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

WebEx Meeting
June 3, 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 Instructions - *Driving with Measurable Controlled Substance Instruction* - *Automobile Homicide Instruction(s)* - *"Actual physical control" Instruction(s)* - *Criminal Refusal Instruction* - *Remaining Instructions?*	Discussion / Action	Tab 2	Judge McCullagh
	CR1615 Consent - *Revisions based on HB0213*	Action	Tab 3	Michael Drechsel
	Jury Unanimity and *State v. Alires*, 2019 UT App 206 - *Supreme Court denied cert on May 8, 2020… discussion of next steps*	Discussion	Tab 4	Judge Blanch
1:30	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/muji-criminal/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

September 2, 2020	November 4, 2020	
October 7, 2020	December 2, 2020	

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

TAB 1

Minutes – May 6, 2020 Meeting

NOTES:

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

WebEx Meeting
May 6, 2020 – 12:00 p.m. to 1:30 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *Chair*	•	
Jennifer Andrus	•	
Melinda Bowen	•	
Mark Field	•	
Sandi Johnson	•	
Judge Linda Jones, *Emeritus*	•	
Karen Klucznik	•	
Elise Lockwood	•	
Judge Brendan McCullagh	•	
Debra Nelson	•	
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall	•	
Scott Young		•

GUESTS:

None

STAFF:

Michael Drechsel

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting, which was held via WebEx. The committee considered the minutes from the February 5, 2020 meeting. Ms. Klucznik moved to approve the draft minutes. Mr. Field seconded the motion. The motion passed unanimously.

(2) LEGISLATIVE UPDATE:

Mr. Drechsel provided the committee members with an update on legislative changes from the 2020 session that might require, or benefit from, a committee response.

HB0139 – DUI LIABILITY AMENDMENTS

Mr. Drechsel described to the committee that this bill: 1) explicitly states that DUI is a strict liability offense; 2) defines what is NOT "actual physical control"; 3) makes a new criminal offense to refuse a blood draw after a

warrant issues; and 4) adds a new method for MA DUI (driving the wrong way on a divided highway / crossing the median).

Mr. Drechsel discussed with the committee how these legislative changes impact the committee's ongoing work on DUI instructions. In particular, Mr. Drechsel noted that instructions CR1003 (MB DUI elements), CR1004 (MA DUI elements), and CR1005 (F3 DUI elements) all contain a mental state for operating or having actual physical control of a motor vehicle ("intentionally, knowingly, or recklessly"). He also noted that CR1004 would need to be amended to include the new way to arrive at an MA DUI (wrong way on divided highway), along with similar changes to SVF1001.

The committee determined it should engage in a discussion of revisions related to these three instructions and the special verdict form before hearing from Mr. Drechsel on the remaining legislative updates. Judge Blanch noted that this would jump the committee ahead to Item 4 on the agenda. [The meeting minutes for this section of the meeting are therefore contained under item (4) below.]

After finishing those revisions (see minutes for Agenda Item (4) below), the committee resumed its discussion of the remaining legislative updates related to HB0139. Mr. Drechsel reported that the draft "actual physical control" instruction (not yet approved by the committee) may need to attend to the HB0139 definition of what is NOT "actual physical control." In addition, the committee should consider whether to create an instruction for the refusal of a blood draw after a warrant issues (criminal refusal). Judge McCullagh explained that a criminal refusal instruction would be useful in certain scenarios. Judge Blanch asked Judge McCullagh to draft a proposed instruction for criminal refusal for a future meeting.

Ms. Johnson proposed that the NOT "actual physical control" instruction be separate from the "actual physical control" instruction. The committee engaged in a discussion about actual physical control instruction. Committee members were concerned if the instruction makes it seem like the defendant bears any burden of proof as it relates to NOT having actual physical control of the vehicle. The committee agreed that the prosecution bears the burden to prove actual physical control and also to prove that the circumstances that are outlined in the definition of what is NOT actual physical control are not satisfied (i.e., prove the negative). It was not clear to some of the committee members whether the NOT actual physical control definition is an affirmative defense. The committee agreed that even if the NOT actual physical control factors are not satisfied, a person may still not have actual physical control when considering the totality of the circumstances (a la *State v. Barnhart*). The committee explored some potential language, but ultimately determined that it would be wise to spend some time drafting language for the next meeting. Judge Blanch asked Judge McCullagh to draft up some proposed language and send it to Ms. Klucznik and Ms. Johnson for review. Judge McCullagh agreed to take on that assignment.

HB0213 – CONSENT LANGUAGE AMENDMENTS

Mr. Drechsel explained that there is currently a MUJI instruction on consent (CR1615). Changes in HB0213 require some modification to CR1615: 1) the bill expands current code so that a sexual act is "without the consent of the victim" if the actor knows the victim is participating because the victim erroneous believes that the actor is someone else (lines 62-63) (previously this was limited to an erroneous belief that the actor was the victim's spouse); and 2) the bill makes clear that prior consent does not necessarily mean consent has been given for any other sexual act and that consent can be withdrawn through words or conduct at any time before or during sexual activity (lines 79-81). Judge Blanch asked that Mr. Drechsel prepare an updated draft of CR1615 for the next meeting. Mr. Drechsel accepted the assignment for the next meeting.

SB0210 – BODY CAMERA AMENDMENTS

Mr. Drechsel provided an overview to the changes in this body-worn camera legislation, noting that for the committee the work is presently simply to consider whether an model adverse inference instruction should be prepared. Mr. Drechsel also suggested that the issue may arise in both criminal and civil cases and so the MUJI Civil committee may also decide to pay some attention to this. Mr. Drechsel noted that he had received one version of an existing adverse inference instruction from one of the committee members and that he could distribute it to the committee if this is addressed at a future meeting. After the introduction, the committee briefly discussed the issue and agreed that a model instruction would be helpful. Ms. Johnson will prepare a draft adverse inference instruction for a future meeting.

SB0238 – BATTERED PERSON MITIGATION

Mr. Drechsel explained the battered person mitigation legislation. Judge Blanch pointed out that there already exist other mitigation-type instruction(s) in the MUJI homicide instructions. The committee briefly discussed CR1450 (imperfect self-defense) and CR1404 (extreme emotional distress). Judge Blanch pointed out *State v. Smith*, 2019 UT App 141, and *State v. White*, 2011 UT 21, as possible relevant cases to inform the committee's preparation of a proposed SB0238 instruction. Ms. Klucznik agreed to prepare a draft mitigation instruction and special verdict form for a future meeting.

SB0121 – MEDICAL CANNABIS AMENDMENTS

Mr. Drechsel briefly mentioned one additional piece of legislation that was not explicitly included on the agenda, but was reflected on the draft instructions on pages 98 and 99 of the meeting materials. During the 2020 session, a change was made to Utah Code § 41-6a-517 (driving with any measurable controlled substance). The change was to specifically exclude "11-nor-9-carboxy-tetrahydrocannabinol" as a substance that can be used to sustain a prosecution under Utah Code § 41-6a-517. "11-nor-9-carboxy-tetrahydrocannabinol" is an inactive metabolite of THC. Mr. Drechsel explained that there are two versions of a proposed draft instruction for driving with a measurable controlled substance and that he had added to each of those some additional proposed language to incorporate the change from SB0121. The committee will address this language at a future when the relevant draft instructions are considered.

(3) JURY UNANIMITY:

Judge Blanch noted that it appears that a petition for certiorari is still pending in *State v. Alires*, 2019 UT App 206. The committee agreed to wait for that cert petition to be resolved prior to addressing the jury unanimity issue.

(4) DUI AND RELATED TRAFFIC INSTRUCTIONS:

CHANGES TO CR-1003, CR-1004, AND CR1005

The committee considered changes to instructions CR1003 (MB DUI elements), CR1004 (MA DUI elements), and CR1005 (F3 DUI elements), necessitated by the passage of HB0139. In particular, the committee discussed the mental state for operating or having actual physical control of a motor vehicle in light of the legislative pronouncement in HB0139 that DUI is a strict liability offense. The committee agreed that HB0139 makes clear that there is no mental state necessary for the DUI elements. The committee discussed whether there needed to be two separate instructions for each level of DUI elements—one for pre-July-1 DUIs and one for post-July-1 DUIs (July 1, 2020 being the effective date for HB0139). Ms. Johnson identified a new case issued in the last few weeks that again noted that DUI is a strict liability offense (*State v. Higley*, 2020 UT App 45). As a result of this,

she suggested to the committee that there be only one instruction that eliminates the mental states, and with an updated committee note that identifies there may be an issue on mental state for pre-July-1 DUIs.

Judge Blanch proposed some language for the updated committee note. The committee discussed and refined the proposed language. The committee also discussed other possible issues with the existing committee notes in regard to the paragraph that speaks to disfavoring instructions that comment on the sufficiency of the evidence (in particular as it relates to "actual physical control"). After discussion, the committee agreed that no further changes to the committee notes were necessary.

The committee next addressed possible changes to CR-1004 (MA DUI elements) to include the new method of MA DUI when operating a vehicle in the wrong direction on a divided highway or crossing the median. The meeting materials contained the new statutory language from HB0139 on this point. The committee discussed how to best articulate the statutory language in a plain-English jury instruction, including exploring use of "going the wrong way." Judge Westfall encouraged that the committee do what it can to use the statutory language as much as possible. The conversation explored a variety of options, including simplifying this general purpose instruction by omitting the option that encompasses the operator of a dispatched tow truck driver; the committee viewed this option as extremely unlikely to arise and that when it did apply, practitioners would need to be attentive to modifying the instruction accordingly. The committee also agreed that SVF1001 "DUI Offenses" should be amended to reflect the change to CR1004 regarding the MA of driving the wrong way on a divided highway or crossing the median.
At the conclusion of all of this discussion and revision, the committee voted unanimously to approve the following revisions to CR1003, CR1004, CR1005, and SVF1001.

For CR1003, the committee approved the following language:

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. Higley, 2020 UT App 45
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.~~ As of July 1, 2020, Utah Code was amended to explicitly state that driving under the influence is a strict liability offense (see HB0139-2020, line 164). For any offense committed prior to July 1, 2020, there is divergent legal authority on whether driving under the influence is a strict liability offense with respect to the operation or actual physical control of the vehicle. *See* Utah Code § 76-2-101(2) (no mental state generally required for traffic offenses), *State v. Higley*, 2020 UT App 45, and *State v. Thompson*, 2017 UT App 183; *but see State v. Vialpando*, 2004 UT App 95, ¶ 26.

Last Revised – ~~01/08/2020~~05/06/2020

For CR1004, the committee approved the following language:

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; or]
   e. [on or after July 1, 2020, without being directed or permitted by a traffic-control device or peace officer:
      i. operated a vehicle on a divided highway using the left-hand roadway; or
      ii. operated a vehicle over, across, or within any dividing space, median, or barrier of a divided 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 § 41-6a-712
Utah Code § 41-6a-714
Utah Code § 76-2-101(2)
State v. Bird, 2015 UT 7
State v. Higley, 2020 UT App 45
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.~~ As of July 1, 2020, Utah Code was amended to explicitly state that driving under the influence is a strict liability offense (see HB0139-2020, line 164). For any offense committed prior to July 1, 2020, there is divergent legal authority on whether driving under the influence is a strict liability offense with respect to the operation or actual physical control of the vehicle. *See* Utah Code § 76-2-101(2) (no mental state generally required for traffic offenses), *State v. Higley*, 2020 UT App 45, and *State v. Thompson*, 2017 UT App 183; *but see State v. Vialpando*, 2004 UT App 95, ¶ 26.

Last Revised – ~~01/08/2020~~05/06/2020

For CR1005, the committee approved the following language:

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. Higley, 2020 UT App 45
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.~~ As of July 1, 2020, Utah Code was amended to explicitly state that driving under the influence is a strict liability offense (see HB0139-2020, line 164). For any offense committed prior to July 1, 2020, there is divergent legal authority on whether driving under the influence is a strict liability offense with respect to the operation or actual physical control of the vehicle. *See* Utah Code § 76-2-101(2) (no mental state generally required for traffic offenses), *State v. Higley*, 2020 UT App 45, and *State v. Thompson*, 2017 UT App 183; *but see State v. Vialpando*, 2004 UT App 95, ¶ 26.

Last Revised – ~~01/08/2020~~05/06/2020

For SVF1001 DUI Offenses, the committee approved the following language:

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), on or after July 1, 2020, without being directed or permitted by a traffic-control device or peace officer, operated a vehicle on a divided highway using the left-hand roadway;]

☐ [(DEFENDANT'S NAME), on or after July 1, 2020, without being directed or permitted by a traffic-control device or peace officer, operated a vehicle over, across, or within any dividing space, median, or barrier of a divided highway;]

☐ [(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.

Last Revised – ~~01/08/2020~~05/06/2020

After approving revisions to CR1003, CR1004, CR1005, and SVF1001, the committee returned to its consideration of the remaining legislative update items under Agenda Item (2) above.

At the conclusion of the meeting, the committee had additional discussion about next steps for the remaining work under this agenda item. Judge McCullagh provided the following guidance: the committee should next consider the "driving with measurable controlled substance" instruction, followed by the automobile homicide instructions, the actual physical control instruction(s), and the new criminal refusal instruction. Judge Blanch indicated that these matters will be first on the agenda for the next meeting.

(5) ADJOURN

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on June 3, 2020, starting at 12:00 noon via WebEx.

TAB 2

DUI and Related Traffic Instructions

NOTES: The remaining draft instructions are included (or are marked as being unavailable at this time — see items marked with an asterisk):

- driving with measurable controlled substance *(elements)* – ver. 1 and ver. 2
- automobile homicide instructions:
  - automobile homicide – mobile device *(F3 elements)*
  - automobile homicide – mobile device *(F2 elements)*
  - automobile homicide *(F3 elements)*
  - automobile homicide *(F2 elements)*
  - automobile homicide w/ priors *(special verdict form)*
- actual physical control *(definition)* ***
- criminal refusal *(elements)* ***
- refusal as evidence *(instruction)*
- DUI general definitions *(definitions)*
- alcohol restricted driver *(elements)*
- dui priors *(instruction and special verdict form)* ***

*** Materials marked with an asterisk will be provided before or during the meeting, if available*

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, other than 11-nor-9-carboxy-tetrahydrocannabinol, 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

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, other than 11-nor-9-carboxy-tetrahydrocannabinol, 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

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.

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

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

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

Placeholder for “actual physical control” instruction(s)

Placeholder for “criminal refusal” instruction

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

CR1002 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)]

For MA/F3 DUI:
“Proximate cause” means that:
(1) the person's act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence; and
(2) the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.
There may be more than one cause of the same harm.

References

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

Placeholder for “DUI Priors” instruction and special verdict form

TAB 3

CR1615 Revisions in light of HB0213

NOTES: At the May 6, 2020 meeting, the committee instructed staff to prepare a draft instruction incorporating the changes to the consent statute (Utah Code § 76-5-406) outlined in HB0213. The draft instruction and a copy of the legislation are included for your consideration.

CR1615 Consent.

(DEFENDANT'S NAME) has been charged with (name of offense). The prosecution must prove beyond a reasonable doubt that [(VICTIM'S NAME)][(MINOR'S INITIALS)] did not consent to the alleged sexual conduct.

Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act. Consent may be initially given but may be withdrawn through words or conduct at any time before or during sexual activity.

Commented [MCD1]: Utah Code § 76-5-406(3) uses the words "prior to" instead of "before"

The alleged sexual conduct is without consent of [(VICTIM'S NAME)] [(MINOR'S INITIALS)] under any, all, or a combination of the following circumstances:

[(VICTIM'S NAME)][(MINOR'S INITIALS)] expressed lack of consent through words or conduct;]

[(DEFENDANT'S NAME) overcame the victim through the application of physical force or violence;]

[(DEFENDANT'S NAME) overcame [(VICTIM'S NAME)][(MINOR'S INITIALS)] through concealment or by the element of surprise;]

[(DEFENDANT'S NAME) coerced [(VICTIM'S NAME)][(MINOR'S INITIALS)] to submit by threatening immediate or future retaliation against [(VICTIM'S NAME)][(MINOR'S INITIALS)] or any person, and [(VICTIM'S NAME)][(MINOR'S INITIALS)] thought at the time that (DEFENDANT'S NAME) had the ability to carry out the threat;]

[(DEFENDANT'S NAME) knew [(VICTIM'S NAME)][(MINOR'S INITIALS)] was unconscious, unaware that the act was occurring, or was physically unable to resist;]

[(DEFENDANT'S NAME) knew that as a result of mental illness or defect, or for any other reason [(VICTIM'S NAME)][(MINOR'S INITIALS)] was incapable at the time of the act of either understanding the nature of the act or of resisting it;]

[(DEFENDANT'S NAME) knew that [(VICTIM'S NAME)][(MINOR'S INITIALS)] ~~submitted or~~ participated because [(VICTIM'S NAME)][(MINOR'S INITIALS)] erroneously believed that (DEFENDANT'S NAME) was ~~[(VICTIM'S NAME)][(MINOR'S INITIALS)]'s spouse~~someone else;]

[(DEFENDANT'S NAME) intentionally impaired [(VICTIM'S NAME)][(MINOR'S INITIALS)]'s power to understand or control [(VICTIM'S NAME)][(MINOR'S INITIALS)]'s conduct by giving [(VICTIM'S NAME)][(MINOR'S INITIALS)] a substance without [(VICTIM'S NAME)][(MINOR'S INITIALS)]'s knowledge;]

[(MINOR'S INITIALS) was younger than 14 years old at the time of the act;]

[At the time of the act, (MINOR'S INITIALS) was younger than 18 years old and (DEFENDANT'S NAME) was (MINOR'S INITIALS)'s parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to (MINOR'S INITIALS);]

[(MINOR'S INITIALS) was 14 years old or older, but younger than 18 years old, and (DEFENDANT'S NAME) was more than three years older than (MINOR'S INITIALS) and enticed or coerced (MINOR'S INITIALS) to submit or participate, under circumstances not amounting to physical force or violence or the threat of retaliation;]

[(DEFENDANT'S NAME) was a health professional or religious counselor who committed the act under the guise of providing professional diagnosis, counseling or treatment, and at the time of the act [(VICTIM'S

NAME)][(MINOR'S INITIALS)] reasonably believed the act was for professionally appropriate reasons, so that [(VICTIM'S NAME)][(MINOR'S INITIALS)] could not reasonably be expected to have expressed resistance.]

In deciding lack of consent, you are not limited to the circumstances listed above. You may also apply the common, ordinary meaning of consent to all of the facts and circumstances of this case.

References
Utah Code § 76-5-406
Utah Code § 76-5-407
State v. Barela, 2015 UT 22
State v. Thompson, 2014 UT App 14

Committee Notes
This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

Last Revised – 09/04/2019

CONSENT LANGUAGE AMENDMENTS

2020 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Angela Romero

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This bill clarifies when consent may be given or withdrawn for sexual activity.

Highlighted Provisions:

This bill:

- makes clarifying changes regarding consent to sexual activity.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

76-5-406, as last amended by Laws of Utah 2019, Chapters 146, 189, and 349

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-5-406** is amended to read:

76-5-406. Sexual offenses against the victim without consent of victim -- Circumstances.

(1) As used in this section:

(a) "Health professional" means an individual who is licensed or who holds the individual out to be licensed, or who otherwise provides professional physical or mental health services, diagnosis, treatment, or counseling, including an athletic trainer, physician,

osteopathic physician, physician assistant, nurse, dentist, physical therapist, chiropractor, mental health therapist, social service worker, clinical social worker, certified social worker, marriage and family therapist, professional counselor, psychiatrist, psychologist, psychiatric mental health nurse specialist, or substance abuse counselor.

(b) "Religious counselor" means a minister, priest, rabbi, bishop, or other recognized member of the clergy.

(c) "To retaliate" includes threats of physical force, kidnapping, or extortion.

(2) An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, forcible sodomy, attempted forcible sodomy, sodomy on a child, attempted sodomy on a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child, attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of the victim under any of the following circumstances:

(a) the victim expresses lack of consent through words or conduct;

(b) the actor overcomes the victim through the actual application of physical force or violence;

(c) the actor is able to overcome the victim through concealment or by the element of surprise;

(d) (i) the actor coerces the victim to submit by threatening to retaliate in the immediate future against the victim or any other person, and the victim perceives at the time that the actor has the ability to execute this threat; or

(ii) the actor coerces the victim to submit by threatening to retaliate in the future against the victim or any other person, and the victim believes at the time that the actor has the ability to execute this threat;

(e) the actor knows the victim is unconscious, unaware that the act is occurring, or <u>is</u> physically unable to resist;

(f) the actor knows or reasonably should know that the victim has a mental disease or defect, which renders the victim unable to:

(i) appraise the nature of the act;

(ii) resist the act;

(iii) understand the possible consequences to the victim's health or safety; or

(iv) appraise the nature of the relationship between the actor and the victim;

(g) the actor knows that the victim [~~submits or~~] participates because the victim erroneously believes that the actor is [~~the victim's spouse~~] someone else;

(h) the actor intentionally impaired the power of the victim to appraise or control his or her conduct by administering any substance without the victim's knowledge;

(i) the victim is younger than 14 years of age;

(j) the victim is younger than 18 years of age and at the time of the offense the actor was the victim's parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to the victim as defined in Section 76-5-404.1;

(k) the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not amounting to the force or threat required under Subsection (2)(b) or (d); or

(l) the actor is a health professional or religious counselor, the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.

(3) Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act. Consent may be initially given but may be withdrawn through words or conduct at any time prior to or during sexual activity.

TAB 4

Jury Unanimity and *State v. Alires*, 2019 UT App 206

NOTES: At the May 6, 2020 meeting, the committee determined it should wait until the Utah Supreme Court decided the then-pending petition for certiorari. That petition was denied by the Court on May 8, 2020. The committee should determine how to proceed on this matter. The materials that follow were previously discussed by the committee at the February 5, 2020 meeting, and were again included in the May 6, 2020 meeting materials. There are no new materials to review at this time.

Unanimity when multiple acts are offered to support one offense and each of those acts could have been charged separately:

- (Defendant) is charged [in Count _____] with [crime] [on or about _____] . The State has presented evidence of more than one act to prove that (Defendant) committed this offense. You must not find (Defendant) guilty unless you unanimously find beyond a reasonable doubt that the State has proved that (Defendant) committed at least one of these acts and you all agree on which act or acts he/she committed.

OR

- (Defendant) is charged [in Count _____] with [crime] [on or about _____] . The State has presented evidence of more than one act to prove that (Defendant) committed this offense. To find (Defendant) guilty, you must unanimously find beyond a reasonable doubt that (Defendant) committed at least one of these acts under the circumstances and with the mental state required for the crime and you all agree on which act or acts he/she committed.

QUESTION - What do we do if Defendant is charged with a sex crime based on specific touching but the prosecutor wants to include the "indecent liberties" alternative of guilt?

Unanimity when multiple acts are offered to support multiple offenses:

- (Defendant) is charged with multiple counts of _____. Each count addresses a distinct occurrence of a distinct act. To find (Defendant) guilty on any count, you must all agree on the distinct act that applies to that count. You must further unanimously find beyond a reasonable doubt that (Defendant) committed that act under the circumstances and with the mental state required for the crime.

QUESTION - What do we do if Defendant is charged with sex crimes based on specific touchings but the prosecutor wants to include a single "indecent liberties" alternative of guilt?

Unanimity when multiple acts or mental states (theories) support one offense and the acts/mental states could not have been charged separately (this is the murder by strangulation or poison example):

- (Defendant) is charged with [crime]. The elements of [crime] are defined in Instruction [Number]. To convict (Defendant) of [crime], you must all agree beyond a reasonable doubt that the State has proved each and every element of the crime. However, [crime] can be committed in alternative ways, and you do not have to unanimously agree on the way (Defendant) committed the crime. Similarly, although you must unanimously find beyond a reasonable doubt that (Defendant) acted with one of the mental states defined in the elements instruction, you do not have to all agree on the mental state (Defendant) acted with.

QUESTION - What do we do if Defendant is charged with an attempted crime that falls under this category (like murder, where each attempt arguably could be charged separately)?

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]"

---

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]

---

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

---

(…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

---

(…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]

---

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.