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
February 5, 2020 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes - *Sub-item*		Tab 1	Judge Blanch
	Jury Unanimity Instruction(s) - *State v. Alires,* 2019 UT App 206			Karen Klucznik Debra Nelson
	DUI and Related Traffic Offenses - *SVF Priors and accompanying instruction about judge determining prior conviction* - *Remaining DUI-related instructions not considered at previous meetings*			Judge McCullagh
	Definition of "Sexual Intercourse"		Tab 2	Judge Blanch
	Entrapment Instruction		Tab 3	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):

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 = 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

Meeting Minutes – January 8, 2020

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
January 8, 2020 – 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)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee from the holidays. Ms. Klucznik moved to approve the minutes and Ms. Nelson seconded. The Committee unanimously approved the minutes.

(2) *STATE V. ALIRES*, 2019 UT APP 206:

Judge Blanch switched agenda items to discuss the *Alires* case first and focused the Committee's attention on agenda item 3. Ms. Klucznik discussed the *Alires* matter for the Committee by briefly discussing the facts and then discussing the legal issue from the case: 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. Ms. Nelson discussed how the attorneys and court address this with the jury.

Ms. Johnson cautioned against over-reacting. She suggested that the practitioners could prepare the element instructions to bracket conduct to the differing acts in a criminal episode tied to a specific victim. In her

perspective, the issue arises when a prosecutor is charging multiple counts regarding the same victim on the same date or from the same episode / incident. Under such circumstances, the practitioners need to be more explicit about the specific details of each unlawful act perpetrated against a particular victim, detailing those specifics in each . The committee discussed Ms. Johnson's views of the situation by posing various hypotheticals to test her position.

Mr. Field responded that he was concerned that the jury could agree a touch happened of the same type, but at different times over the span of various episodes. He asked whether that would create problems for unanimity of a jury verdict if all jurors agreed that some touch occurred at some point in that time frame, but they may not agree that the same particular touch happened at a particular time. The committee discussed this hypothetical. Ms. Johnson provided additional perspective on the scope of the issue and how instructions can be prepared to address the issue.

[Judge Westfall joined the conversation via phone at 12:21 p.m.]

The committee discussed *Hummel*, alternative factual theories of the case, and different acts constituting discreet unlawful acts being raised in different counts.

[Judge McCullagh joined the meeting at 12:27 p.m.]

Judge Blanch expressed that the biggest problem is the verdict form does not specify what alleged count refers to conduct alleged. Ms. Nelson asked how that practically works when instructing the jury with the verdict forms. Judge Blanch stated he had brackets describing the events related to each count. Judge Westfall asked if the edit is in the instructions for the event in each count and Judge Blanch explained his process for avoiding this issue. Judge Westfall asks the prosecutor to instruct the jury as to each count which event is linked to the event. Judge McCullagh said he has a jury instruction with a count with elements that tie to the conduct with more specific language. Judge McCullagh felt that *Alires* renders useless the current unanimity instruction.

Ms. Nelson then discussed the unanimity holding from *Saunders* to help the Committee with clarity on that point. Ms. Johnson felt that the best we could do to help practitioners is to add a note in the jury instruction for unanimity when practitioners have multiple counts.

Judge Blanch invited Ms. Klucznik and Ms. Nelson to sort out the following:

- Does the Committee need to make a change to the current unanimity instruction?
- Does the Committee need to add a special instruction for cases like *Alires* where there are multiple similar counts?
- What kind of practitioner note should the Committee include, and should that note recommend that in a situation like *Alires* that there be a separate elements instruction for each charge that includes identifying information as to what particular conduct is alleged with corresponding identifying information on the verdict form?

This work should be completed before the next meeting so that the Committee can provide to practitioners a prompt response to the *Alires* case. They agreed to take on that assignment.

(3) DUI AND RELATED TRAFFIC INSTRUCTIONS:

Judge Blanch then changed the focus of the Committee to the second agenda item: DUI and Related Traffic Instructions. The Committee turned to other DUI instructions that were not addressed in the prior meeting. Mr. Drechsel explained the three instructions for DUI, one for each level of offense (MB, MA, and F3), that were prepared as a result of the December meeting. Mr. Drechsel also briefly explained the "preamble" instruction he had prepared. Ms. Johnson stated she liked the all of the instructions, however, she addressed a citation issue that needed resolution in the Committee Notes section. Minor revisions were made to that section. The Committee discussed each of the draft instructions.

On the MA and F3 versions of the instruction, Ms. Klucznik addressed the instruction and felt there the "proximate result" language in section 3.a. might confuse the jury. The Committee reviewed MUJI Civil CV209 ("Cause" defined). Judge Blanch felt that the legislature used legal language which has a specific meaning for proximate causation and that there should be a careful review of the case law to ensure the meaning and guidance is employed in the jury instruction. The Committee discussed the issue of proximate result / proximate cause in detail. Ultimately, the Committee concluded that the term "proximate cause" should be used, which required the sentence in 3.a. to be restructured.

The Committee then addressed the need for a "Preamble" instruction and the content of that instruction. Judge Blanch asked that "Bookend" be changed to "Bookends."

In the Preamble instruction, Ms. Klucznik was concerned about the language referring to "bookends" and some of the other terms of art because she was not sure some of the terms would be familiar to practitioners (since they weren't familiar to her as a result of not practicing in this area of law). The Committee assured her that practitioners would understand what that terminology means.

Ms. Bowen then left the conversation at 12:50pm.

After discussion and minor revisions to the draft instruction, Judge McCullagh made motion to approve the following four instructions (DUI MB, DUI MA, DUI F3, and Preamble). Ms. Johnson seconded the motion. The motion passed unanimously.

CLASS B MISDEMEANOR INSTRUCTION:

CR1003 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 CR1004 or CR1005, 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 CR1001 "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) and *State v. Thompson*, 2017 UT App 183; *but see State v. Vialpando*, 2004 UT App 95, ¶ 26.

CLASS A MISDEMEANOR INSTRUCTION:

CR1004 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. [operated the vehicle in a negligent manner which was the proximate cause of bodily injury upon [VICTIM'S NAME];]
   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. [operated a vehicle onto or from any controlled-access highway except at entrances and exits established by the appropriate highway authority;]
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 CR1003 or CR1005, respectively. An alternative method to instruct the jury would be to use CR1003 (MB Instruction) in combination with SVF1001 ("Driving Under the Influence 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 CR1001 "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) and *State v. Thompson*, 2017 UT App 183; *but see State v. Vialpando*, 2004 UT App 95, ¶ 26.

THIRD DEGREE FELONY INSTRUCTION:

CR1005 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) operated the vehicle in a negligent manner which was the proximate cause of serious bodily injury upon [VICTIM'S NAME].
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 CR1003 or CR1004, respectively. An alternative method to instruct the jury would be to use CR1003 (MB Instruction) in combination with SVF1001 ("Driving Under the Influence 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 SVF1002 ("Driving Under the Influence – Prior Conviction").

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 CR1001 "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) and *State v. Thompson*, 2017 UT App 183; *but see State v. Vialpando*, 2004 UT App 95, ¶ 26.

PREAMBLE INSTRUCTION:

CR1001 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:

- "Bookends"
- 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).

Once these four instructions were approved, the Committee turned its attention to the special verdict forms for the DUI instructions (one for priors: "DUI – Prior Conviction"; and one for enhancements: "DUI Offenses").

On the DUI – Prior Conviction SVF, Ms. Klucznik felt that a conviction is an issue for the jury to determine and may therefore need a definition. Judge McCullagh disagreed as to who determines what a conviction is at trial and distinguished the legal question of whether there has been a prior conviction from the factual question of whether that conviction applies to the defendant / whether that conviction is within the statutory time period. Judge McCullagh felt it would be better for him to come with case law addressing this issue at the next Committee hearing. Ms. Klucznik pointed out that the citations and references in the SVF also need attention and shouldn't be included in the SVF. Ms. Johnson suggested that perhaps instead referencing statutory citations in the SVF, the underlying case number that would serve as a qualifying conviction (as determined by the judge) might be used in the SVF language. Judge McCullagh and Ms. Klucznik both agreed with that suggestion. Finally, Ms. Klucznik raised the issue "None of the above" as an option in the SVF. The Committee discussed how this method was used in the assault instructions. The Committee verified that the "None of the above" language was in fact used in the assault instructions.

The Committee then tabled further consideration of the DUI – Prior Conviction SVF until the next meeting.

The Committee then turned its attention to the DUI Offenses SVF. Mr. Drechsel changed the proposed SVF to reflect the Committee's changes to to the MA and F3 DUI instructions regarding "proximate cause."

Judge Westfall expressed concern about the language on the SVF that states "None of the above" and agreed with Ms. Klucznik that this could be read to mean that the jury has to unanimously believe that "None of the above" conditions happened. The Committee agreed with this concern, discussed this concern, and other alternatives to the "None of the above" language. Judge McCullagh provided an explanation about the effect of a hung jury where the jury couldn't actually unanimously agree on the "None of the above" language.

Ms. Johnson suggested that various options for MA DUI and F3 DUI could be merged into a single list. She explained her thinking. The Committee agreed that a single SVF with all conditions made sense. The Committee discussed the need for a SVF in this area of instructions. The Committee discussed the contolled-

access highway language again to further simplify the language. At the conclusion of that discussion, the list was combined, refined, and reordered.

Ms. Johnson made motion to approve the DUI Offenses SVF. Ms. Andrus seconded that motion. The Committee voted unanimously to approve.

SVF 1000. 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 (#)

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) 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) operated a vehicle onto or from any controlled-access highway except at entrances and exits established by the appropriate highway authority;]
- ☐ [(DEFENDANT'S NAME) operated the vehicle in a negligent manner which was the proximate cause of bodily injury upon [VICTIM'S NAME];]
- ☐ [(DEFENDANT'S NAME) operated the vehicle in a negligent manner which was the proximate cause of serious bodily injury upon [VICTIM'S NAME].]
- ☐ 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.

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(4) DEFINITION OF SEXUAL INTERCOURSE:

This item was not addressed at the meeting.

(5) ENTRAPMENT INSTRUCTION:

This item was not addressed at the meeting.

(6) ADJOURN

The Committee then concluded its business at 1:37 p.m. The next meeting will be held on February 5, 2020, starting at 12:00 noon.

TAB 2

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 3

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