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
January 8, 2020 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes	Action	Tab 1	Judge Blanch
	DUI and Related Traffic Instruction - *Review and Approve DUI "level-of-offense" instructions* - *Review remaining pending instructions not addressed at previous meetings*	Action	Tab 2	Judge McCullagh
	State v. Alires, 2019 UT App 206	Discussion	Tab 3	Karen Klucznik
	Definition of "Sexual Intercourse"	Discussion	Tab 4	Judge Blanch
	Entrapment Instruction	Discussion	Tab 5	Judge Jones
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):

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 – December 4, 2019 Meeting

NOTES:

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
December 4, 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	•	
Karen Klucznik	•	
Judge Brendan McCullagh	•	
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young		•
Elise Lockwood	•	
Debra Nelson	•	
Melinda Bowen		•

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. Phelps made the motion.
- Ms. Johnson seconded the motion.
- The motion carried unanimously.

Judge Blanch introduced the newest committee member, Debra Nelson, from the Salt Lake Legal Defender Association. Ms. Nelson briefly discussed her history as an appellate attorney for indigent clients.

(2) REVIEW OF AGGRAVATED ASSAULT INSTRUCTIONS TARGETING A LAW ENFORCEMENT OFFICER:

Judge Blanch then turned the committee's attention to the assault instruction involving targeting a law enforcement officer. Ms. Johnson addressed the proposed aggravated assault instruction included in Tab 2 of the meeting materials. Ms. Johnson elaborated on her proposed instructions, including her proposed addition of "intentionally or knowingly" in element 4 of the instruction, including her research and consideration of other legal authorities in support of adding these two mental states. The committee discussed the matter and agreed that

adding “intentionally or knowingly” to element 4 is appropriate, in particular due to the “in furtherance of a political or social objective” language in the statute.

On a separate note, Ms. Klucznik questioned whether “recklessly” was a necessary mental state for element 3. Ms. Johnson believed that recklessly is appropriate in element 3 because it was conceivable that a person is aware and still consciously disregards a risk. Judge Blanch asked if a Committee Note was needed to explain the committee’s reasoning for adding the two mental states to element 4. After discussion, the committee unanimously felt a Committee Note was not needed. Ms. Lockwood asked if “knowingly” is not an appropriate mens rea to include. The committee discussed the “knowingly” mens rea and concluded that “knowingly” should be included.

Ms. Klucznik moved to adopt the following language for the instruction:

CR ____ 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 circulation of blood of (VICTIM’S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
            1. Applying pressure to the neck or throat of (VICTIM’S NAME); or
            2. 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
    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)’s actions caused serious bodily injury; and
3. (DEFENDANT’S NAME) intentionally, knowingly, or recklessly committed the offense against a law enforcement officer; and
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
Utah Code § 76-5-21

Ms. Johnson seconded that motion. The committee voted unanimously to approve the instruction.

(3) DUI AND RELATED TRAFFIC INSTRUCTIONS:

Judge Blanch then turned the committee's attention to the instructions regarding DUI and Related Traffic Instructions. Judge McCullagh continued where the committee left off regarding its discussion of how *Vialpando* impacts the DUI offenses as to an intent element. After the last meeting, Ms. Johnson researched *State v. Thompson* which mentions that DUI is a strict liability offense. Judge Jones explained her belief that *Thompson* is not inconsistent with *Vialpando* or *Bird*. The committee discussed the precedential effect of these opinions as it relates to preparation of a DUI instruction. Judge Jones suggested that these cases should be listed in a Committee Note / Reference so that practitioners can review the case law in preparing instructions. The committee agreed that a Committee Note is appropriate.

Ms. Klucznik pointed out that the Legislature has had numerous opportunities to remove the ambiguity being discussed by the committee. Ms. Johnson stated that the issue may be raised this coming session.

The committee began reviewing the language of the DUI instruction found on page 10 of the meeting materials, which language had been preliminarily approved at the end of the previous meeting. The committee was reminded that at the conclusion of the last meeting, the committee had decided to craft a Committee Note at this meeting. Judge Jones suggested that a Committee Note might be better stated instead as a general "Preamble" to the DUI instructions. Some committee members supported the Preamble idea, while others believed it would not be reviewed by practitioners when they are looking for instructions. The committee discussed the language in the proposed Committee Note on page 11 of the materials. During the discussion, the committee made significant revisions to all of the proposed language.

The committee then considered whether this instruction should be broken into different instructions for different levels of offense (class B misdemeanor, class A misdemeanor, and felony versions of the instruction). The committee agreed that it is preferable to have three different instruction for each level, as well as an option to use a SVF if desired. This is similar to the committee's approach to crafting assault instructions. Judge McCullagh agreed to prepare these instructions for the next meeting.

The committee then returned its attention to the existing language in the DUI instruction on page 10 of the meeting materials. Ms. Klucznik noted that element 3 subpart d needed to be revised to remove the statutory citation and instead insert the direct language from 41-6a-714. After discussion, the committee revised that language to mirror the statutory language (without a citation).

The committee did not vote on the language of the instruction or committee note at this time. Instead, Judge McCullagh will revise the instruction into three separate instructions with the Committee Note as discussed by the committee and present those drafts to the committee at the beginning of the next meeting.

On a completely different topic, Ms. Lockwood still intends to bring a "specific intent" instruction to the committee for review. Judge Jones also explained that she recently had a jury ask a question about who has the burden of proof. Judge Jones' review of the stock instruction left her feeling a need to create a single instruction that squarely states that the burden of proof is on the State and that the defendant is presumed innocent without having to put on any evidence. The committee quickly reviewed the existing model instructions and determined that the matter was adequately covered by those instructions for the time being.

(4) ENTRAPMENT INSTRUCTION:

This item was not addressed at the meeting and will be moved to a future agenda.

(5) SEXUAL INTERCOURSE:

This item was not addressed at the meeting (other than a brief mention by Judge Blanch at the very end of the meeting). Actual discussion of the matter will be moved to a future agenda.

(6) ADJOURN

The Committee then concluded its business at 1:27 pm. The next meeting will be held on January 8, 2020, starting at 12:00 noon.

TAB 2

DUI and Related Traffic Instructions

NOTES:

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

(DEFENDANT'S NAME) is charged [in Count ____] with committing Driving Under the Influence of [Alcohol][Any Drug][the Combined Influence of Alcohol and Any Drug] [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME) 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].
3. [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. Thompson, 2017 UT App 183
State v. Vialpando, 2004 UT App 95

Committee Notes

This instruction is intended to be used in prosecuting Class B Misdemeanor driving under the influence. For Class A Misdemeanor or Third Degree Felony driving under the influence instructions, use CR_____ or CR_____, respectively.

In the realm of DUI, courts often give instructions at the request of the parties that comment on the sufficiency, or relative quality, of evidence. These instructions are disfavored and may run afoul of the Utah Supreme Court's admonition that trial courts should not comment upon the evidence. *See State v. Pappacostas*, 407 P.2d 576 (Utah 1965); Utah R. Crim. P. 19(f) ; and CR1000 "Preamble to Driving Under the Influence Instructions."

It is an open question whether a mens rea is required with respect to the operation or actual physical control element 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, and *State v. Thompson*, 2017 UT App 183.

Last Revised – 12/04/2019

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, operated a vehicle onto or from any freeway or other controlled-access highway except at entrances and exits established by the highway authority having jurisdiction over the highway;]
4. [The defense of _____ does not apply.]

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

References

Utah Code § 41-6a-502
Utah Code § 76-2-101(2)
State v. Bird, 2015 UT 7
State v. Thompson, 2017 UT App 183
State v. Vialpando, 2004 UT App 95

Committee Notes

This instruction is intended to be used in prosecuting Class A Misdemeanor driving under the influence. For Class B Misdemeanor or Third Degree Felony driving under the influence instructions, use CR_____ or CR_____, respectively. An alternative method to instruct the jury would be to use CR_____ (MB Instruction) in combination with SVF_____ ("DUI Offenses").

In the realm of DUI, courts often give instructions at the request of the parties that comment on the sufficiency, or relative quality, of evidence. These instructions are disfavored and may run afoul of the Utah Supreme Court's admonition that trial courts should not comment upon the evidence. *See State v. Pappacostas*, 407 P.2d 576 (Utah 1965); Utah R. Crim. P. 19(f) ; and CR1000 "Preamble to Driving Under the Influence Instructions."

It is an open question whether a mens rea is required with respect to the operation or actual physical control element 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, and *State v. Thompson*, 2017 UT App 183.

Last Revised – 12/04/2019

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) inflicted serious bodily injury upon [VICTIM'S NAME] as a proximate result of having operated the vehicle in a negligent manner.
4. [The defense of _____ does not apply.]

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

References

Utah Code § 41-6a-502
Utah Code § 76-2-101(2)
State v. Bird, 2015 UT 7
State v. Thompson, 2017 UT App 183
State v. Vialpando, 2004 UT App 95

Committee Notes

This instruction is intended to be used in prosecuting Third Degree Felony driving under the influence. For Class B Misdemeanor or Class A Misdemeanor driving under the influence instructions, use CR_____ or CR_____, respectively. An alternative method to instruct the jury would be to use CR_____ (MB Instruction) in combination with SVF_____ ("DUI Offenses"). For Third Degree Felony driving under the influence offenses that result from a prior conviction or convictions, practitioners should request that the court address the prior convictions in a bifurcated proceeding and, if appropriate, use SVF_____ ("DUI Priors").

In the realm of DUI, courts often give instructions at the request of the parties that comment on the sufficiency, or relative quality, of evidence. These instructions are disfavored and may run afoul of the Utah Supreme Court's admonition that trial courts should not comment upon the evidence. *See State v. Pappacostas*, 407 P.2d 576 (Utah 1965); Utah R. Crim. P. 19(f); and CR1000 "Preamble to Driving Under the Influence Instructions."

It is an open question whether a mens rea is required with respect to the operation or actual physical control element 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, and *State v. Thompson*, 2017 UT App 183.

CR_____ Preamble to Driving Under the Influence Instructions.

In the realm of DUI, practitioners often request that the court give instructions that comment on the sufficiency, or relative quality, of evidence. Some examples of such instructions include:

- "Bookend"
- Standardized field sobriety tests (including horizontal gaze nystagmus)
- *Baker* waiting period
- Breath test
- "Mere consumption"
- "Under the influence"
- Margin of error

Instructions of this nature are disfavored and may run afoul of the Utah Supreme Court's admonition that trial courts should not comment upon the evidence. *See State v. Pappacostas*, 407 P.2d 576 (Utah 1965) and Utah R. Crim. P. 19(f).

Last Revised – 12/04/2019

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" [outlined in Utah Code § 41-6a-501(2)] 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

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

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

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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

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; 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 § 76-5-207

Committee Notes

For Second Degree Felony automobile homicide based upon negligent operation of a motor vehicle and a prior conviction as defined in Utah Code § 41-6a-501(2), practitioners should request that the court address the prior conviction in a bifurcated proceeding and, if appropriate, use SVF_____ ("Automobile Homicide with Prior Conviction").

Last Revised - 00/00/0000

SVF ____. Automobile Homicide with Prior Conviction.

(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** **AUTOMOBILE HOMICIDE** **WITH PRIOR CONVICTION** Case No. (*********) Count (#)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Automobile Homicide, 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 a prior "conviction" for [driving under the influence of alcohol, any drug, or a combination of both][alcohol, any drug, or a combination of both-related reckless driving or a similar local ordinance][impaired driving][driving with a measurable controlled substance][automobile homicide][Utah Code § 58-37-8(2)(g)].]

- ☐ None of the above.

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

_____
Foreperson

Committee Notes

Last Revised – 00/00/0000

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 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 § 76-5-207

Committee Notes

Last Revised - 00/00/0000

DRAFT: 01/08/2020

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;
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 § 76-5-207.5

Committee Notes

Last Revised - 00/00/0000

Commented [MCD1]: (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.

DRAFT: 01/08/2020

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 criminally negligent manner;
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 § 76-5-207.5

Committee Notes

Last Revised - 00/00/0000

Commented [MCD1]: (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 3

State v. Alires, 2019 UT App 206

NOTES: This case addresses the need for jury unanimity as to each element of each crime (and an appropriate instruction to that effect where neither the charges nor the element instructions link each count to a particular act). The committee will discuss the impact of this decision on existing MUJI Criminal Instructions.

2019 UT App 206

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
PHILBERT EUGENE ALIRES,
Appellant.

Opinion
No. 20181033-CA
Filed December 19, 2019

Third District Court, Salt Lake Department
The Honorable Adam T. Mow
No. 171908080

Ann M. Taliaferro and Staci Visser, Attorneys
for Appellant

Sean D. Reyes and William M. Hains, Attorneys
for Appellee

JUDGE DIANA HAGEN authored this Opinion, in which
JUDGES MICHELE M. CHRISTIANSEN FORSTER and JILL M. POHLMAN
concurred.

HAGEN, Judge:

¶1 Philbert Eugene Alires was charged with six counts of aggravated sexual abuse of a child—two counts for conduct toward his youngest daughter and four counts for conduct toward one of his daughter's friends (the friend). A jury convicted Alires on two counts, one for each alleged victim, and acquitted him of the remaining four counts. We agree with Alires that his trial counsel was constitutionally ineffective in failing to request an instruction requiring the jury to reach a unanimous verdict with respect to each act for which he was convicted. Accordingly, we vacate his convictions and remand for further proceedings.

BACKGROUND[1]

¶2 One afternoon, Alires and his wife (the mother) hosted a party for their youngest daughter's eleventh birthday. The daughter invited two of her guests—the friend and another friend (the other friend)—to a sleepover that night. As the evening progressed, the daughter, the friend, and the other friend joined others in the living room to play a video game called "Just Dance."

¶3 Later that night, after everyone else had left, Alires and the mother got into a loud argument that the daughter, the friend, and the other friend overheard. The daughter appeared visibly upset and "started tearing up because her parents were fighting." Both Alires and the mother could tell that the girls overheard and were affected by the argument.

¶4 Alires and the mother went to their bedroom and discussed how they could "try and make [the daughter] happy." They decided that Alires would join the girls in the living room and "try to lighten the mood." Alires testified that he can generally make the daughter happy by "wrestling" with her and her friends or other family members because it "usually ends up being a dog pile" on Alires and it "usually brings the kids together and usually changes the mood." While Alires went to the living room, the mother stayed behind to change into her pajamas.

¶5 According to the friend, Alires went into the living room after the argument and "started trying to dance with [them]"

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1. "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly. We present conflicting evidence only as necessary to understand issues raised on appeal." *State v. Reigelsperger*, 2017 UT App 101, ¶ 2 n.1, 400 P.3d 1127 (cleaned up).

and "lighten the mood" because "the fight wasn't very fun for anybody." While they were dancing, Alires "put his hand on [the friend's] waist and kind of like slid it down, so [she] just sat down because [she] felt really uncomfortable." Alires then "tried dancing with [her] again and he . . . touched around [her] butt," though he "was kind of sneaky about it" as if he was "trying to make it look like it wasn't happening." On direct examination, the State asked the friend, "[H]ow does that get accomplished?" She responded, "I'm not sure. He just did it."

¶6 Feeling uncomfortable, the friend sat down on the couch next to the daughter. Alires sat down between the two and "started tickling [the daughter]." The friend testified that, while Alires tickled the daughter, "it looked like he was touching like in her inner thigh, and like moved up to her crotch area." According to the friend, "it was really not tickling, it was more like grabbing and grosping [sic]." This lasted "probably 15 to 30 seconds." Then, Alires turned to the friend and said, "I'm going to tickle you now." The friend told Alires she did not feel well and said, "[P]lease don't." But Alires started tickling near her "ribcage and then touched [her] breast area" and then he "started tickling [her] inner thighs and did the same thing that he did to [the daughter]." The friend testified, "[H]e slid his hand up to my vagina and started like grabbing, and like grosping [sic], I guess" for "[p]robably about seven to 10 seconds."

¶7 According to the friend, when Alires got up from the couch, the daughter asked, "[D]id he touch you?" The friend said, "[Y]eah. And he touched you, because I kind of saw it." The daughter "was like, yeah, can we just go to my room?"

¶8 According to the mother, she entered the living room about sixty seconds after Alires and told everyone that it was time to go to bed. The friend testified that it had been "probably about three minutes," during which time Alires touched her buttocks "twice," her breasts "twice," and her vagina "[a]bout

four times," in addition to touching the daughter's thigh and vagina.

¶9 Both the daughter and the other friend testified at trial that Alires did not touch anyone inappropriately and that they were only wrestling and tickling.

¶10 A few days after the birthday party, the daughter decided to report the friend's claim to a school counselor. The daughter went to the counselor's office in tears and when the counselor asked her if "something happen[ed] over the weekend" she "nodded her head yes." The daughter "wouldn't speak to [the counselor]" but told him that she was "going to go get a friend." The daughter then left and returned to the counselor's office with the friend. According to the counselor, the friend told him that Alires had touched both the daughter and the friend on "[t]he lower area and the breasts," although "they first described it as tickling . . . whatever that means." He also testified that the daughter "agreed to where the touching happened." At trial, the daughter testified that she told the counselor only what the friend had told her.

¶11 The State charged Alires with six counts of aggravated sexual abuse of a child without distinguishing the counts. At trial, the jury was instructed that four of those counts were for conduct perpetrated against the friend and two of those counts were for conduct perpetrated against the daughter. During closing argument, the prosecutor explained that, based on the friend's testimony, the jury could "ascertain six counts of touching of [the friend]" and that the State was "charging four" of those touches. The prosecutor also cited the friend's testimony that she saw Alires touch the daughter on her "inner thigh" and "on her vagina." The prosecutor further explained that "any one of those touchings qualifies for each of the counts. One for one. One touch for one count. And . . . it has to be just on the vagina, just on the butt, or just on the breast. It can be any combination."

¶12 Although both parties submitted proposed jury instructions, neither side asked the court to instruct the jury that it must be unanimous as to the specific act underlying each count of conviction. During its deliberations, the jury sent a question to the court asking, "Can we please have a clarification on how the counts work? We don't understand how to weigh each count when they are all the same. Not sure what they mean." Alires's trial counsel still did not request a specific unanimity instruction. Instead, with consent from both parties, the court referred the jury to instructions it had already received. The jury convicted Alires on one count of aggravated sexual abuse of a child involving the friend and one count involving the daughter.

¶13 After the jury returned its verdict and prior to sentencing, Alires filed a motion to arrest judgment and for a new trial due to, among other things, "fatal errors in the jury instructions and verdict forms." Trial counsel argued that the jury instructions were "fatally erroneous in failing to require the jury to find a unanimous verdict." The district court denied the motion and imposed two indeterminate terms of six-years-to-life in prison to run concurrently.

¶14 Alires appeals.

ISSUE AND STANDARD OF REVIEW

¶15 Alires argues that his trial counsel was constitutionally ineffective for failing to request a jury instruction that required the jurors to unanimously agree to the specific act at issue for each count of aggravated sexual abuse of a child.[2] Alires further

2. Alires did not preserve the underlying jury instruction issue for appeal, because he raised it for the first time in a post-trial motion. *State v. Fullerton*, 2018 UT 49, ¶ 49 n.15, 428 P.3d 1052 (reaffirming that "an objection that could have been raised at (continued…)

argues that, due to the lack of such an instruction, we "cannot be assured the jury was unanimous" as to which specific acts formed the basis for his conviction. "When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review and we must decide whether the defendant was deprived of the effective assistance of counsel as a matter of law." *State v. Bonds*, 2019 UT App 156, ¶ 20, 450 P.3d 120 (cleaned up).[3]

(…continued)
trial cannot be preserved in a post-trial motion"). Therefore, he must establish one of the three exceptions to the preservation requirement: plain error, ineffective assistance of counsel, or exceptional circumstances. *See State v. Johnson*, 2017 UT 76, ¶ 19, 416 P.3d 443. In addition to arguing ineffective assistance of counsel, Alires also asks us to review this issue under plain error. But because Alires's trial counsel proposed jury instructions that contained the same alleged infirmity, trial counsel invited the error and we are precluded from reviewing it under the plain error exception to the preservation requirement. *State v. Moa*, 2012 UT 28, ¶¶ 23–27, 282 P.3d 985 (explaining that the invited error doctrine precludes plain error review).

3. Alires also raises issues concerning the sufficiency of the evidence of sexual intent and the absence of a jury instruction defining "indecent liberties." Because we vacate Alires's convictions on other grounds and it is uncertain whether these issues will arise again on remand, *see infra* note 7, we do not "exercise our discretion to address those issues for purposes of providing guidance on remand." *State v. Low*, 2008 UT 58, ¶ 61, 192 P.3d 867; *see also State v. Barela*, 2015 UT 22, ¶ 35, 349 P.3d 676 (concluding that "[w]e need not and do not reach the factual question of the sufficiency of the evidence" when reversing on the basis of ineffective assistance of counsel relating to the jury instructions).

ANALYSIS

¶16 Alires argues that his trial counsel was ineffective for failing to request an instruction requiring the jury to unanimously agree on the specific act committed for each count of conviction. "To demonstrate ineffective assistance of counsel, [a defendant] must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense." *State v. Squires*, 2019 UT App 113, ¶ 25, 446 P.3d 581 (cleaned up); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). We agree with Alires that his trial counsel performed deficiently and that counsel's deficient performance prejudiced his defense.

A. Deficient Performance

¶17 To overcome the high level of deference we give to trial counsel's performance, Alires "must show that counsel's representation fell below an objective standard of reasonableness when measured against prevailing professional norms." *See State v. Popp*, 2019 UT App 173, ¶ 26 (cleaned up); *see also Strickland*, 466 U.S. at 687–88. Under the circumstances of this case, it was objectively unreasonable for trial counsel to propose instructions that did not require the jury to be unanimous as to the specific acts supporting each count of conviction.

¶18 The right to a unanimous verdict in criminal cases is guaranteed by Article 1, Section 10 of the Utah Constitution (the Unanimous Verdict Clause). "The Article I, section 10 requirement that a jury be unanimous is not met if a jury unanimously finds only that a defendant is guilty of a crime." *State v. Saunders*, 1999 UT 59, ¶ 60, 992 P.2d 951. Instead, "[t]he Unanimous Verdict Clause requires unanimity as to each count of *each distinct crime charged* by the prosecution and submitted to the jury for decision." *State v. Hummel*, 2017 UT 19, ¶ 26, 393 P.3d 314 (emphasis in original). For example, a verdict would not be valid "if some jurors found a defendant guilty of a robbery

committed on December 25, 1990, in Salt Lake City, but other jurors found him guilty of a robbery committed January 15, 1991, in Denver, Colorado, even though all jurors found him guilty of the elements of the crime of robbery and all the jurors together agreed that he was guilty of some robbery." *Saunders*, 1999 UT 59, ¶ 60. "These are distinct counts or separate instances of the crime of robbery, which would have to be charged as such." *Hummel*, 2017 UT 19, ¶ 26.

¶19 The constitutional requirement that a jury must be unanimous as to distinct counts or separate instances of a particular crime "is well-established in our law." *Id.* ¶ 30. Indeed, this requirement was applied in the closely analogous *Saunders* case in 1999. In *Saunders*, the Utah Supreme Court considered whether jurors must be unanimous as to the particular act or acts that form the basis for a sexual abuse conviction. 1999 UT 59, ¶¶ 9–11. The jury had been instructed that there was "no requirement that the jurors be unanimous about precisely which act occurred or when or where the act or acts occurred." *Id.* ¶ 58 (cleaned up). The court held that, "notwithstanding a clear constitutional command and applicable case law, the instruction does not set out any unanimity requirement at all." *Id.* ¶ 62. The alleged child victim had testified that at least fifteen different acts of touching occurred—some in which the defendant had been applying Desitin ointment to her buttocks and vaginal area and some in which he had not. *Id.* ¶ 5. Without a proper unanimity instruction, "some jurors could have found touchings without the use of Desitin to have been criminal; others could have found the touchings with Desitin to have been criminal; and the jurors could have completely disagreed on when the acts occurred that they found to have been illegal."[4] *Id.* ¶ 65. Because the

4. "[B]ecause time itself is not an element of an offense, it is not necessary that the jurors unanimously agree as to just when the criminal act occurred." *State v. Saunders*, 1999 UT 59, ¶ 60, 992 (continued…)

"jury could have returned a guilty verdict with each juror deciding guilt on the basis of a different act by [the] defendant," the court held that "it was manifest error under Article I, section 10 of the Utah Constitution not to give a unanimity instruction." *Id.* ¶ 62.

¶20 Our supreme court recently reinforced these principles in *Hummel*. In that case, the court distinguished between *alternative factual theories* (or methods or modes) of committing a crime for which a jury need not be unanimous and *alternative elements* of a crime for which unanimity is required. *Hummel*, 2017 UT 19, ¶ 53. Hummel was charged with the crime of theft. *Id.* ¶ 1. Under Utah law, a person commits theft if he "obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404 (LexisNexis 2017). Subsequent sections of the Utah Code explain that a person is guilty of theft if he obtains or exercises control over the property "by deception," *id.* § 76-6-405, or "by extortion," *id.* § 76-6-406. But the Utah Supreme Court explained that "[t]heft by deception and theft by extortion are not and cannot logically be separate offenses." *Hummel*, 2017 UT 19, ¶ 21. "If they were, Hummel could be charged in separate counts and be convicted on both." *Id.* Because the method of obtaining or exercising control over the property is not an alternative *actus reus* element of the crime, jury unanimity at that level is not required. *Id.* ¶ 61.

(…continued)
P.2d 951. "Thus, a jury can unanimously agree that a defendant was guilty of a particular act or acts that constituted a crime even though some jurors believed the crime occurred on one day while the other jurors believed it occurred on another day." *Id.* In other words, if all jurors agree that a defendant committed a particular act, it is immaterial if some jurors think that the act occurred on a Saturday and others believe it occurred on a Monday.

¶21 In contrast to *Hummel*, where deception and extortion are merely "exemplary means" of satisfying the obtaining or exercising control element of the single crime of theft, *id.*, each unlawful touch of an enumerated body part (or each unlawful taking of indecent liberties) constitutes a separate offense of sexual abuse of a child under Utah Code section 76-5-404.1(2). This is illustrated by the fact that a defendant can be charged in separate counts and be convicted for each act that violates the statute. *See State v. Suarez*, 736 P.2d 1040, 1042 (Utah Ct. App. 1987) (holding that the defendant's acts of placing his mouth on the victim's breasts and then placing his hand on her vagina were "separate acts requiring proof of different elements and constitute separate offenses"). Unlike the theft statute in *Hummel*, the sexual abuse of a child statute "contains alternative *actus reus* elements by which a person could be found" guilty of sexual abuse. *See Hummel*, 2017 UT 19, ¶ 61. Those alternative elements are touching "the anus, buttocks, pubic area, or genitalia of any child, the breast of a female child, or otherwise tak[ing] indecent liberties with a child," Utah Code Ann. § 76-5-404.1(2), each of which constitutes a distinct criminal offense.

¶22 Here, Alires was charged with six counts of aggravated sexual abuse of a child based on distinct touches prohibited by the statute. The information charged Alires with six identically-worded counts of aggravated sexual abuse of a child without distinguishing the counts by act or alleged victim. At trial, the friend testified that Alires unlawfully touched her at least six times and unlawfully touched the daughter twice. In closing, the State argued that the jury could convict Alires on four counts based on any of the six alleged touches of the friend in "any combination." Similarly, the State did not identify which alleged touch of the daughter related to which count. Once the State failed to elect which act supported each charge, the jury should have been instructed to agree on a specific criminal act for each charge in order to convict. *See State v. Santos-Vega*, 321 P.3d 1, 18 (Kan. 2014) (holding that "either the State

must have informed the jury which act to rely upon for each charge during its deliberations or the district court must have instructed the jury to agree on the specific criminal act for each charge in order to convict"); *see also State v. Vander Houwen*, 177 P.3d 93, 99 (Wash. 2008) (en banc) (noting that "[t]o ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt" (cleaned up)).

¶23 Despite the State's failure to elect which acts it relied upon for each charge, trial counsel failed to request a proper instruction. As a result, the jury was never instructed that it must unanimously agree that Alires committed the same unlawful act to convict on any given count. Without such an instruction, some jurors might have found that Alires touched the friend's buttocks when dancing, while others might have found that he touched the friend's breast while tickling. Or the jury might have unanimously agreed that all of the touches occurred, but some might have found that Alires had the required intent to gratify or arouse sexual desires only while trying to dance with the friend, while others might have found that he only had sexual intent when he tickled the friend. In other words, the jurors could have completely disagreed on which acts occurred or which acts were illegal. *See Saunders*, 1999 UT 59, ¶ 65. Where neither the charges nor the elements instructions link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each element of each crime.[5]

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5. The instructions informed the jury that, "[b]ecause this is a criminal case, every single juror must agree with the verdict before the defendant can be found 'guilty' or 'not guilty.'" This instruction is plainly insufficient. The constitutional requirement (continued…)

¶24 It was objectively unreasonable for Alires's trial counsel to propose jury instructions that did not require unanimity as to the specific act that formed the basis of each count resulting in conviction. Although no prior Utah appellate decisions have applied the Unanimous Verdict Clause to a case where a defendant is charged with multiple counts of the same crime, trial counsel is not "categorically excused from failure to raise an argument not supported by existing legal precedent." *State v. Silva*, 2019 UT 36, ¶ 19. In any event, it should have been readily apparent that, although *Saunders* involved a prosecution in which the defendant was charged with and convicted of a single count of sexual abuse that could have been based on any one of a number of separate acts, its holding applies with equal force to a case such as this where a defendant is charged with multiple counts of sexual abuse, each of which could have been based on any one of a number of separate acts.

¶25 The State suggests that a reasonable trial counsel may have had strategic reasons for not requesting a proper unanimity instruction. While it is true that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland v. Washington*, 466 U.S. 668, 690 (1984), here trial counsel candidly admitted that the failure to request a proper unanimity instruction was "not due to tactical reasons, but mistaken oversight." Had trial counsel properly investigated the governing law, it would have been apparent that *Saunders* required the court to instruct the jury that it must agree on the specific criminal act for each charge in order to convict. Moreover, we disagree with the State's theory that a reasonable defense attorney could have concluded that "further clarification would have increased the likelihood of conviction." By failing to require juror unanimity as to each

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(…continued)
of unanimity "is not met if a jury unanimously finds only that the defendant is guilty of a crime." *Saunders*, 1999 UT 59, ¶ 60.

underlying act, the instructions—coupled with the prosecutor's closing argument—effectively lowered the State's burden of proof. *See State v. Grunwald*, 2018 UT App 46, ¶ 42, 424 P.3d 990, (holding that "no reasonable trial strategy would justify trial counsel's failure to object to instructions misstating the elements of accomplice liability in a way that reduced the State's burden of proof"), *cert. granted*, 429 P.3d 460 (Utah 2018). Under these circumstances, failure to request such an instruction fell below an objective standard of reasonableness.

B. Prejudice

¶26 Having established that trial counsel performed deficiently by failing to request a proper unanimity instruction, Alires must show that he was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Therefore, we consider whether Alires has shown a reasonable likelihood that a juror unanimity instruction would have led to a more favorable result.[6] *See State v. Evans*,

6. Citing *State v. Hummel*, 2017 UT 19, 393 P.3d 314, the State argues that "defendants challenging a verdict under the Unanimous Verdict Clause must affirmatively prove that the jury was not unanimous." In *Hummel*, the court stated that "a lack of certainty in the record does not lead to a reversal and new trial; it leads to an affirmance on the ground that the appellant cannot carry his burden of proof." *Id.* ¶ 82. But the *Hummel* court was addressing how to assess the prejudicial effect of "a superfluous jury instruction," that is, a jury instruction that includes an alternative theory that was not supported by sufficient evidence at trial. *Id.* ¶¶ 81–84. It does not speak to the (continued…)

2001 UT 22, ¶ 16, 20 P.3d 888 (reviewing for plain error a defendant's challenge to the trial court's failure to provide a juror unanimity instruction and explaining that a "defendant must demonstrate . . . that the error should have been obvious to the trial court, and that the error was of such a magnitude that there is a reasonable likelihood of a more favorable outcome for the defendant"); *State v. Saunders*, 1999 UT 59, ¶¶ 57, 65, 992 P.2d 951 (same); *see also State v. McNeil*, 2016 UT 3, ¶ 29, 365 P.3d 699 (explaining that "the prejudice test is the same whether under the claim of ineffective assistance or plain error").

¶27 To determine whether the defendant has shown a reasonable probability of a more favorable outcome, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. 668, 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.*; *see also Saunders*, 1999 UT 59, ¶¶ 5, 13, 57, 65 (holding that "factual issues in the case"—including the "conflicting, confused," and "obviously . . . coached" testimony of the alleged victim and the absence of other witnesses—created a reasonable likelihood that a proper unanimity instruction would have resulted in "a more favorable outcome for the defendant").

¶28 Here, the evidence supporting Alires's guilt was not overwhelming. The evidence was conflicting both as to which acts occurred and as to Alires's intent. The friend testified to eight separate touchings that allegedly occurred during a sixty-second to three-minute period in full view of all three girls in the room. The friend was the only person to testify that Alires unlawfully touched her and the daughter. Both the daughter and

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(…continued)
standard for showing prejudice where the jury is not properly instructed on the unanimity requirement.

the other friend testified that no inappropriate touching occurred. Given the conflicting evidence, there is a reasonable probability that the jury did not unanimously agree that the same two acts occurred.

¶29 In addition, even if the jury fully accepted the friend's testimony that all eight touches occurred, the surrounding circumstances were sufficiently ambiguous that members of the jury could have easily reached different conclusions as to which acts were done with the required sexual intent. Although direct evidence of the intent to gratify or arouse a sexual desire is not required, *see In re G.D.B.*, 2019 UT App 29, ¶ 21, 440 P.3d 706, Alires, the mother, and even the friend testified that Alires went to the living room to "tickle" and "wrestle" with the girls with the intent to "lighten the mood." Given this evidence, some jurors may have found that the touches while tickling were innocent or inadvertent and that Alires had the intent to gratify or arouse sexual desires only when he slid his hand down to the friend's buttocks in a "sneaky" way while dancing. Others may have concluded touching one particular body part while tickling the friend or the daughter evidenced sexual intent, although they may have disagreed as to which body part that was. Where the evidence is so readily subject to different interpretations, "we are not persuaded that the jury would have unanimously convicted had the error not existed." *See Saunders*, 1999 UT 59, ¶ 65.

¶30 This is particularly true given the prosecutor's statements in closing argument and the jury's note expressing confusion over how to treat the various counts. The State told the jury in closing argument that any of the alleged acts against a particular victim could support any of the charges relating to that victim. Further, the elements instructions were identical for each of the six counts, with the exception of substituting the friend's initials for counts one through four and the daughter's initials for counts five and six. And during its deliberations, the jury expressed confusion over how to deal with the various counts,

asking the court, "Can we please have a clarification on how the counts work? We don't understand how to weigh each count when they are all the same. Not sure what they mean." The jury's question shows that the absence of a proper unanimity instruction had a palpable impact on the jury deliberations and undermines our confidence in the jury's verdict. *McNeil*, 2016 UT 3, ¶ 30. We therefore conclude that Alires was prejudiced by trial counsel's failure to request a juror unanimity instruction.

CONCLUSION

¶31 We conclude that trial counsel performed deficiently when he did not request an instruction regarding juror unanimity and that this deficient performance was prejudicial to Alires's defense. Accordingly, we vacate Alires's convictions and remand for further proceedings.[7]

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7. Ordinarily, a defendant who prevails on an ineffective assistance of counsel claim is entitled to a new trial. *See State v. Hales*, 2007 UT 14, ¶ 68, 152 P.3d 321. But where the counts of conviction cannot be distinguished from the counts on which the defendant was acquitted, a retrial may be prohibited by the Double Jeopardy Clause. *See, e.g.*, *Dunn v. Maze*, 485 S.W.3d 735, 748–49 (Ky. 2016) (collecting state and federal cases holding that a mixed verdict on identically-worded counts forecloses a retrial). We express no opinion on the merits of the double-jeopardy issue, which will not be ripe unless and until the State seeks a retrial.

TAB 4

Definition of “Sexual Intercourse”

NOTES:

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).

TAB 5

Entrapment Instruction

NOTES:

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