Vialpando next argues that the trial court erred in admitting the results of his intoxilyzer exam. In essence, Vialpando argues that the State failed to make the required foundational showing; consequently, the trial court erred in concluding that a proper foundation had been laid for the test's admission into evidence. "A trial court's determination that there was a proper foundation for the admission of evidence 'will not be overturned unless there is a showing of an abuse of discretion.' " *State v. Torres,* 2003 UT App 114, ¶ 7, 69 P.3d 314 (citation omitted).

¶ 14 To ensure that the results of an intoxilyzer test are reliable, the State must present evidence, inter alia, that: (1) the intoxilyzer machine had been properly checked by a trained technician, and that the machine was in proper working condition at the time of the test; (2) the test was administered correctly by a qualified operator; and (3) a police officer observed the defendant during the fifteen minutes immediately preceding the test to ensure that the defendant introduced nothing into his or her mouth during

that time. *See* *In re Oaks,* 571 P.2d 1364, 1367 (Utah 1977) (Maughan, J., dissenting) (citing *State v. Baker,* 56 Wash.2d 846, 355 P.2d 806, 809–10 (1960) (articulating foundation elements for intoxilyzer tests)); *see also* *Salt Lake City v. Womack,* 747 P.2d 1039, 1041 (Utah 1987) (affirming the necessity of the pre-test observation period). Vialpando argues that the arresting trooper, who also administered the intoxilyzer test, failed to satisfy the observation requirement. Vialpando's argument centers on his claim that the observation period itself was insufficient, or in the alternative, that the nature of the trooper's observation was unsatisfactory.

¶ 15 At the suppression hearing, the trooper testified that he arrested Vialpando after Vialpando failed a series of field sobriety tests. The trooper handcuffed Vialpando's hands behind his back, read him his *Miranda* rights, and placed him in the patrol car's front passenger seat. The trooper then asked Vialpando if he was "willing to take the [intoxilyzer] test." Vialpando consented to the test, and, at about 1:37 a.m., the pair drove away from the scene of the arrest. Soon thereafter, Vialpando told the trooper that he had to vomit. The trooper quickly pulled over and allowed Vialpando to vomit outside of the car.

¶ 16 When Vialpando was finished, the trooper used his flashlight to check in Vialpando's mouth to ensure that it was clear of foreign matter. Satisfied that Vialpando's mouth was empty, the trooper began the required observation period at 1:45 a.m. The trooper arrived with Vialpando at the Sorenson Center before 2:00 a.m., and ran all of the pre-tests required to correctly administer an intoxilyzer test. Then, according to the readout, which was also admitted into evidence, the trooper tested Vialpando at 2:00 ***214** a.m., exactly fifteen minutes after the trooper began the observation period.

¶ 17 The trial court found that the trooper observed Vialpando for the required fifteen-minute period and admitted the test results. In so ruling, the trial court acted within its permitted range of discretion. Although it is possible to conclude that the trooper was not credible in his assessment of the time that passed during his observation period, such assessments clearly lie in the hands of the trial court, and absent clear error this court is in no position to speculate on the credibility of witnesses. *See* *State v. Hansen,* 2002 UT 125, ¶ 48, 63 P.3d 650.

¶ 18 Nor are we willing to adopt the position urged by Vialpando concerning the quality of the trooper's observation. The purpose of the observation period is to ensure that a defendant does not introduce anything into his mouth that might taint the test results. While this requirement serves to ensure that the defendant places no food, drink, or smoke into his mouth during the observation period, its most important function is to ensure that any alcohol in a suspect's mouth is absorbed into the system before the test is administered. *See* *State v. Gardner,* 126 N.M. 125, 967 P.2d 465, 469 (Ct.App.1998). We do not believe that this requires the undivided attention of the observing officer. Instead, "the level of surveillance must be such as could reasonably be expected to" ensure that no alcohol has been introduced into the suspect's mouth, "from the outside or by belching or regurgitation," during the entire observation period. *State v. Carson,* 133 Idaho 451, 988 P.2d 225, 227 (Ct.App.1999). The purpose of the observation period is satisfied if (1) the suspect was in the officer's presence for the entire period; (2) it is clear that the suspect had no opportunity to ingest or regurgitate anything during the minimum observation period; and (3) nothing impeded the officer's powers of observations during the observation period. *See id.*

¶ 19 Here, the trooper placed Vialpando next to him in the front passenger seat of the patrol car, with Vialpando's hands handcuffed behind his back, preventing Vialpando from placing anything in his mouth. Vialpando sat next to the trooper for the entire fifteen-minute period, and during that time the trooper monitored, both visually and aurally, to ensure that Vialpando's mouth remained clear. The late hour and the minimal traffic presented little or no distraction to the trooper during the observation period, allowing the trooper to focus on driving and observing Vialpando. Moreover, unlike the situation presented in *Carson,* which Vialpando proffers as a nearly identical case, here there is no evidence that the weather was foul, or that the trooper's hearing was impaired. *See* *Carson,* 988 P.2d at 227. Furthermore, although Vialpando vomited both before and after the observation period, in both cases he informed the trooper of his situation before vomiting. Taken together, the trooper's monitoring of Vialpando, coupled with Vialpando's previous, as well as subsequent, act of alerting the trooper to his need to vomit, supports a reasonable belief that Vialpando's mouth was clear for the entire observation period. Therefore, the trial court could properly conclude that the purpose of the observation period was satisfied and that the intoxilyzer test results were reliable.

¶ 20 Finally, Vialpando argues that the trial court improperly instructed the jury concerning the elements required to find that he was in "actual physical control" of a vehicle. We disagree.

¶ 21 Section 41–6–44(2) states

> A person may not operate *or be in actual physical control* of a vehicle within this state if the person: (i) has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control.

Utah Code Ann. § 41–6–44(2)(a)–(2)(a)(i) (1998) (emphasis added). Vialpando argues that the controlling case interpreting the phrase "actual physical control" is *State v. Bugger,* 25 Utah 2d 404, 483 P.2d 442 (1971). To the extent that the *Bugger* court defined the phrase, Vialpando is correct. *See id.* at 443 (" '[A]ctual physical control' in its ordinary sense means 'existing' or 'present bodily restraint, directing influence, domination or regulation.' " (citations omitted)).

***215** ¶ 22 However, as we stated in *State v. Barnhart,* 850 P.2d 473 (Utah Ct.App.1993), "the *Bugger* decision is not particularly helpful to our analysis and does not serve as a guide to the trial courts and law enforcement and prosecutorial officials of this state." *Id.* at 478 n. 2. Consequently, because *Bugger* offers little guidance concerning the scope of "actual physical control," we concluded that the determination must be made through examining the "totality of the circumstances." *Id.* at 478. Thus, we referenced a nonexclusive list of factors that could bear on the determination, and noted that "the statute is intended to prevent intoxicated persons from causing harm by apprehending them before they operate a vehicle." *Id.* at 477–78. [4] Finally, we made clear that "a person need not actually move [ ] a vehicle, but only needs to have an apparent ability to start and move the vehicle in order to be in actual physical control." *Id.* at 477 (citation omitted).

[4] The factors articulated in *Barnhart* include

> (1) whether [the] defendant was asleep or awake when discovered;
> (2) the position of the automobile;
> (3) whether the automobile's motor was running;
> (4) whether [the] defendant was positioned in the driver's seat of the vehicle;
> (5) whether [the] defendant was the vehicle's sole occupant;
> (6) whether [the] defendant had possession of the ignition key;
> (7) [the] defendant's apparent ability to start and move the vehicle;
> (8) how the car got to where it was found; and
> (9) whether [the] defendant drove it there.

State v. Barnhart, 850 P.2d 473, 477 (Utah Ct.App.1993) (quotations and citations omitted).

¶ 23 Notably, the approach we adopted in *Barnhart* comports with the approach taken by the majority of jurisdictions in which similar statutory language can be found. *See, e.g., Farley v. City of Montgomery,* 677 So.2d 1251, 1252–53 (Ala.Crim.App.1995) ("Whether one is in 'actual physical control' of a vehicle is determined by a totality-of-the-circumstances test." (quotations and citations omitted)); *Kingsley v. State,* 11 P.3d 1001, 1003 (Alaska Ct.App.2000) (stating "a person may exercise actual physical control over a vehicle without making active attempts to operate it"); *State v. Love,* 182 Ariz. 324, 897 P.2d 626, 628 (1995) ("We find it preferable, as in other cases, to allow the trier of fact to consider the totality of the circumstances in determining whether defendant was in actual physical control of his vehicle."); *accord Savage v. State,* 252 Ga.App. 251, 556 S.E.2d 176, 180 (2001), *cert. denied* 2001 WL 1346297, 2002 Ga. LEXIS 275 (Ga. March 25, 2002); *People v. Eyen,* 291 Ill.App.3d 38, 225 Ill.Dec. 249, 683 N.E.2d 193, 199 (1997); *State v. Johnson,* 130 N.M. 6, 15 P.3d 1233, 1239–40 (2000); *State v. Lewis,* 131 Ohio App.3d 229, 722 N.E.2d 147, 150 (1999); *cf. State v. Wiggs* 60 Conn.App. 551, 760 A.2d 148, 150 (2000) (examining the meaning of operating a motor vehicle with results similar to our analysis of "actual physical control").

¶ 24 Vialpando cites to, and seemingly understands, the implications of *Barnhart.* However, he argues that *Barnhart* was decided in error because it gave insufficient deference to, and in fact insufficiently analyzed, *Bugger,* and instead relied upon civil driver license revocation cases in crafting the applicable standard. Specifically, Vialpando argues that this court failed to require the State to prove an intent "to operate or exercise control over a motor vehicle," and that we cannot look to civil cases for guidance in crafting our analysis for criminal cases. Vialpando is incorrect.

¶ 25 First, contrary to Vialpando's argument, *Bugger* did not establish a requirement that the State prove "a vehicle's occupants actively and affirmatively chose to exercise dominion and control over a motor vehicle." Instead, the State is required to prove that a defendant had an " 'existing' or 'present bodily restraint, directing influence, domination or regulation' " over the vehicle. *Bugger,* 483 P.2d at 442 (citation omitted). The defendant's conviction in *Bugger* was reversed not because the state failed to show intent, but because "the facts [did] not bring the case within the wording of the statute." *Id.* The defendant was arrested after being discovered asleep in his car with the car "completely off traveled portions of the highway." *Id.* at 442. Thus, the court determined that the defendant was not in physical control of ***216** the vehicle and did not address the issue of intent. Consequently, we conclude that rather than reading an element of intent into the statute, the *Bugger* court merely determined that "actual physical control" is necessary to violate the statute.

¶ 26 Moreover, we addressed whether the statute required a showing of intent in *Barnhart* and determined that "[it is] permissible for a trial court to find that a person had actual physical control over a vehicle even though the person did not subjectively intend to exercise it." 850 P.2d at 479. Underlying this conclusion was our determination that "the statute is intended to prevent intoxicated persons from causing harm by apprehending them before they operate a vehicle." *Id.* at 478. We further concluded that "a person need not actually move, or attempt to move, a vehicle, but only needs to have an apparent ability to start and move the vehicle in order to be in actual physical control." *Id.* (citation omitted); *see also State v. Johnson,* 130 N.M. 6, 15 P.3d 1233, 1239 (2000) ("The policy underlying the DWI statute is to prevent individuals from driving or exercising actual physical control over a vehicle when they, either mentally or physically, or both, are unable to exercise the clear judgment and steady hand necessary to handle a vehicle with safety both to themselves and the public." (quotations and citation omitted)); *State v. Blanton,* 121 Ohio App.3d 162, 699 N.E.2d 136, 141 (1997) ("The clear purpose of [the DWI statute] is to discourage persons from putting themselves in the position in which they can potentially cause the movement of a motor vehicle while intoxicated or under the influence of any drug of abuse." (quotations and citation omitted)). Accordingly, we conclude that *Bugger* does not require the State to prove intent to demonstrate that the statute has been violated. Rather, because both *Bugger* and section 41–6–44 are silent concerning culpable mental state, a violation of the statute occurs when a person "intentionally, knowingly, [or] recklessly" takes "actual physical control" of a vehicle, while intoxicated. Utah Code Ann. §§ 76–2–101(1), –102 (1999). [5]

[5] Utah Code Annotated section 76–2–102 establishes that: "Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Utah Code Annotated section 41–6–44(2) prohibits a person with a blood alcohol concentration of .08 grams or more from operating or being "in actual physical control of a vehicle." Utah Code Ann. § 41–6–44(2) (1998). It does not, however, specify any culpable mental state; thus, the State is not required to prove that Vialpando intended to be in "actual physical control" of the vehicle.

¶ 27 The second flaw in Vialpando's *Barnhart* argument concerns our use of civil case law to guide our analysis. Although Vialpando argues that this court cannot rely on civil case law for guidance in criminal cases, he cites neither case law, nor statutory authority to support this proposition. Consequently, we decline to further address this claim. *See State v. Thomas,* 961 P.2d 299, 305 (Utah 1998). Accordingly, Vialpando's final argument is without merit and the trial court properly instructed the jury.

CONCLUSION

¶ 28 Trooper Plank acted reasonably in detaining Vialpando after witnessing the late night chase on 3200 West. The trooper articulated sufficient facts to support the detention and we conclude that any reasonable police officer in the same situation

would have also detained Vialpando to investigate the situation. Moreover, the trial court did not err in finding that the State had laid the proper foundation to support the admission of the intoxilyzer test results. Finally, the trial court did not err in instructing the jury concerning the factors necessary to show that Vialpando was in "actual physical control" of a vehicle at the time of his detention. Accordingly, we affirm Vialpando's conviction.

¶ 29 WE CONCUR: PAMELA T. GREENWOOD and GREGORY K. ORME, Judges.

All Citations

89 P.3d 209, 496 Utah Adv. Rep. 34, 2004 UT App 95

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850 P.2d 473
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Kelly S. BARNHART, Defendant and Appellant.

No. 920357-CA.
|
March 31, 1993.

Synopsis
Defendant was convicted for being in actual physical control of motor vehicle while under influence of alcohol after police officer found motorist unconscious in driver's seat with key in car's ignition by the Fifth District Court, Washington County, James L. Shumate, J. Defendant appealed. The Court of Appeals, Bench, J., held that: (1) correction-of-error standard of review applied; (2) fact that motorist left keys in ignition while sober was not dispositive; (3) finding of actual physical control did not require that motorist touch any operating controls; (4) motorist's subjective intent that his girlfriend drive car away was irrelevant; and (5) motorist's unconscious condition did not prevent finding of actual physical control.

Affirmed.

Garff, J., concurred in result.

Attorneys and Law Firms

***474** Phillip L. Foremaster (argued), St. George, for defendant and appellant.

Eric A. Ludlow, Washington County Atty., and Wade A. Farraway (argued), Deputy Washington County Atty., St. George, for plaintiff and appellee.

Before BENCH, GARFF and JACKSON, JJ.

OPINION

BENCH, Judge:

Defendant, Kelly Barnhart, appeals his conviction for being in actual physical control of a motor vehicle while under the influence of alcohol in violation of Utah Code Ann. § 41-6-44(1) (1988). We affirm.

BACKGROUND

The parties do not dispute the basic facts. Defendant stipulated that the police report was accurate insofar as it concerned the period of time when the police were involved. The parties also stipulated to several additional facts. Finally, the trial court made additional factual findings of its own based upon the police report and the stipulated facts. We recite the facts accordingly.

On March 24, 1992, between 8:00 and 9:00 p.m., defendant drove his girlfriend's car to the grocery store in order to meet her. Defendant's intent was that his girlfriend ***475** would drive the car home. Prior to driving to the store, defendant had consumed two cans of beer. While waiting in the car for his girlfriend, defendant consumed an additional seven cans of beer.

At approximately 10:00 p.m., the store manager called the police because the store had closed and defendant was still in the parking lot. When a police officer arrived, he found defendant sitting upright in the driver's seat with his head back. The keys were in the ignition but the car was not running and the engine was cold.

According to the officer, defendant was either sleeping or unconscious. The officer tapped on the window, but defendant did not respond. The officer then pounded on the door with his fist and defendant still did not respond. Finally, the officer opened the door and shook defendant until he awoke. He was "very disoriented" and the officer noticed a strong odor of alcohol on defendant's breath and in the car. When asked by the officer where the owner of the car was, defendant pointed to the empty passenger seat. Defendant could not tell the officer where she was.

The officer conducted field sobriety tests and determined that defendant was intoxicated. During the course of the officer's investigation, defendant's girlfriend arrived. Defendant was placed under arrest and taken to jail. Testing at the jail showed a blood-alcohol level of .18%.

The trial court found that defendant was unconscious and not merely asleep when the officer arrived, and that although defendant was the sole occupant of the car, he did not intend to drive the car away from the store. The trial court also found that when defendant drove to the store he was not under the influence of alcohol to a degree that would have rendered him in violation of the law at the time. Finally, the trial court made the following finding:

> I find specifically that you had possession of the ignition key, and it was in the ignition of the vehicle, and that you had the ability to start and move the vehicle, absent the fact that you appeared to be unconscious from the effects of the alcohol. But there was no other intervening factor other than the alcohol itself prohibiting you from starting and moving the car.

The trial court found defendant guilty of being in actual physical control of a vehicle while intoxicated. Defendant was then sentenced, but the sentence was stayed pending this appeal.

STANDARD OF REVIEW

Defendant challenges the trial court's finding that he was in "actual physical control" of the vehicle, as proscribed by Utah Code Ann. § 41-6-44(1) (1988). Ultimate factual determinations such as this are limited by legal principles that guide a trial court in its factfinding function. *See State v. Thurman,* 846 P.2d 1256, 1268-1272 (Utah 1993). These legal guidelines create a field of inquiry within which the trial court can make its ultimate factual findings. *State v. Richardson,* 843 P.2d 517, 521-22 (Utah App.1992) (Bench, P.J., concurring). Whether or not a trial court operated within the proper field of inquiry is a determination we make using a correction-of-error standard of review. *See Thurman,* 846 P.2d at 1271-1272; *Richardson,* 843 P.2d at 522 (Bench, P.J., concurring).

As the supreme court reasoned in *Thurman,* multi-judge appellate courts are better suited to establish the legal guidelines trial courts must apply when making ultimate factual findings. 846 P.2d at 1271-1272. By utilizing a correction-of-error standard, appellate courts are able to ensure that trial courts statewide correctly identify and follow the same legal standards in making ultimate factual findings. This standard also allows appellate courts to uniformly adjust the field of inquiry within which trial

courts must make their ultimate findings of fact. *See id.* ("each new opinion narrows the universe of unsettled questions"); *see also Richardson,* 843 P.2d at 524-25 (Bench, P.J., concurring) (if injustice occurs because of disparate treatment of similar facts by different trial courts, "the field of inquiry should be restricted by adjusting the governing law").

***476** We do not, however, apply the correction-of-error standard to every aspect of a trial court's finding of ultimate fact. The correction-of-error standard is intended to allow us to review and correct the trial court's determination of "the legal content" of an ultimate finding. *Thurman,* 846 P.2d at 1271-1272. We defer, on the other hand, to the trial court's findings of underlying facts. *Id.* Consequently, we defer to a trial court's judgment of a debatable issue made within the trial court's proper realm of factual inquiry, such as a finding based on the totality of the circumstances. As the supreme court noted in *Thurman:* "the appellate court addresses itself to the clarity and correctness of the developing law." *Id.* (quoting *State v. Vigil,* 815 P.2d 1296, 1300 (Utah App.1991)).

If an appellant asserts that the trial court has incorrectly identified the legal guidelines establishing its permissible field of inquiry, we use the correction-of-error standard because the appellant has challenged the "legal content" of the trial court's finding. If, on the other hand, an appellant cannot show that the trial court's ultimate finding was erroneous as a matter of law, the appellant is requesting nothing more than a second opinion on a debatable question of fact. In such cases, an appellant is simply challenging the trial court's judgment in its ultimate factual finding. Absent a violation of legal guidelines, a trial court's finding of ultimate fact remains on the same level as any other underlying factual finding, and we defer. *See Lopez v. Schwendiman,* 720 P.2d 778, 780 (defer to trial court's finding of actual physical control unless trial court misapplied the law or the finding was clearly against the weight of the evidence); *Garcia v. Schwendiman,* 645 P.2d 651, 653 (Utah 1982) (same).

Our use of the correction-of-error standard when reviewing a trial court's compliance with the legal guidelines does not allow us to substitute our judgment for that of the trial court simply because we would have reached a different result. *State v. Howard,* 544 P.2d 466, 468 (Utah 1975); *Pitcher v. Lauritzen,* 18 Utah 2d 368, 371, 423 P.2d 491, 493 (1967); *Richardson,* 843 P.2d at 524-25 (Bench, P.J., concurring); *Cf. Thurman,* 846 P.2d at 1271-1272. "The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside." *State v. Walker,* 743 P.2d 191, 193 (Utah 1987) (quoting Wright & Miller, *Federal Practice and Procedure* § 2585 (1971)).

If we could simply substitute our judgment in each new case, then each new opinion would not "narrow[ ] the universe of unsettled questions of appellate review." *Thurman,* 846 P.2d at 1271. Under the correction-of-error standard, particularly when the trial court has applied a totality of the circumstances test, an appellate court must identify the specific error made by the trial court before disturbing the trial court's finding. Only by clearly identifying the legal error of the trial court does the appellate court's ruling achieve the desired effect of harmonizing and developing the legal guidelines. *See id.; see also State v. Vigil,* 815 P.2d 1296, 1300 (Utah App.1991) (when reviewing ultimate findings, appellate courts address "the clarity and correctness of the developing law in order to provide unambiguous direction"). If the appellate court cannot clearly articulate a legal guideline that the trial court has violated in making its ultimate finding of fact, the trial court has not committed reversible error. The finding of an ultimate fact thereby remains a factfinding function of the trial court to which we defer. *Richardson,* 843 P.2d at 522 (Bench, P.J., concurring).

In the instant case, defendant raises several factors that he claims prevent a finding of actual physical control. In other words, he contends that as a matter of law the trial court could not have made the ultimate factual finding it made. His claims go directly to the legal guidelines that define the trial court's field of inquiry. In order for defendant to succeed, we must be persuaded to rule, as a matter of law, that the factors he points to prevented the trial court from properly finding that he had actual physical control. Otherwise, the trial court's finding that defendant was in ***477** actual physical control remains factual in nature, and we defer.

ANALYSIS

Defendant recites the fact situations of several "actual physical control" cases and attempts to draw factual similarities and distinctions that he believes are determinative in this case. We review those cases to discover the previously established legal guidelines in this area.

In *Garcia v. Schwendiman,* 645 P.2d 651 (Utah 1982), Garcia was in his vehicle attempting to start its motor, but apparently was unable to do so because of his intoxicated state. In front of Garcia's car was a fence and behind his car was another car-parked there by a concerned observer who had noticed Garcia's intoxicated condition. Garcia was unable to move the vehicle more than a few feet. The supreme court held that inasmuch as there was evidence that Garcia "occupied the driver's position behind the steering wheel, with possession of the ignition key and with the apparent ability to start and move the vehicle," there had been an adequate showing of actual physical control. *Id.* at 654. Noting that the objective of the statute is to prevent intoxicated persons from causing harm with a vehicle, the court rejected defendant's claim that his inability to move his car prevented him from having actual physical control. We gather the following legal guideline from the supreme court's holding: A person need not actually move, or attempt to move, a vehicle in order to have actual physical control; the person only needs to have "the apparent ability to start and move the vehicle." *Id.* at 654.

In *Lopez v. Schwendiman,* 720 P.2d 778 (Utah 1986), an officer found Lopez in his pickup truck parked by a public telephone booth at 3:00 a.m. The truck's motor was not running but there were vehicle tracks in the freshly fallen snow. Lopez was sitting in the driver's seat with his head resting on the steering wheel. When the door to the truck was opened, Lopez fell out of the truck and the officer had to catch him. Lopez smelled of alcohol and was drooling. He needed assistance to stand. The keys were in the ignition. The supreme court affirmed the trial court's finding that Lopez was in actual physical control of the truck. The court reiterated that the statute is intended to protect the public safety by apprehending intoxicated persons before they strike. *Id.* at 781.

In *Richfield City v. Walker,* 790 P.2d 87 (Utah App.1990), Walker, seeking a room, drove to a motel during the early hours of the morning. He was already in an inebriated condition when the hotel informed him that there were no vacancies. He returned to the parking lot and went to sleep in his truck. He was discovered by a police officer who found the truck with the engine off but the headlights on. The keys were in the ignition. Walker was asleep on the seat, his head towards the passenger door and a blanket covering him. Walker submitted to an intoxilyzer test that registered his blood-alcohol level at .21%. This court indicated that whether a person was in actual physical control of a vehicle required consideration of the totality of the circumstances. *Id.* at 93.

Walker contains the following list of factors that may be relevant in considering the totality of the circumstances:

(1) whether defendant was asleep or awake when discovered;

(2) the position of the automobile;

(3) whether the automobile's motor was running;

(4) whether defendant was positioned in the driver's seat of the vehicle;

(5) whether defendant was the vehicle's sole occupant;

(6) whether defendant had possession of the ignition key;

(7) defendant's apparent ability to start and move the vehicle;

(8) how the car got to where it was found; and

(9) whether defendant drove it there.

Id. at 93.[1] The court made clear, however, that none of the factors are dispositive of ***478** the question as a matter of law, nor is the list all-inclusive. *Id.*

[1] The trial court in the present case expressly considered each of these factors. It made the following findings: defendant was the sole occupant of the car and had possession of the ignition key, which was in the ignition; the car was located in the parking lot of a store with direct access to public streets; defendant was sitting upright in the driver's seat, albeit unconscious; the only impairment of defendant's ability to drive the car away was the debilitating effect of the alcohol. In defendant's favor, the trial court found: the car was not running when the police arrived, nor had it been running for some period of time; defendant had only consumed two beers prior to arriving at the store and therefore was likely not legally intoxicated at the time of arrival; defendant did not intend to drive the car away from the store when he arrived. These factual findings have not been challenged.

The only case relied upon by defendant as being even arguably advantageous to his position is *State v. Bugger,* 25 Utah 2d 404, 483 P.2d 442 (1971). Bugger was found in his car, which was parked off the traveled portion of the highway. The motor was not running. Bugger was asleep at the time the officer arrived and the officer had some difficulty waking him. The Utah Supreme Court summarily held that "defendant at the time of his arrest was *not* controlling the vehicle, nor was he exercising any dominion over it." *Id.* 483 P.2d at 443. Although not clear from the decision, it appears that Bugger's conviction was reversed because he was asleep when first observed by the officer.[2] In *Lopez,* the supreme court distinguished *Bugger* by emphasizing that there was no evidence that Bugger was positioned in the driver's seat, as was Lopez. *Lopez,* 720 P.2d at 780. In *Walker,* this court indicated that under a totality of the circumstances test, whether a person was asleep when discovered and whether the person was positioned in the driver's seat are relevant factors, but they are not determinative of the question. 790 P.2d at 93. The *Bugger* decision, as subsequently interpreted, does not support defendant's contention that the trial court could not have found him to be in actual physical control simply because he was unconscious when the police officer arrived.

[2] The supreme court's decision in *Bugger* illustrates the problem of not clearly identifying the legal principles that drive the court's decision. We can only speculate as to why the supreme court reversed the trial court's finding in *Bugger.* Without an explanation of how the trial court erred as a matter of law, the *Bugger* decision is not particularly helpful to our analysis and does not serve as a guide to the trial courts and law enforcement and prosecutorial officials of this state. *See Thurman,* 846 P.2d at 1271-1272.

To summarize, we recognize the following established legal guidelines that affect a trial court's factfinding discretion in these cases: the trial court must look to the totality of the circumstances, no single factor being dispositive as a matter of law, *Walker,* 790 P.2d at 93; the statute is intended to prevent intoxicated persons from causing harm by apprehending them before they operate a vehicle, *Garcia,* 645 P.2d at 654; *Lopez,* 720 P.2d at 781; a person need not actually move, or attempt to move, a vehicle, but only needs to have an apparent ability to start and move the vehicle in order to be in actual physical control, *Garcia,* 645 P.2d at 654-55.

The trial court made its findings within these previously established guidelines. Defendant, however, raises several additional factors which he asserts evidence a lack of actual physical control. He claims, in essence, that certain historical facts in this case mandate an ultimate finding that he was not in actual physical control. We must therefore determine whether the trial court violated any previously undeclared legal guidelines when, in light of the facts identified by defendant, it found that defendant was in actual physical control.

Defendant first claims that he left the keys in the ignition when he arrived at the parking lot-while he was not in an intoxicated condition. Defendant's argument totally fails on evidentiary grounds because it is not supported by the record. While the prosecution did stipulate that the keys were in the ignition when the officer arrived, there is no stipulation that defendant placed them there while sober. Even if such evidence were properly introduced, this fact would not preclude the trial court from finding that defendant was in actual ***479** physical control. Since defendant still had the keys in his possession, it was permissible for the trial court to find that he had the apparent ability to start and move the car.

Defendant next argues that the police officer who found him did not see him touch any of the operating controls. While evidence that a person touched the controls in an attempt to operate the vehicle could be probative, the absence of such evidence does not, as a matter of law, prevent a finding that defendant was in actual physical control. Defendant's argument goes more to the question of whether defendant operated the vehicle, not whether he had actual physical control of the vehicle. Section

41-6-44(1) does not require that a person operate a vehicle in order to be in actual physical control. Having actual physical control over a vehicle while intoxicated is an offense distinct from operating a vehicle while intoxicated. *See* *Garcia,* 645 P.2d at 653 (statute proscribes conduct beyond and different from driving or operating a moving vehicle and therefore defines two distinct offenses). [3] Defendant's argument is therefore misplaced. Since there is a distinction between operating a vehicle and having actual physical control of a vehicle, a person need not operate, or attempt to operate, a vehicle before he or she may be found to be in actual physical control.

[3] At issue in *Garcia* was Utah Code Ann. § 41-6-44(10) (1953 as amended), which was subsequently repealed and replaced with Utah Code Ann. § 41-6-44(1) (1988), the statute at issue here. Applying the *Garcia* analysis, this court held in *Walker* that section 41-6-44(1) still describes two distinct offenses: (1) operating a vehicle, and (2) being in actual physical control of a vehicle. 790 P.2d at 89 n. 2.

Defendant similarly claims that he could not have been in actual physical control of the vehicle while intoxicated because he was not intoxicated when he arrived at the store. Once again, this argument could have some merit if defendant had been charged with operating a vehicle while intoxicated, but he was only charged with being in actual physical control. The relevant inquiry is whether defendant was in actual physical control after he arrived at the store and consumed seven more beers. Trial courts may certainly consider a person's consumption and intoxication occurring after the person has ceased operation of the vehicle but retained the apparent ability to operate the vehicle.

Defendant also points to the trial court's express finding that defendant intended that his girlfriend drive the car away. The subjective intent of a defendant not to operate the vehicle does not prevent a finding that the defendant was in actual physical control. "[A]n intent to control a vehicle [may] be inferred from the performance of those acts which we have held to constitute actual physical control." *Garcia,* 645 P.2d at 655. Whether or not a person has the subjective intent to subsequently operate a vehicle is irrelevant to the question of whether the person has the present ability to start and move the vehicle. It is therefore permissible for a trial court to find that a person had actual physical control over a vehicle even though the person did not subjectively intend to exercise it.

Finally, defendant claims that his unconscious condition at the time the officer arrived prevents a finding of actual physical control. Defendant's frame of reference, however, is too narrow. The fact that defendant was unconscious at the time the police officer arrived does not prevent a finding that defendant had the ability to start the car and drive away either before or after his unconsciousness. The trial court astutely observed in this case that the only thing that prevented defendant from starting the car and driving away was the incapacitating effect of the alcohol. It was therefore permissible to infer that defendant had actual physical control before the alcohol rendered him unconscious. If a person had actual physical control of a car while drinking himself into an unconscious stupor and would, upon waking, still be in control of the car, a trial court could logically disregard the fact the person was unconscious when the police arrived. We therefore expressly hold that ***480** the fact a person has passed out from imbibing alcohol does not, as a matter of law, prevent a trial court from finding that the person was in actual physical control of a vehicle. [4]

[4] Were we to hold otherwise, police officers would be required to either wait until the intoxicated person awakes on his or her own volition, or wake the person and allow them to escape prosecution.

This ruling is consistent with the public policy goal of preventing an intoxicated person from causing harm with a vehicle. An unconscious person, with the ignition keys in possession may, at any time, awake and attempt to exercise his or her control by operating the vehicle. *See* *Garcia,* 645 P.2d at 653-54 (statute is intended to prevent the danger to the public created when a person gets behind the wheel and has the ability to start the vehicle and drive away) (citing *Hughes v. State,* 535 P.2d 1023 (Ok.Cr.1975) ("an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist.")). The risk to public safety intended to be prevented by the statute therefore continues, albeit in a reduced degree, while a person is unconscious. [5]

5 Similar analysis applies when considering defendant's subjective intent that his girlfriend would drive the car away. Even if defendant drove to the store with the original intention that he not drive away, defendant was capable, at any time, of altering his plans and driving the car himself.

While defendant was free to make the foregoing arguments at trial in hopes of convincing the trial court that he did not have actual physical control given the totality of the circumstances, these facts do not mandate a finding by the trial court, as a matter of law, that he did not have actual physical control. Defendant therefore has not shown on appeal how the trial court departed from the proper field of inquiry. Consequently, defendant has not shown how the trial court committed reversible error. Inasmuch as defendant has not made any argument that the trial court's ultimate factual finding was against the clear weight of the evidence, we do not disturb the trial court's determination that defendant was in actual physical control of the vehicle while intoxicated.

CONCLUSION

Defendant has failed to show how the trial court violated any legal guidelines in finding that he was in actual physical control of the car.

We therefore affirm the conviction.

JACKSON, J., concurs.

GARFF, J., concurs in result.

All Citations

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End of Document

76-2-101 Requirements of criminal conduct and criminal responsibility.

(1)

(a) A person is not guilty of an offense unless the person's conduct is prohibited by law; and

(b)

(i) the person acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or

(ii) the person's acts constitute an offense involving strict liability.

(2) These standards of criminal responsibility do not apply to the violations set forth in Title 41, Chapter 6a, Traffic Code, unless specifically provided by law.

Amended by Chapter 2, 2005 General Session