

**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.

MEMBERS:	PRESENT	EXCUSED	GUESTS:
Judge James Blanch, <i>Chair</i>	•		None
Jennifer Andrus	•		
Melinda Bowen	•		
Mark Field	•		STAFF:
Sandi Johnson	•		Michael Drechsel
Judge Linda Jones, <i>Emeritus</i>	•		
Karen Klucznik	•		
Elise Lockwood	•		
Judge Brendan McCullagh	•		
Debra Nelson	•		
Stephen Nelson	•		
Nathan Phelps	•		
Judge Michael Westfall	•		
Scott Young		•	

(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 erroneously 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 – 01/08/202005/06/2020

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.