

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

Via WebEx
June 3, 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	•		
Sandi Johnson	•		
Judge Linda Jones, <i>Emeritus</i>	•		
Karen Klucznik		•	
Elise Lockwood		•	
Judge Brendan McCullagh		•	
Debra Nelson	•		
Stephen Nelson		•	
Nathan Phelps	•		
Judge Michael Westfall	•		
Scott Young	•		

STAFF:

Michael Drechsel
Jiro Johnson (minutes)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting. The committee considered the minutes from the May 6, 2020 meeting. Ms. Nelson moved to approve the draft minutes. Mr. Field seconded the motion. The motion passed unanimously.

(2) CR1616A CONDUCT SUFFICIENT TO CONSTITUTE SEXUAL INTERCOURSE FOR UNLAWFUL SEXUAL ACTIVITY WITH A MINOR, UNLAWFUL SEXUAL CONDUCT WITH A 16 OR 17 YEAR OLD, OR RAPE:

Judge Blanch asked that the committee take matters on the agenda out of order, starting with the third agenda item. The committee discussed the need to amend the current instruction CR1616A regarding penetration for offenses involving “sexual intercourse.” The committee discussed the proposed instruction language included in the meeting materials.

Ms. Johnson raised a concern that this language, although legally correct, would require a medical person to scientifically identify what the outer folds of the labia are. Other committee members weigh in on this concern. Judge Blanch highlighted that the committee has typically provided definitional instruction based upon statutory language, but has also done so when case law explicitly provides interpretive direction on the meaning of statutory language. The language proposed in this modification comes from case law.

The committee made one minor grammatical change (removing a comma after the word “however”) and added three case citations to the references. With these minor changes, Mr. Young made a motion to adopt the proposed instruction. Ms. Nelson seconded. The Committee voted unanimously to approve the following changes to the language of CR1616A:

CR1616A CONDUCT SUFFICIENT TO CONSTITUTE SEXUAL INTERCOURSE FOR UNLAWFUL SEXUAL ACTIVITY WITH A MINOR, UNLAWFUL SEXUAL CONDUCT WITH A 16 OR 17 YEAR OLD, OR RAPE.

~~For purposes of [Unlawful Sexual Activity with a Minor][Unlawful Sexual Conduct with a 16 or 17 year old][Rape], any sexual penetration, however slight, is sufficient to constitute sexual intercourse. You are instructed that any sexual penetration of the penis between the outer folds of the labia, however slight, is sufficient to constitute "sexual intercourse" for purposes of the offense of [Unlawful Sexual Activity with a Minor] [Unlawful Sexual Conduct with a 16 or 17 Year Old] [Rape].~~

REFERENCES

Utah Code § 76-5-401
Utah Code § 76-5-401.2
Utah Code § 76-5-402
Utah Code § 76-5-407
State v. Simmons, 759 P.2d 1152 (Utah 1988)
State v. Patterson, 2017 UT App 194
State v. Heath, 2019 UT App 186
State v. Martinez, 2002 UT 80
State v. Martinez, 2000 UT App 320

COMMITTEE NOTES

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

Last Revised - 06/03/2020

(3) CR1607 OBJECT RAPE AND STATE V. HEATH, 2019 UT APP 186:

Judge Blanch turned the committee’s attention to CR1607. The committee discussed the draft language included in the meeting materials. The committee discussed the order of the two bracket options and whether there may be confusion in how the options are ordered. The committee resolved to change the order of the bracketed options as indicated in the approved language below. Mr. Field raised a concern that the term “genital opening” is broader than the term “vaginal opening” in that genital opening includes “the outer fold of the labia.” The committee discussed modifications to the language to address this issue. Ms. Nelson felt that the floor of conduct encapsulated by this statute is penetration of the outer folds of the labia (i.e., that it would not be possible to penetrate the vaginal opening without first penetrating the outer folds of the labia). The committee agreed with this assessment and crafted the language of the instruction to address this observation. The committee also discussed whether it was necessary to include a committee note to practitioners that the instruction would need to be modified in the uncommon circumstance where the “genital opening” at issue

under the facts of the case was the male urethral opening. Ultimately, the committee concluded that the language crafted by the committee in element 2 obviated the need to craft a committee note.

Based upon the discussion of the committee, and the resulting changes to the proposed language in the meeting materials, Ms. Nelson moved to approve the modified language (included below). Mr. Field seconded that motion. The committee voted unanimously in support of the motion, and approved the following language:

CR1607 OBJECT RAPE.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Object Rape [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. Intentionally, knowingly, or recklessly caused the penetration, however slight, of [(VICTIM'S NAME) [MINOR'S INITIALS]]'s anal opening [(VICTIM'S NAME) [MINOR'S INITIALS]]'s genital opening, including the outer folds of the labia) [(VICTIM'S NAME) [MINOR'S INITIALS]]'s genital or anal opening, by any object or substance other than the mouth or genitals;
3. The act was without [(VICTIM'S NAME) [MINOR'S INITIALS]]'s consent;
4. (DEFENDANT'S NAME) acted with intent, knowledge, or recklessness that [(VICTIM'S NAME) [MINOR'S INITIALS]] did not consent; and
5. (DEFENDANT'S NAME) did the act with the intent to:
 - a. cause substantial emotional or bodily pain to [(VICTIM'S NAME) [MINOR'S INITIALS]]; or
 - b. arouse or gratify the sexual desire of any person.

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 § 76-5-402.2
State v. Barela, 2015 UT 22
State v. Simmons, 759 P.2d 1152 (Utah 1988)
State v. Patterson, 2017 UT App 194
State v. Heath, 2019 UT App 186

COMMITTEE NOTES

~~For a definition of vaginal "penetration" for purposes of this instruction, see *State v. Patterson*, 2017 UT App 194, ¶13 (citing *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988)).~~

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

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. See [SVF 1617, Sexual Offense Prior Conviction](#) or [SVF 1618, Serious Bodily Injury](#).

(4) CR1615 CONSENT:

Judge Blanch requested that the committee consider changes to CR1615, as necessitated by HB0213 (<https://le.utah.gov/~2020/bills/static/HB0213.html>) from the 2020 legislative session. Mr. Drechsel explained the draft changes in the meeting materials. The committee engaged in discussion regarding how to best incorporate the new subsection (3) in Utah Code § 76-5-406(3) (lines 79-81).

Ms. Johnson raised a concern that withdrawing consent is not limited to words or conduct but at any time prior to or during a sexual act. Judge Blanch asked are there other methods to give or withdraw consent. Mr. Field gave an example where someone froze during sex and could not use words or conduct. Judge Blanch asked if we remove “through words or conduct” is there a possibility that some conduct becomes criminal that was not made criminal by the statute. Ms. Andrus stated that this change would only make things more readable. Mr. Young argued that “through words or conduct” is in the statute but also is more understandable by jurors who are not likely to use terms like consent when commonly referring to sexual conduct.

After significant back and forth, the committee ultimately determined that it would be best to incorporate the statutory language verbatim, with the following two minor modifications: 1) omitting the words “through words or conduct” (line 81) because the committee could not conceive of any other method whereby consent might be withdrawn; and 2) changing the words “prior to” to “before” (line 81) to improve readability for lay jurors. Ms. Johnson moved to incorporate those changes into the instruction. Ms. Nelson seconded that motion. The Committee voted unanimously in favor of the motion and the motion passed.

The Committee then considered the portion of the instruction discussing erroneous belief that the other person was the alleged victim’s spouse. HB0213 expanded this erroneous belief provision from “spouse” to “someone else” (i.e., any person other than the specific person who the alleged victim believed the person to be). The committee discussed changing “erroneously” to “mistakenly” or “incorrectly,” as one of those two options was believed to be more understandable to a juror. Ultimately the committee agreed that “incorrectly” was the better option as it avoids introducing the possible value judgment that the concept of “mistake” might introduce into the instruction. Having concluded the discussion, Ms. Nelson made a motion to adopt the changes, and Judge Westfall seconded that motion. The Committee unanimously voted in favor of the motion.

As a result of the two motions on this matter, the entire committee approved the following amended language to CR1615:

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 at any time before or during sexual activity.

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)] incorrectly 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 (revised); 06/03/2020 (revised for HB0213)

(5) JURY UNANIMITY AND *STATE V. ALIRES*, 2019 UT APP 206:

The committee entertained a brief discussion on this agenda item. Ms. Nelson recommended that the committee address this on the agenda at the next meeting so that Ms. Nelson and Ms. Klucznik can coordinate and prepare for the discussion. Judge Blanch instructed staff to include this matter on the next meeting agenda.

(6) ADJOURN

At the conclusion of the meeting, the committee discussed whether the committee should meet in July or August (in light of the fact that a meeting earlier in the year was canceled). The committee agreed that there should be no meeting in July (as previously planned). The committee agreed to meet in August (contrary to the previous plan) in order to continue its work on the DUI and jury unanimity instructions. In order to address those items, the committee will need to have certain members present on August 5th who were not able to attend today. Judge Blanch instructed Mr. Drechsel to reach out to the committee members to check for conflicts. If there is no conflict, then Mr. Drechsel will send out the calendar invite and meeting materials to the committee as a whole. The meeting adjourned at approximately 1:22 p.m. The next meeting is tentatively scheduled for August 5, 2020, starting at 12:00 noon (most likely via WebEx).