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

12:00	Welcome and Approval of Minutes		Tab 1	Judge Blanch
	Aggravated Assault – Targeting a Law Enforcement Officer		Tab 2	Sandi Johnson
	DUI and Related Instructions - *Vialpando and mens rea in light of State v. Thompson, 2017 UT App 183, ¶ 52, 405 P.3d 892, 903, cert. denied, 417 P.3d 577 (Utah 2018)* - *Continued consideration of new instructions not addressed by committee at previous meeting* - *"Commenting" instruction examples*		Tab 3	Judge McCullagh Sandi Johnson
	Entrapment Instruction		Tab 4	Judge Jones Judge Blanch
	Definition of "Sexual Intercourse"		Tab 5	Judge Blanch
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):

January 8, 2020
February 5, 2020
March 4, 2020
April 1, 2020
May 6, 2020
June 3, 2020
September 2, 2020
October 7, 2020
November 4, 2020
December 2, 2020

UPCOMING ASSIGNMENTS:
1. Sandi Johnson = Assault; Burglary; Robbery
2. Judge McCullagh = DUI; Traffic
3. Karen Klucznik & Mark Fields = Murder
4. Stephen Nelson = Use of Force; Prisoner Offenses
5. Judge Jones = Wildlife Offenses

TAB 1

Minutes – October 2, 2019 Meeting

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

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

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *chair*	•	
Jennifer Andrus	•	
Mark Field	•	
Sandi Johnson	•	
Judge Linda Jones, *emeritus*	•	
Karen Klucznik	•	
Judge Brendan McCullagh	•	
Stephen Nelson		•
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young		•
Elise Lockwood	•	
Melinda Bowen *(via phone)*	•	

GUESTS:

None

STAFF:

Michael Drechsel
Jiro Johnson (minutes)
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee.
Judge Blanch asked for a motion to approve the minutes.
Mr. Field made the motion. Judge McCullagh seconded. The motion carried unanimously.
As an introductory matter, Judge Blanch and Judge Jones discussed with other judges the need to look at the instructions the Committee has propounded to the courts.

(2) REVIEW OF AGGRAVATED ASSAULT INSTRUCTIONS:

Judge Blanch then turned the Committee's attention to the recently approved aggravated assault instruction (CR1320) and whether the aggravating factors found in element 3 require a mental state. Judge Jones cited *State v. Jimenez*, 2012 UT 41, 284 P.3d 640, for the proposition that aggravated assault requires a mental state for use of a dangerous weapon. Ms. Klucznik, recalling a footnote in that case, asked whether that was in relation to an accomplice. Upon review of that case the committee determined that the case language was in regard to accomplice liability. Ms. Johnson joined the Committee at 12:16pm. After discussion, the committee proposed the following language to resolve the issue:

CR ____ 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);~~
1. (DEFENDANT'S NAME) 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
2. (DEFENDANT'S NAME) intentionally, knowingly, or recklessly
    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];
3. [(DEFENDANT'S NAME)'s actions
    a. [Resulted in serious bodily injury; or]
    b. [produced a loss of conscious by impeding the breathing or circulation of blood of (VICTIM'S NAME) ~~produced a loss of consciousness; or~~ and]
    ~~c. [intentionally, knowingly, or recklessly targeted a law enforcement officer and resulted in serious bodily injury]; and~~
4. [The defense of _____ does not apply.]

Ms. Johnson explained that the legislature eliminated the need for a mental state regarding the ultimate result of a defendant's conduct. The committee agreed that there is no need for a mental state for the elements in section 3, except as it relates to 3.c. (targeting a law enforcement officer). Ms. Lockwood and Mr. Phelps identified that the language involving "targeting a law enforcement officer" requires a separate intent requirement based on the definition in statute (Utah Code § 76-5-210). The committee agreed that the committee should create a separate instruction for "targeting an officer." Ms. Johnson volunteered to write a separate instruction for such cases, which will be presented for committee consideration at the next meeting.

Judge McCullagh moved to approve the above changes to the Aggravated Assault instruction. Ms. Johnson seconded. The motion was unanimously approved.

(3) DUI AND RELATED TRAFFIC INSTRUCTIONS:

Judge Blanch then turned the committee's attention to the instructions regarding DUI and Related Traffic Instructions. The focus of the conversation commenced in regard to whether a mental state is required for these instructions. Judge Blanch noted that is an open question, given State v. Bird, 2015 UT 7, and State v. Vialpando, 2004 UT App 95, about whether there is a required mental state at all. Vialpando does not even mention that traffic offenses are strict liability, but it does flat out say there is a mental state requirement (though the legal

foundation for that assertion is suspect. Judge McCullagh stated he reviewed the case and it cites the general mens rea statute, but it cites subparagraph 1, not subparagraph 2, which would apply to this particular charge (DUI). Judge Jones recommends that there should be a committee note referencing Vialpando and Bird. The committee paused its consideration of that issue and turned to the actual language of the elements in the DUI instruction.

Judge McCullagh felt that intentionally, knowingly, or recklessly applies to only "actual physical control," and not "operated." Judge Jones felt that the mens rea requirements apply to both. Judge Blanch stated that as long as Vialpando has precedential value, he would be including a mental state for each option.

Judge Jones' calendar then required that she leave the meeting at 12:50pm.

Judge Blanch queried whether element 2 needed a mens rea requirement. The committee agreed that mens rea elements were not necessary for element 2, but preferred to write a note about the potential for voluntary intoxication, involuntary intoxication (affirmative defenses and justifications). Judge Blanch was concerned that a mens rea element may be needed based on the definition of "drug" which has a catchall provision for knowing, intentionally, or recklessly ingesting any substance that could impair an individual (see Utah Code §41-6a-501(1)(c)(iii)). After the discussion, the committee agreed that no mental state was required for element 2.

Judge McCullagh then explained that the proposed instruction was designed to give a practitioner the many variants of DUIs and their severity. For a basic MB DUI, a practitioner can simply delete everything after 2.c. The elements in 3 describe the various higher-level DUIs. Ms. Klucznik noted that sub-elements 3.f. and 3.g. should be removed because practitioners will be required to bifurcate those issues. Therefore, in crafting this language, the committee specifically omitted the language in current Utah Code § 41-6a-503(2)(b) and (c) because it has to do with prior offenses, which would be handled in a bifurcated manner (with a special verdict form or decision by the judge). The committee agreed that two special verdict forms should be created: one for priors and one for aggravating factors.

Ms. Johnson asked the committee to go back and discuss Vialpando in light of its reference to Utah Code § 76-2-101 and raised the concern that the case was decided prior to amendments to the statute. After review of the history of the code, it appeared to the committee that strict liability applying to traffic offenses was in the code at the time Vialpando was decided. As a result, Vialpando simply didn't address the existing law at the time that made traffic offenses strict liability. Under those circumstances, Judge Blanch preferred to keep the mens rea requirement. Ms. Lockwood explained that several courts deny her requests to include a mens rea requirement despite the language in Vialpando. Drafting the instruction in this way will assist in making arguments.

The committee discussed how legislation could resolve the tension between current Utah Code and the Vialpando decision.

After these discussions, the committee created the following language for a DUI instruction:

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) intentionally, knowingly, or recklessly

a. operated a vehicle; or
b. was in actual physical control of a vehicle; and

2. (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]
3. [(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.]
4. [That the defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

Judge McCullagh moved to approve the substance of the rule (as quoted above); Ms. Klucznik seconded. The committee unanimously approved the rule. The committee determined it would address necessary Committee Notes at the next meeting. Judge McCullagh agreed to prepare revised Committee Notes for the DUI instruction (above), as well as a version of 41-6a-517 and a version of automobile homicide for the next meeting.

(4) ADJOURN

The Committee then concluded its business at 1:21 pm. The next meeting will be held on November 6, 2019, starting at 12:00 noon.

TAB 2

CR1322. Aggravated Assault – Targeting a Law Enforcement Officer.

CR1322 Aggravated Assault – Targeting Law Enforcement Officer.

(DEFENDANT'S NAME) is charged [in Count _____] with committing Aggravated Assault – Targeting a Law Enforcement Officer [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME) intentionally, knowingly, or recklessly
   a. committed an act with unlawful force or violence that
   b. caused bodily injury to (VICTIM'S NAME) by:
      i. [use of a dangerous weapon; or]
      ii. [interfering 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:
         A. applying pressure to the neck or throat of (VICTIM'S NAME); or
         B. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
      iii. [other means or force likely to produce death or serious bodily injury]; and
2. (DEFENDANT'S NAME)'s actions caused serious bodily injury; and
3. (DEFENDANT'S NAME) intentionally, knowingly, or recklessly committed the offense against a law enforcement officer;
4. (DEFENDANT'S NAME) [intentionally or knowingly] acted in furtherance of political or social objectives in order to intimidate or coerce a civilian population or to influence or affect the conduct of a government or a unit of government; 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

Last Revised – 08/07/2019

Commented [MCD1]: On element #4, there was a question as to what the mental state would be. The same language is found in the aggravated murder statute, which uses "intentionally or knowingly" language for the underlying offense, however then it says "the homicide was committed: to target a law enforcement officer."

There is no caselaw on the statute. The sponsor of the bill kept using "targeting" and talked about how it was very specific and narrowed the circumstances where it would apply.

Based on that, "intentionally or knowingly" has been bracketed so the committee could discuss that, perhaps leaving the mental state out altogether.

No matter what the committee does with "intentionally or knowingly," "recklessly" is not an appropriate mental state for this instruction.

TAB 3

DUI and Related Traffic Instructions

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) intentionally, knowingly, or recklessly
   a. operated a vehicle; or
   b. was in actual physical control of a vehicle; and
2. (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]
3. [(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.]~~
4. [That the defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 41-6a-502
Utah Code § 76-2-101(2)
State v. Bird, 2015 UT 7
State v. Vialpando, 2004 Utah App. 95

Commented [MCD1]: Approved by committee at meeting on 20191002. No other language in this document is currently approved.

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.

Defenses language . . .

Aggravating prior convictions must employ the use of special verdict form . . .

Last Revised - 00/00/0000

405 P.3d 892
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Bill Robert THOMPSON, Appellant.

No. 20150721-CA
|
Filed September 28, 2017

Synopsis

Background: Defendant was convicted in the Third District Court, West Jordan Department, L. Douglas Hogan, J. of depraved indifference murder. Defendant appealed.

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

content of text messages between defendant and a woman other than his wife was relevant because it showed defendant's mental state just three hours before defendant's drunken rampage that resulted in a fatal crash;

text messages could not be excluded as unfairly prejudicial;

text messages could not be excluded as cumulative and unnecessary;

evidence was sufficient to support a finding that defendant acted with depraved indifference to human life, as element of depraved indifference murder;

evidence was sufficient to support a finding that defendant created such a risk that there was a highly likely probability that death would result, as element of depraved indifference murder; and

State presented enough evidence to carry its burden that, despite his intoxication, defendant was aware of his actions and knew of their consequences.

Affirmed.

***894** Third District Court, West Jordan Department, The Honorable L. Douglas Hogan, No. 141400758

Attorneys and Law Firms

Teresa L. Welch, Attorney for Appellant.

Sean D. Reyes and Christopher D. Ballard, Attorneys for Appellee.

Judge Kate A. Toomey authored this Opinion, in which Judges David N. Mortensen and Diana Hagen concurred. [1]

[1] After hearing the arguments in this case, Judge J. Frederic Voros Jr. retired and did not participate in the consideration of the case. Judge Diana Hagen, having reviewed the briefs and listened to a recording of the oral arguments, substituted for Judge Voros and participated fully in this decision.

Opinion

TOOMEY, Judge:

¶ 1 Bill Robert Thompson was intoxicated and enraged when he assaulted and threatened people at his house, then got behind the wheel of his full-sized pickup truck and sped away. He eventually ran a red light, hitting ***895** seven other vehicles, injuring several people and killing another. He was convicted of a number of crimes and appeals some of those convictions on two grounds: first, he contends that the trial court erred in permitting the introduction of what he characterizes as irrelevant and prejudicial evidence against him, and second, he argues that the evidence was insufficient to support his conviction for first degree murder.[2] We affirm.

[2] Thompson was convicted of first degree murder under a theory of depraved indifference. *See* Utah Code Ann. § 76-5-203(2)(c) (LexisNexis 2012).

BACKGROUND

¶ 2 Thompson was sound asleep in bed early one evening when his wife (Wife) wakened him by spraying water on him.[3] Wife was distressed after discovering "inappropriate" and "extremely flirty" text messages on Thompson's phone. And because she found vomit on the bedsheets, she suspected that he had been drinking alcohol. Initially, she attempted to waken Thompson by shaking him but resorted to spraying him with water when he remained unresponsive.

[3] "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly." *State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346 (citation and internal quotation marks omitted).

¶ 3 Thompson woke up angry and agitated. The couple argued about the text messages, then quarreled about Thompson's alcohol consumption. As the argument continued, a friend (Friend) who was staying with them emerged from the basement and saw Wife holding the couple's three-year-old son (Son). Wife told Friend that Thompson had "been drinking" and was "drunk again." Wife put down Son, and Friend picked him up as Thompson chased Wife around the kitchen table. Thompson pointed at Friend, looked at Wife, and said, "You don't think I'll fucking hit her?" Thompson then "smacked" Friend and "bloodied [her] nose." He hit her head "four or five times" as she continued to hold Son.

¶ 4 Wife ran out of the house, and Thompson chased her. Friend also raced outside, still carrying Son, and was attempting to get to a neighbor's house when Thompson grabbed her arm and spun her around, causing her to fall to the ground. As Friend shielded Son's head, Thompson repeatedly hit her head until she broke free and ran toward a neighbor's house.

¶ 5 As Friend fled, a man, J.P., approached Thompson to inquire about what had happened.[4] Thompson directed his attention toward J.P., "angrily shouting" at him and repeatedly yelling, "[W]ho are you?" He pushed J.P. and punched him in the face, prompting J.P. to wrestle Thompson to the ground. As the men struggled, Thompson called J.P. names and threatened him: "[Y]ou're a little bitch, you're a little bitch, and I'm going to kick your ass, you little bitch." J.P. smelled alcohol on Thompson, and Thompson's speech was slurred. Several neighbors eventually intervened to separate them. One of the neighbors called 911, and Thompson told her, "Snitches get stitches you fucking pu[ta]."

4 J.P. was visiting his mother, who lived near Thompson.

¶ 6 Thompson returned to his own house and got into his truck, saying to the neighbors, "You're going to fucking die." Thompson drove away at high speed, "fishtailing" the truck, making its tires squeal, and sending "black smoke" pouring out of the exhaust pipe as he accelerated down the street. On his way out of the neighborhood, Thompson noticed a stop sign and at the last second "slammed on the brakes," and then continued on.

¶ 7 He drove onto the freeway, where he encountered two teenage girls, K.R. and S.B., in a small car. They noticed Thompson driving in the emergency lane, avoiding rush-hour traffic. K.R. and S.B. exited the freeway, lost their way, and then found themselves on a frontage road traveling behind Thompson's truck. K.R., who was at the wheel, thought Thompson was intoxicated because his driving was "kind of crazy" and his speed varied. S.B. observed the truck "drift into" oncoming traffic, causing an oncoming car to swerve out of the way, and nearly hitting another.

***896** ¶ 8 Still following Thompson's truck on the frontage road, the teenagers reached a dead end with a cul-de-sac that allowed vehicles to turn around. K.R. pulled to the side of the road while Thompson maneuvered his truck. He turned it toward the girls' car, which had suddenly stalled. They called 911 as Thompson and his truck accelerated in their direction, then slowed and "bumped" their car, leaving "a couple of little dents." Thompson backed up, then hit the car again, "laughing in amusement," before he sped away "recklessly and fast." Moments later, the girls heard a loud crashing noise. Shortly thereafter, K.R.'s parents picked them up, and as they drove by the intersection of 12300 South and Lone Peak Parkway, the girls observed a multi-car accident and saw Thompson's truck in the wreckage.

¶ 9 After Thompson left the cul-de-sac, he continued to drive erratically and "really fast," and he was "increasing his speed." Moments later, Thompson negotiated a nearly 90-degree curve in the road at freeway speed and headed toward a busy intersection. As Thompson approached the intersection at 12300 South and Lone Peak Parkway, he continued to accelerate despite having a red light in his direction.

¶ 10 Video footage from a nearby gas station showed that the traffic light had been red for 29 seconds before Thompson's truck went through the intersection, and another 78 seconds elapsed before it turned green. An inspection of the airbag control modules from Thompson's truck, which convey information about the truck's "throttle, RPM, brake switch, [and] accelerator pedal," revealed that the gas pedal had been "pushed as far to the floor as possible" when the truck entered the intersection. It was traveling 68 miles per hour "2.5 seconds prior to the crash," then 63 miles per hour two seconds before the crash, and then slowed to 62 miles per hour at .5 seconds before the crash. But during the half second before impact, Thompson slightly increased speed to 62.78 miles per hour. Thompson never touched the brakes in the seconds before the collision, and he did not attempt any evasive maneuvers.

¶ 11 As Thompson ran the red light, his 7,500-pound truck, with its "lifted suspension," crashed into the driver's side door of the victim's (Victim) car, sending Victim's car "flying through the air," hitting the top of the vehicle next to it as it soared over.[5] Victim's car landed on its wheels and "backed into a pole at the corner of the intersection." The driver's side of Victim's car "looked like it was gone," and the car "looked like half a car." The truck penetrated roughly half-way through Victim's car, leaving Victim unconscious and mortally injured[6] and her daughter seriously injured.[7] The force of the impact separated Victim's skull from her vertebral column, severing her brain stem. The impact also tore her aorta from her heart, fractured most of her ribs, lacerated her diaphragm, liver, spleen, left kidney, and large intestine, and punctured her lungs.

5 In the course of plowing through the intersection, Thompson's truck collided with other vehicles as well.

6 Victim likely died on impact.

7 Victim's daughter was unconscious, her head was bleeding, and she had "at least two" compound fractures in her legs. She was missing a significant amount of skin and muscle from her legs, had a fractured skull and wrist, and her jaw was broken in two places. She also suffered a traumatic brain injury.

¶ 12 A police officer who happened to be on the scene at the time of the crash noticed that Thompson was "bleeding pretty heavily from his head" and "wasn't breathing correctly." Another officer testified Thompson had "watery, red" eyes, dilated pupils, slurred speech, and a dazed look. A paramedic and an emergency medical technician, who attended to Thompson after the crash, testified that in response to their questions, Thompson repeatedly responded, "[F]uck you" and raised his middle finger. He attempted to grab at the paramedics as they started an intravenous line, put him on oxygen, and attached a cardiac monitor. His belligerence, anger, and combativeness initially made the paramedics consider whether he had a head injury, but ultimately they concluded that he was drunk.

***897** ¶ 13 Blood drawn from Thompson later that evening showed a blood alcohol content of .22 grams per 100 milliliters. The lab test also showed an "indication" of chlordiazepoxide, an anti-anxiety drug with a sedative effect that can amplify the effect of alcohol, but its presence was never confirmed.

¶ 14 Thompson was charged with a number of crimes, and eventually the case proceeded to a jury trial. During trial and over Thompson's objection, evidence was introduced of the content of a text message conversation between Thompson and a woman (Woman) who was not his wife. These were transmitted over a 90-minute period on the day of the crash, ending approximately two hours before Wife confronted Thompson.

Thompson: U alive (2:30 pm)

[Woman]: Haha. Yup (2:32 pm)

Thompson: Wanna be naked (2:32 pm)

[Woman]: Want me to be? Oh wait, yours was not a question. (2:41 pm)

Thompson: Last time was pretty awesome (2:41 pm)

[Woman] YOU want to be naked. Lol[.] Was I naked?? (2:42 pm)

Thompson: You had just got done with girl's best friend (2:43 pm)

[Woman] Really?? Wow (2:45 pm)

Thompson: Don't be afraid[.] You think I'm a V tease (2:46 pm)

[Woman] No. No. (2:47 pm)

Thompson: Wanna??? (2:50 pm)

[Woman] I'm driving. So I can't text (2:51 pm)

Thompson: Can you touch (2:51 pm)

[Woman]: And .... I'm flattered but I can't[ ]. Kinda wish I could. I'm sure it would be fun[.] I can speak in text (2:53 pm)

Thompson: I've seen you spe[ak] text one of the hottest conversation[s] I've ever had (2:55 pm)

[Woman]: Are you sure you have the right person? (2:56 pm)

Thompson: Yes I came to your house[,] you answered "come in[.]" [A]s I entered you were slowly putting on your robe with commercial grade vibrator by your feet[.] [Y]ou said sorry[,] I said no[,] my pleasure[.] I also have a great 8x 10 of your perfect body (3:02 pm)

[Woman]: 8x 10? (3:04 pm)

Thompson: Well phone pic[.] 8x 10 just sounded good (3:05 pm)

[Woman]: Lol (3:05 pm)

Thompson: You even fed me cereal and told me you loved me (3:07 pm)

Thompson: Cat got you by the pussy (3:12 pm)

Thompson: Was that too much (3:12 pm)

Thompson: Guess so sorry (3:32 pm)

[Woman]: A[m] on the phone, still (4:00 pm)

¶ 15 Wife read only a couple of these texts, and on this basis Thompson's counsel argued that the messages were not relevant. Additionally, he argued that the messages were "more prejudicial than probative."

¶ 16 On the second day of trial, Thompson pleaded guilty to some of the charges: one count of driving under the influence of alcohol/drugs, a third degree felony; seven counts of driving under the influence of alcohol/drugs, a class A misdemeanor; and one count of domestic violence in the presence of a child, a class B misdemeanor. The jury convicted him of three others: murder, a first degree felony, and two counts of aggravated assault, a third degree felony. Thompson filed a timely appeal.

ISSUES AND STANDARDS OF REVIEW

¶ 17 Thompson advances two arguments on appeal. First, he contends the district court erred by admitting the contents of the text message conversation he had with Woman. "We afford district courts a great deal of discretion in determining whether to admit or exclude evidence and will not overturn an evidentiary ruling absent an abuse of discretion." *State v. Cuttler*, 2015 UT 95, ¶ 12, 367 P.3d 981 (citation and internal quotation marks omitted).

¶ 18 Second, Thompson contends sufficient evidence does not support the jury's verdict that Thompson committed first degree murder, particularly in light of his voluntary intoxication defense. "When considering ***898** an insufficiency-of-the-evidence claim, we review the evidence and all reasonable inferences in the light most favorable to the jury's verdict" and reverse the conviction "only if we determine that the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt" as to whether the defendant committed the crime. *State v. Kennedy*, 2015 UT App 152, ¶ 39, 354 P.3d 775.

ANALYSIS

I. Admissibility of the Text Messages

¶ 19 Thompson contends the district court erred by admitting the text message conversation he had with Woman because it was "irrelevant and more prejudicial than probative."

A. Relevance

¶ 20 Rules 401 and 402 of the Utah Rules of Evidence govern relevancy. "Irrelevant evidence is not admissible." Utah R. Evid. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *Id.* R. 401. Thompson claims that "the content of the messages

did not, and could not, assist the fact finder in determining whether [he] acted with depraved indifference." But before a jury may convict someone of depraved indifference murder, it must find that the person acted knowingly. *See* Utah Code Ann. § 76-5-203(2)(c) (LexisNexis 2012) (stating that criminal homicide constitutes murder if "acting under circumstances evidencing a depraved indifference to human life, the actor knowingly engages in conduct which creates a grave risk of death to another and thereby causes the death of another").

¶ 21 Critical to this appeal, in making his defense at trial, Thompson raised the affirmative defense of voluntary intoxication, arguing he was so intoxicated that he could not form the requisite mental state. *See id.* § 76-2-306. Thompson also argued that on the day of Victim's death, he was suffering from extreme emotional distress, massive anxiety, and withdrawal symptoms because of a gap in the anti-anxiety medication he was taking. Thus, we must assess the text messages' relevance in light of Thompson's voluntary intoxication defense and his general theory of the case.

¶ 22 The State contends "the content of the texts was relevant because it showed [Thompson's] mental state just three hours before the fatal crash, which was critical to determining whether [Thompson] acted with depraved indifference, was suffering from extreme emotional distress, and whether the voluntary intoxication defense applied." The State also argues the content of the text message conversation was relevant to show why Thompson's wife "had confronted him just twenty minutes before the fatal crash, thus supporting the inference that [Thompson] may have believed his world [was] coming apart and possibly could have felt that he had nothing to lose." (Second alteration in original) (internal quotation marks omitted). We agree.

¶ 23 The test for relevance presents a very low bar, and the content of the text message conversation tended to aid the jury in determining whether Thompson acted knowingly, a required element of depraved indifference murder. *See* Utah R. Evid. 401; Utah Code Ann. § 76-5-203(2)(c). The text messages also tended to aid the jury in determining whether Thompson was so intoxicated that he could not act knowingly. *See* Utah Code Ann. § 76-2-306.

¶ 24 Thompson further asserts the State's arguments "all suffer from a temporal problem because the content of the text messages show Thompson's state of mind when he wrote the texts, not his state of mind when he was confronted by his wife about them, nor his state of mind when he caused the fatal crash." In support of this argument, Thompson relies on *State v. Maurer*, 770 P.2d 981 (Utah 1989), where our supreme court concluded that statements in a letter sent by the defendant to the victim's father while the defendant was in jail awaiting trial on charges of second degree murder were irrelevant because they spoke to defendant's mental state *after* the commission of the crime, and therefore should not have been admitted. *Id.* at 982–83. But here, the text ***899** message conversation occurred *before* the commission of the crimes, just hours before Thompson's drunken rampage. And where Thompson's mental state in the hours leading up to the killing of Victim was directly at issue, the content of the text messages was relevant.

B. Rule 403 Balancing

¶ 25 Thompson contends the content of the text messages was unfairly prejudicial and cumulative. Specifically, Thompson argues the text messages were unfairly prejudicial "because they showed him having improper sexual conversations with a woman who was not his wife," which "could have provoked an emotional response from the jury and provoked its instinct to punish or otherwise divert the jury from its task to determine the mental state of the defendant at the time of the killing." (Citation and internal quotation marks omitted.) And he argues the text messages were cumulative because "the State had other witnesses to testify about [his] state of mind around the time the crash occurred." We first address Thompson's unfair prejudice argument and then turn to his argument that the text messages were cumulative evidence.

¶ 26 Rule 403 of the Utah Rules of Evidence provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 403 "imposes ... the heavy burden not only to show that the risk of unfair prejudice is greater than the probative value, but that it 'substantially outweighs' the probative value." *State v. Jones*, 2015 UT 19, ¶ 29, 345 P.3d 1195 (brackets omitted). Indeed, rule 403 is an "inclusionary rule." *State v. Kooyman*, 2005 UT App 222, ¶ 26, 112 P.3d 1252 (citation and internal quotation marks omitted). Evidence is unfairly prejudicial when it has " 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' " *Maurer*, 770 P.2d at 984 (quoting Fed. R. Evid. 403 advisory committee's notes). "But even if a trial court improperly admits unfairly prejudicial or cumulative evidence, we will not overturn a jury verdict based on that evidence if the admission of the evidence did not reasonably [affect] the likelihood of a different verdict." *State v. Gonzalez*, 2015 UT 10, ¶ 36, 345 P.3d 1168 (citation and internal quotation marks omitted).

¶ 27 Rule 403 is, at its heart, a balancing test. *See Maurer*, 770 P.2d at 984. To carry his burden of persuasion, Thompson must show that the text messages' probative value was "substantially outweighed by a danger of ... unfair prejudice." *See* Utah R. Evid. 403. But Thompson glosses over the text messages' probative value and addresses only the potential risk they may have had. This is insufficient to carry his burden of persuasion. And in any event, the text messages were probative of whether Thompson acted knowingly or was suffering from extreme emotional distress or anxiety.

¶ 28 The text messages show that Thompson was able to engage in written conversation, that he was aware enough to build on Woman's responses, that he could recall memories, that he was aware that he might have offended Woman with a few of his messages, and that he appeared to be in a light-hearted and content mood.

¶ 29 Thompson next argues the text messages were cumulative and unnecessary because other witnesses testified about Thompson's mental state and because "it would have been sufficient for the prosecution to put on evidence that Thompson's wife confronted him about inappropriate text messages." But Wife read only "[a] couple" of the text messages before she confronted Thompson and therefore could not testify about the majority of them. Moreover, the text messages were different in kind from the evidence elicited by the other witnesses who observed Thompson's rampage.

¶ 30 We are also not convinced that if the district court had refrained from admitting the text messages, there would have been a "likelihood of a different verdict." *See Gonzalez*, 2015 UT 10, ¶ 36, 345 P.3d 1168 (citation and internal quotation marks omitted). ***900** Thompson complains that the text messages depicted him as "a coarse and indecent individual." But the jury heard a great deal of evidence that arguably damaged his character far more than the text messages: for example, assaulting Friend as she held his three-year-old son; threatening the neighbors who tried to intervene; aggressively driving through a residential neighborhood and then into heavy traffic; ramming a small car carrying teenagers as he laughed; and cursing the emergency responders who were attempting to render medical assistance.

¶ 31 We conclude the district court did not abuse its discretion in admitting the text messages because they were relevant to Thompson's mental state and their probative value was not substantially outweighed by a danger of unfair prejudice.

II. Sufficiency of the Evidence

¶ 32 Thompson contends that even when viewing the evidence in the light most favorable to the verdict, "the evidence did not prove that [he] acted with depraved indifference," and "the evidence did not disprove the affirmative defense of voluntary intoxication."

¶ 33 When reviewing the sufficiency of the evidence, this court does not "sit as a second fact finder." *Salt Lake City v. Miles*, 2014 UT 47, ¶ 10, 342 P.3d 212 (citation and internal quotation marks omitted). Rather, our review "is limited to [ensuring] that there is sufficient competent evidence regarding each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime." *Id.* (citation and internal quotation marks omitted). "So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." *State v. Ring*, 2013 UT App 98, ¶ 2, 300 P.3d 1291 (per curiam) (citation and internal quotation marks omitted).

¶ 34 A defendant is guilty of depraved indifference murder if, "acting under circumstances evidencing a depraved indifference to human life, the actor knowingly engages in conduct which creates a grave risk of death to another and thereby causes the death of another." Utah Code Ann. § 76-5-203(2)(c) (LexisNexis 2012). Thompson contends there was insufficient evidence to prove that (A) he acted with depraved indifference to human life, (B) his conduct created a grave risk of death, and (C) he acted knowingly in creating the grave risk of death.

A. Depraved Indifference to Human Life

¶ 35 The element of depraved indifference cannot be proved by evidence of "a single, unanticipated tragic result"; depraved indifference "means an utter callousness toward the value of human life and a complete and total indifference as to whether one's conduct will create the requisite risk of death ... of another." *State v. Standiford*, 769 P.2d 254, 261 (Utah 1988). "The term 'depraved indifference to human life' does not refer to the mens rea, or subjective culpable mental state, of depraved murder, but rather to an objective reasonable person standard as to the value of human life." *Id.* (footnote omitted).

¶ 36 Through this lens, the question becomes whether a reasonable factfinder could find that driving a large and heavy pickup truck at freeway speeds through a red light and into heavy traffic without applying the vehicle's breaks or otherwise attempting to avoid a collision objectively demonstrated "an utter callousness toward the value of human life." *See id.* We conclude it could.

¶ 37 Thompson argues that because motor vehicles have great social utility, his conduct did not "rise to the level" of utter callousness. Although it is true that social utility is a factor in determining whether a person has acted with depraved indifference, it is just one factor. Factors a jury may consider include the following: "(1) the utility of the defendant's conduct, (2) the magnitude of the risk, (3) the defendant's knowledge of the risk, and (4) any precautions taken by the defendant to minimize that risk." *State v. Bolsinger*, 699 P.2d 1214, 1220 (Utah 1985).

¶ 38 Although motor vehicles generally have great social utility, this "vanishes when a driver is intoxicated, on the wrong side of the road, driving at a high rate of speed, and ***901** running red lights." David Luria, *Death on the Highway: Reckless Driving as Murder*, 67 Or. L. Rev. 799, 827 (1988); *see also Jeffries v. State*, 169 P.3d 913, 921 (Alaska 2007) ("While there is certainly utility in driving, that utility is, except in rare circumstances, completely negated by the grave danger posed to society by an extremely intoxicated driver."); *Brown v. Commonwealth*, 174 S.W.3d 421, 427 (Ky. 2005) (stating that the social utility of driving a motor vehicle through a red light at a high rate of speed "was nonexistent"). "This type of driver has converted an automobile from a benign, yet powerful, instrument of transportation into a lethal weapon, one often more deadly than a gun." David Luria, *Death on the Highway: Reckless Driving as Murder*, 67 Or. L. Rev. 799, 827 (1988).

¶ 39 Thompson did not merely cause an accident while driving intoxicated. He ignored speed limits and traffic signals and accelerated into a busy intersection with the traffic light turned red. Moreover, Thompson did nothing to minimize the significant risk of injury that occurs when a motor vehicle collides with another vehicle at a high rate of speed. Thompson did not try to brake or swerve out of the way but instead accelerated his large truck through the intersection with the gas pedal pressed to the floor at the moment of impact.

¶ 40 We conclude the evidence was sufficient to demonstrate that Thompson acted with depraved indifference to human life.

B. Grave Risk of Death

¶ 41 This element requires the jury to find that the defendant created such a risk that there is "a *highly likely probability* that death will result." *State v. Standiford*, 769 P.2d 254, 264 (Utah 1988). "Risk has two dimensions: the likelihood of the potential harm and the magnitude of that harm." *State v. Ricks*, 2013 UT App 238, ¶ 15, 314 P.3d 1033. "This standard is less than what is required for an intentional or knowing murder, but greater than what is required for reckless manslaughter." *Standiford*, 769 P.2d at 264.

¶ 42 Thompson argues that because " 'drunk driving is, at least from a statistical point of view, not all that dangerous,' the 'highly likely probability' of [Victim's] death was absent." (Quoting David Luria, *Death on the Highway: Reckless Driving as Murder*, 67 Or. L. Rev. 799, 828 (1988).) We find this wholly unpersuasive. The conduct to be evaluated is not drunk driving in general but where and how Thompson was driving. This entails analyzing the magnitude and likelihood of injury where a person drives a large truck through a red light at freeway speeds into a busy intersection. Such driving created a high magnitude and likelihood of death.

¶ 43 We conclude there was sufficient evidence to demonstrate that Thompson's driving created a grave risk of death.

C. Mens Rea

¶ 44 To be convicted of depraved indifference murder, the defendant must act knowingly in creating the grave risk of death to another. *Standiford*, 769 P.2d at 263. "That means that to be convicted, a defendant must know the nature of his conduct, must know the circumstances that give rise to the risk of death, and must know that the risk constitutes a grave risk of death." *Id.* A person acts knowingly with respect to his conduct "when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." Utah Code Ann. § 76-2-103(3) (LexisNexis 2012).

¶ 45 Thompson contends "his high level of intoxication" prevented him from acting knowingly. Thompson's argument on this element is identical to his argument concerning his voluntary intoxication defense, and we therefore address them together.

¶ 46 "Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense...." *Id.* § 76-2-306. Thus, intoxication alone is not enough; the defendant must have been so intoxicated that it negated the requisite mental state, in this case, knowingly. Where a jury is instructed on a voluntary ***902** intoxication defense, the prosecution must "disprove the existence of affirmative defenses beyond a reasonable doubt." *State v. Drej*, 2010 UT 35, ¶ 15, 233 P.3d 476 (citation and internal quotation marks omitted).

¶ 47 Thompson argues the State did not "meet its burden of disproving [his] affirmative defense of voluntary intoxication"[8] because his blood alcohol content was nearly three times the legal limit and there was some evidence that he was intoxicated at the time of the incident, evidenced by the altercation at his home and his erratic driving.[9] But it is not enough to show that he was intoxicated.

8 As we understand it, the State argues in its brief that Thompson was not entitled to a jury instruction on the voluntary intoxication defense. It does not appear the State contested the jury instruction but rather stipulated to it. Because the State did not object to the instruction, we do not analyze whether Thompson was entitled to it.

9 Thompson also contends that the indication of the presence of chlordiazepoxide, an anti-anxiety drug, in his blood aided in showing he did not act knowingly. But the presence of the drug was not confirmed by the forensic toxicologist because the indication did not "meet [the lab's] acceptance criteria."

¶ 48 In *State v. Burke*, 2011 UT App 168, 256 P.3d 1102, we held that although the defendant had consumed alcohol and was intoxicated at the time of the charged offenses, the evidence was insufficient to entitle him to a voluntary intoxication jury

instruction on his charge of aggravated sexual abuse of a child. *Id.* ¶¶ 1, 84. We reached this holding despite evidence that the defendant's speech had been slurred, that he looked "glazed-over," and that his father had found a vomit-filled towel left by the defendant. *Id.* ¶ 83. Although there were signs of intoxication, the defendant was "coherent enough to give directions" to his father's house. *Id.*

¶ 49 Although in the present case the jury was instructed on voluntary intoxication, *Burke* is instructive to our analysis. In both the present case and *Burke*, testimony was elicited that the defendants were intoxicated, that their speech was slurred, and that they had vomited around the time of the offenses. But notwithstanding their intoxication, they appeared coherent and aware of their conduct.

¶ 50 Here, the State presented enough evidence to carry its burden that, despite his intoxication, Thompson was aware of his actions and knew of their consequences. For example, on his way out of the neighborhood, Thompson saw a stop sign and had the presence of mind to slam on his brakes at the last second to stop his truck. Later, Thompson encountered two teenage girls in their vehicle at the end of a cul-de-sac and showed precision in maneuvering his truck. Twice, Thompson pointed his truck at the driver's side door of the teenagers' vehicle, accelerated, and then slowed right before bumping the vehicle. And as he pulled away, he smirked and laughed at the teenagers, creating an inference that he intended to scare them and knew he had succeeded. Thompson then negotiated several turns, one of which was a 90-degree curve in the road which he traversed at freeway speeds. Just 2.5 seconds prior to the collision, Thompson removed his foot from the accelerator. But one second later, he fully engaged the accelerator and did so through impact. And when paramedics were attending to Thompson after the crash, he did not respond by asking what had happened or by otherwise acting as though he was not aware of his conduct. Rather, he responded by using offensive language and gestures. Based on this evidence, the jury could reasonably infer that Thompson had the capacity to control his vehicle but instead chose to barrel through a busy intersection knowing that his conduct created a grave risk of death.

¶ 51 Thompson's text message conversation with Woman just a few hours before the fatal crash also suggests he was aware of his conduct. As we previously discussed, *supra* ¶28, Thompson's messages demonstrate that he was able to carry a conversation, that he was aware enough to comprehend and reply to Woman's responses, that he could recall memories, and that he was aware enough that he felt the need to apologize for his inappropriate words. While the evidence did not establish when Thompson began drinking that day, the text messages showed that Thompson was clearheaded just a few hours ***903** before the crash. This evidence cast doubt on Thompson's claim that he was so intoxicated that he could not form the requisite mental state for depraved indifference murder.

¶ 52 On the surface, it may appear contradictory that a person can be intoxicated enough to be convicted of driving under the influence of alcohol but not so intoxicated as to mount a successful voluntary intoxication defense. But driving under the influence of alcohol is a strict-liability crime and therefore does not have a mens rea requirement. *See* Utah Code Ann. § 76-2-102 (LexisNexis 2012) ("An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state."); *State v. Larsen*, 2000 UT App 106, ¶ 25, 999 P.2d 1252 ("Traffic violations are regulatory type crimes or *malum prohibitum* offenses for which strict liability is generally imposed."); *see also* Utah Code Ann. § 41-6a-502 (LexisNexis 2014) (stating that a person may not operate a vehicle if the person "has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test"). More importantly, the voluntary intoxication defense applies only to offenses that require something more than a reckless mental state *so long as* the person is so intoxicated that it negates the requisite mental state. *See* Utah Code Ann. § 76-2-306 (LexisNexis 2012).

¶ 53 Although Thompson demonstrated he was intoxicated, the State met its burden to prove beyond a reasonable doubt that he was not so intoxicated as to negate his knowing mental state. Therefore, there was sufficient evidence that he acted knowingly in creating a grave risk of death.

¶ 54 We conclude there was sufficient evidence to convict Thompson of depraved indifference murder and therefore affirm his conviction for murder.

CONCLUSION

¶ 55 We conclude that the content of Thompson's text message conversation with Woman was properly admitted because it was relevant and because its probative value was not substantially outweighed by any danger of unfair prejudice. We also conclude there was sufficient evidence to convict Thompson of depraved indifference murder.

¶ 56 Affirmed.

All Citations

405 P.3d 892, 848 Utah Adv. Rep. 62, 2017 UT App 183

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;]

- ☐ 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

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** **PRIOR CONVICTIONS** Case No. (*********) Count (#)

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) 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

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

CR_____ Driving with Any Measurable Controlled Substance in the Body. (VERSION 1)

(DEFENDANT'S NAME) is charged [in Count ____] with committing Driving with Any Measurable Controlled Substance in the Body [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) intentionally, knowingly, or recklessly
   a. operated a vehicle; or
   b. was in actual physical control of a vehicle; and
2. (DEFENDANT'S NAME):
   a. had any measurable controlled substance or metabolite of a controlled substance in the person's body.
3. [That the following defenses do not apply:]
   a. [the controlled substance was not involuntarily ingested;]
   b. [the controlled substance was not prescribed by a practitioner for use by (DEFENDANT'S NAME);]
   c.]the controlled substance was not cannabis in a medicinal dosage form or a cannabis product in a medicinal dosage form that the accused legally ingested; or]
   d. [the controlled substance was not otherwise legally ingested.]
4. [That the defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 41-6a-517
Utah Code § 76-2-101(2)

Committee Notes

Last Revised - 00/00/0000

CR_____ Driving with Any Measurable Controlled Substance in the Body. (VERSION 2)

Before you can convict the defendant of "driving a motor vehicle with a measured amount of a Controlled Substance {DRUG}" you must find from all the evidence and beyond a reasonable doubt each and every one of the following numbered elements of that offense:

1. That on or about [DATE], the defendant;
2. operated or was in actual physical control of a motor vehicle;
3. had a measurable {amount of a} controlled substance or metabolite of a controlled substance in his/her body; and
4. [DEFENSES:
    a. The substance was {NOT IN}voluntarily ingested by the defendant.
    b. The substance was not prescribed by a practitioner {or recommended by a physician [cannabis offenses prior to 12/04/18]} for use by the defendant.
    c. If the controlled substance was cannabis or a cannabis product, it was not ingested by the defendant in a medicinal dosage form in accordance with the Utah Medical Cannabis Act. [Offenses after 12/04/18].
    d. The substance was not legally ingested.

If, after careful consideration of all the evidence in this case, you are convinced of the truth of each and every one of the foregoing numbered elements beyond a reasonable doubt, then you must find the defendant guilty of "driving a motor vehicle with a measured amount of a Controlled Substance {DRUG}" as charged in the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of that count.

References

Utah Code § 41-6a-517
Utah Code § 76-2-101(2)

Committee Notes

Last Revised - 00/00/0000

DRAFT: 11/02/2019

CR_____ Automobile Homicide.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Automobile Homicide [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):
   a. operated a motor vehicle in a negligent manner; or
   b. operated a motor vehicle in a criminally negligent manner; and
2. Caused the death of (VICTIM'S NAME); 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][.][; and]
4. [That the defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 41-6a-502

Committee Notes

Last Revised - 00/00/0000

Commented [MCD1]: Utah Code § 76-5-207(2)(c): As used in this Subsection (2), "negligent" means simple negligence, the failure to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances

Commented [MCD2]: Utah Code § 76-2-103(4): A person engages in conduct . . . [w]ith criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

DRAFT: 11/02/2019

CR_____ Automobile Homicide Involving Using a Handheld Wireless Communication Device While Driving.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Automobile Homicide Involving Using a Handheld Wireless Communication Device While Driving [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):
   a. operated a motor vehicle on a highway in a negligent manner; or
   b. operated a motor vehicle on a highway in a criminally negligent manner; and
2. While using a handheld wireless communication device to manually:
   a. write, send, or read a written communication, including:
      i. a text message;
      ii. an instant message; or
      iii. electronic mail; or
   b. dial a phone number;
   c. access the Internet;
   d. view or record video; or
   e. enter data into a handheld wireless communication device; and
3. Caused the death of (VICTIM'S NAME); and
4. [That the defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 41-6a-502

Committee Notes

Last Revised - 00/00/0000

Commented [MCD1]: Utah Code § 76-5-207(2)(c): As used in this Subsection (2), "negligent" means simple negligence, the failure to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances

Commented [MCD2]: Utah Code § 76-2-103(4): A person engages in conduct . . . [w]ith criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Commented [MCD3]: (3)→Subsection (2) does not prohibit a person from using a handheld wireless communication device while operating a moving motor vehicle:
(a)→when using a handheld communication device for voice communication;
(b)→to view a global positioning or navigation device or a global positioning or navigation application;
(c)→during a medical emergency;
(d)→when reporting a safety hazard or requesting assistance relating to a safety hazard;
(e)→when reporting criminal activity or requesting assistance relating to a criminal activity;
(f)→when used by a law enforcement officer or emergency service personnel acting within the course and scope of the law enforcement officer's or emergency service personnel's employment; or
(g)→to operate:
(i)→hands-free or voice operated technology; or
(ii)→a system that is physically or electronically integrated into the motor vehicle.

INSTRUCTION NO. ___

You have heard evidence that the defendant was administered a field sobriety test known as the "Horizontal Gaze Nystagmus" or HGN test. However, there has been no evidence presented, nor may you infer or assume, that the test is a scientifically accurate means of determining alcohol or drug impairment. Rather, evidence of the HGN test has been admitted solely as a part of the basis of the arresting officer's opinion that the defendant was under the influence of alcohol to the extent that she was not capable of safely operating a motor vehicle. You are not bound to agree with the officer's opinion, nor are you obligated to give any weight to the evidence regarding the HGN test. It is your duty as jurors to independently determine whether the defendant was capable of safely operating her vehicle. In considering that issue, you may give whatever weight you deem proper to the officer's opinion and to any of the various bases for that opinion.

INSTRUCTION NO._____

In this case, you have heard evidence that the defendant was asked to perform certain roadside tests commonly referred to as field sobriety tests.

It is up to you to decide if those tests give any reliable indication of whether or not the defendant's capacity to safely operate a motor vehicle was diminished, or, whether or not such tests have any rational connection to operating a motor vehicle safely. In other words, it is up to you to determine the weight to give to the defendant's performance on the field sobriety tests.

In judging the defendant's performance on the roadside tests, you may consider the circumstances under they were given, the defendant's physical condition, the defendant's state of mind, and any relevant factors.

You are not bound to agree with the officer's opinion, nor are you obligated to give any weight to the field sobriety tests. It is your duty as jurors to independently determine whether the defendant was capable of safely operating a vehicle based upon all of the evidence presented to you. In considering that issue, you may give whatever weight you deem proper to the officer's opinion and to any of the various bases for that opinion.

INSTRUCTION NO. ___

Under our law, it may be said that a driver is under the influence of alcohol and/or drugs to a degree which renders him incapable of safely driving a vehicle when, as a result of drinking alcoholic beverages or ingesting drugs, his or her mental or physical faculties or abilities of perception, coordination, or judgment are so affected as to impair, to an appreciable degree, his or her ability to operate a vehicle with the degree of care which an ordinary, prudent person in full possession of his or her faculties would exercise in similar circumstances. "Under the influence of alcohol and/or drugs to a degree that renders a driver incapable of safely driving a vehicle," as that expression is used here, covers not only the well known and easily recognized conditions and degrees of intoxication, but also any perceptible, abnormal mental or physical condition which is the result of the consumption of alcohol and/or drugs which perceptibly deprives one of the use of that clearness of intellect and control that one would otherwise possess and which is required to safely operate a vehicle.

The City is not bound to prove that the defendant was drunk or intoxicated as those terms are commonly understood, nor is the City bound to prove that the defendant drive his or her vehicle improperly or erratically.

INSTRUCTION NO. _____

The prosecution has presented evidence of a breath test and the numeric result of that test. As the triers of fact it is up to you to determine what weight is to be given to the result of the breath test. It is up to you to determine if you feel that the breath test accurately reflects the defendant's breath alcohol content at the time of his arrest. Unless you are convinced beyond a reasonable doubt that the Defendant 's blood or breath alcohol content exceeded .08 percent grams or greater by weight, then you cannot find the Defendant guilty of driving under the influence while having a blood alcohol content of .08.

INSTRUCTION NO. _____

You are instructed that if by subtracting the "Margin of Error" or "Tolerance" from the chemical breath test reading, that the result is then less than .08, by virtue of the presumption of innocence applied in favor of the Defendant, you must find that the Defendant's blood or breath alcohol content was **not** over the legal limit and that the Defendant is **not guilty** of that element of the crime.

INSTRUCTION NO. _____

The prosecution has presented evidence of a breath test and the numeric result of that test. As the triers of fact it is up to you to determine what weight is to be given to the result of the breath test if any. It is up to you to determine if you feel that the breath test accurately reflects the defendant's breath alcohol content at the time of his arrest. Unless you are convinced beyond a reasonable doubt that the Defendant 's breath alcohol content exceeded .08 percent grams or greater, then you cannot find the Defendant guilty of driving under the influence while having a breath alcohol content of .08.

You have heard certain evidence that the Defendant was administered a field sobriety test known as the Horizontal Gaze Nystagmus or HGN test. However, there has been no evidence presented, nor may you infer or assume, that the HGN test is a scientifically accurate means of determining either the presence of alcohol in someone's system or whether someone is under the influence of alcohol.

Indeed, the HGN test has not been approved as a scientifically reliable test in any Utah court. Rather, evidence of the HGN test has been admitted solely as a part of the basis of the arresting officer's opinion that the Defendant was under the influence of alcohol.

You are not bound to agree with the officer's opinion, nor are you obligated to give any weight to the HGN evidence. It is your duty as jurors to independently determine whether the Defendant was capable of safely operating a vehicle based upon all of the evidence presented to you. In considering that issue, you may give whatever weight you deem proper to the officer's opinion and to any of the various bases for that opinion.

INSTRUCTION NO._____

During the course of the trial you were advised that police officers in Utah are trained and required to observe a rule called the Baker rule. Pursuant to the Baker rule, before administering a breath test an officer must check the subjects mouth to ensure that there are no foreign objects in the subjects mouth, the officer must personally observe the driver for a period of 15 minutes to ensure that the driver has not belched, vomited or otherwise introduced any foreign substances of alcohol containing substances into the drivers mouth, and the officer must have been properly certified to conduct a breath test.

If you find that the officer failed to comply with the Baker rule, as the trier of fact you shall determine what effect the officer's failure to comply with the Baker rule may have on the accuracy of the breath test and what weight, if any, shall be given to the result of the test.

INSTRUCTION NO. ___

You may consider the way in which the defendant drove the vehicle and the defendant's physical characteristics observed by the officer, along with all of the other evidence in this case, in determining whether or not the defendant was under the influence of alcohol to a degree which rendered him or her incapable of safely operating a motor vehicle at the time he or she was driving.

INSTRUCTION NO. ___

The mere consumption of alcohol prior to driving is not unlawful under the laws of the State of Utah. To act unlawfully, one must drive or be in actual physical control of a vehicle when he/she was under the influence of alcohol and/or drugs to a degree which rendered him/her incapable of safely driving the vehicle.

INSTRUCTION NO._____

You are instructed that the law allows a person who is requested to submit to a chemical breath test to elect not to do so. You have heard evidence related to the fact that the defendant in this case elected not to submit to a breath test sought after her arrest. This fact is not controlling on any issue in this case, but is simply something that you may consider and weigh as you see fit in connection with the circumstances and the other evidence, or the lack of other evidence, as you reach your verdict.

INSTRUCTION NO._____

Before you can convict the defendant of Driving Under the Influence of Alcohol and/or drugs, you must find from the evidence, beyond a reasonable doubt, each of the following elements:

1. On or about March 3, 2018;
2. The defendant, Melanie H. Romo;
3. In West Valley City, Utah;
4. Operated or was in actual physical control of a vehicle; and
5. She was under the influence of alcohol and/or any drug to a degree that rendered her incapable of safely operating a vehicle.

If you believe that the evidence establishes each and all of the elements beyond a reasonable doubt, it is your duty to find the defendant "Guilty." If, on the other hand, you believe the evidence does not establish any one or more of the elements, then you must find the defendant "Not Guilty."

Before you can convict the defendant of the crime of Open Container, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:

1. On or about March 3, 2018;
2. In West Valley City, Utah;
3. The defendant, Melanie H. Romo;

INSTRUCTION NO._____

4. drank any alcoholic beverage while operating a motor vehicle or while a passenger in a motor vehicle, whether the vehicle is moving, stopped, or parked on any highway or waters of the state.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence has failed to so establish one or more of the elements, then you must find the defendant "Not Guilty."

When you retire to consider your verdict, you will select one of your members to act as a foreperson to preside over your deliberations.

Your verdict in this case must be either:

NOT GUILTY of Driving Under the Influence of Alcohol/Drugs, as charged in Count I of the information, or GUILTY;

NOT GUILTY of Open Container, as charged in Count II of the Information, or GUILTY

as your deliberations may determine.

A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict one count should not control your verdict on any other count.

INSTRUCTION NO._____

This being a criminal case, a unanimous concurrence of all jurors is required to find a verdict. Your verdict must be in writing, and when found, must be signed and dated by your foreperson and then returned by you to this Court. When your verdict has been found, notify the bailiff that you are ready to report to the court.

DATED this _____ day of _____, 2019.

TAB 4

Entrapment Instruction?

CR_____ Entrapment.

You are instructed that entrapment is an affirmative defense to the crime of [crime]. Entrapment occurs when a police officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by a person not otherwise ready to commit it.

The defense of entrapment is available even when the actor denies commission of conduct charged to constitute the offense.

Entrapment may occur when, but is not limited to, the following:

- a person is induced to commit an offense based on improper conduct by a police officer;
- a police officer appeals to the person to commit a crime based on sympathy, pity, or close personal friendship;
- a police officer offers a person an inordinate sum of money;
- a police officer places persistent, excessive, or unreasonable pressure on a person to commit an offense; or
- a police officer engages in conduct that creates a substantial risk that a normal law-abiding person would be induced to commit a crime.

The focus is on whether the conduct of a police officer falls below the standards to which common feelings respond for the proper use of governmental power.

The phrase “police officer” includes anyone directed by or acting in cooperation with a police officer.

Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

The defendant carries no burden to prove the defense of entrapment. In other words, the defendant is not required to prove she was entrapped. Rather, the prosecution must prove beyond a reasonable doubt that the defense does not apply. The prosecution has the burden of proof at all times. If the prosecution has not carried this burden, then you must find the defendant not guilty.

References

Committee Notes

Last Revised - 00/00/0000

TAB 5

“Sexual intercourse” definition?

Judge Blanch instruction:

INSTRUCTION 31

You are instructed that any sexual penetration of the penis between the outer folds of the labia, however slight, is sufficient to constitute "sexual intercourse" for purposes of the offense of rape.

Party's submitted instruction:

INSTRUCTION _____

You are instructed that "sexual intercourse" means an actual contact of the sexual organs and a penetration, however slight, into the body of the female by the insertion of the penis to some extent into the female genitals.

You are instructed that "penetration, however slight" means touching beyond the outer folds of the female's labia.

76-5-407(2)(a)(iii) (However slight); *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988) and *State v. Kelly*, 770 P.2d 98, 99 (Utah 1988).