

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

Via WebEx
September 2, 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	•		STAFF: Michael Drechsel Jiro Johnson (minutes)
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 <i>(from 12:45-13:20 due to court calendar)</i>	•		
Scott Young		•	

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting. The committee considered the minutes from the August 5, 2020 meeting. Mr. Phelps moved to approve the draft minutes. Ms. Johnson seconded the motion. The motion passed.

(2) “INDECENT LIBERTIES” DEFINITION FOR CR1601:

Mr. Drechsel reported to the committee on his efforts to follow the committee’s August direction to make tense and stylistic changes to the statutory definition of “indecent liberties” (Utah Code § 76-5-416). The committee discussed the best manner to approach the definition, including various possibilities to ensure the definition is an accurate reflection of the statute and harmonizes with the tense of other MUJI instructions. Mr. Phelps noted that the tense difference between “take” and “took” will likely not pose a problem for jurors. Ms. Klucznik asked whether “the actor” in subparagraph (1) is necessary. After exploring some other possibilities (i.e., changing the gerunds—touching, causing, simulating, etc.—to past tense verbs—touched, caused, simulated, etc.), the

committee ultimately determined that the simplest solution that hews most closely to the statute is for the definition to be for “indecent liberties” (as opposed to the statute’s “take indecent liberties”) and that the words “the actor” should be removed from subparagraph (1), with no other changes, as follows:

“~~Take~~ []ndecent liberties” means:

- (1) ~~the actor~~ touching [(VICTIM’S NAME) (MINOR’S INITIALS)]’s genitals, anus, buttocks, pubic area, or female breast;
- (2) causing any part of [(VICTIM’S NAME) (MINOR’S INITIALS)]’s body to touch the actor’s or another’s genitals, pubic area, anus, buttocks, or female breast;
- (3) simulating or pretending to engage in sexual intercourse with [(VICTIM’S NAME) (MINOR’S INITIALS)], including genital-genital, oral-genital, anal-genital, or oral-anal intercourse; or
- (4) causing [(VICTIM’S NAME) (MINOR’S INITIALS)] to simulate or pretend to engage in sexual intercourse with the actor or another, including genital-genital, oral-genital, anal-genital, or oral-anal intercourse.

Reference:

Utah Code Ann. § 76-5-416

Committee Note:

The legislature enacted the above definition, effective May 14, 2019. Before that date, the definition was based upon case law. See, e.g., State v. Lewis, 2014 UT App 241, 337 P.3d 1053; State v. Peters, 796 P.2d 708 (Utah App. 1990)

Ms. Klucznik made motion to adopt the language; Ms. Nelson seconded the motion. The motion passed unanimously. Staff will publish the adopted language, which will replace the previous case-law-based definition, which will be preserved in these minutes / meeting materials, and read as follows:

[“Indecent liberties” is defined as conduct that is as serious as touching [under clothing] the anus, buttocks, or genitals of a person or the breast of a female.

In deciding whether conduct amounts to indecent liberties, use your judgment and common sense. You may consider such factors as:

- (1) the duration of the conduct;
- (2) the intrusiveness of the conduct against [(VICTIM’S NAME) (MINOR’S INITIALS)]’s person;
- (3) whether [(VICTIM’S NAME) (MINOR’S INITIALS)]’s requested that the conduct stop;
- (4) whether the conduct stopped upon request;
- (5) the relationship between [(VICTIM’S NAME) (MINOR’S INITIALS)]’s and the defendant;
- (6) [(VICTIM’S NAME) (MINOR’S INITIALS)]’s age; and

(7) whether [(VICTIM'S NAME) (MINOR'S INITIALS)]'s was forced or coerced to participate, and any other factors you consider relevant.

The fact that touching may have occurred over clothing does not preclude a finding that the conduct amounted to indecent liberties.]

Reference: *State v. Lewis*, 2014 UT App 241, 337 P.3d 1053; *State v. Peters*, 796 P.2d 708 (Utah App. 1990)

(3) BATTERED PERSON MITIGATION:

The committee heard from Ms. Klucznik on the materials she previously prepared for “Battered Person Mitigation” (SB0238-2020). These materials were located in Tab 3 of the meeting materials. This was the first time the committee considered these materials. Ms. Klucznik explained her approach to the materials generally. She explained that she patterned these proposed instructions after the imperfect self-defense instructions. She also incorporated the “clear and convincing” standard from the civil jury instructions.

Ms. Johnson pointed out that in her review of the battered person mitigation (BPM) statute (Utah Code § 76-2-409), imperfect self-defense may not be the best model for these BPM instructions. Ms. Johnson pointed out that imperfect self-defense requires the prosecution to prove beyond a reasonable doubt that the defense does not apply. If the prosecution is unable to meet that burden, then the conviction would be for a different named offense at a different level of offense. In contrast, the burden for BPM is placed, by statute, on the defendant to prove by clear and convincing evidence that the defendant is entitled to mitigation, after having been convicted of the charged offense. If the defendant is able to meet that burden, then only the level of that charged offense is reduced (but the name of the offense does not change). In her view, the BPM instructions should be formulated as follows:

- (1) the jury should be provided an elements instruction and verdict form for the charged offense;
- (2) if the jury finds that the State has proved those elements beyond a reasonable doubt, then the jury would consider the BPM elements and have a verdict form for those BPM elements; and
- (3) if the jury finds that the defendant has proven those BPM elements by clear and convincing evidence, then the level of the charged offense would be reduced one degree by the judge at the time of sentencing.

In other words there would be separate regular verdict forms for each of the verdict inquiries. Ms. Klucznik suggested that she take these materials back and rework them in light of the committee discussion. Judge Blanch agreed with that approach. The reworked materials will be reconsidered at the next meeting.

(4) PUBLIC COMMENT REVIEW:

The committee continued its review of public comments received in connection with the large number of instructions that were published from June 3, 2020, through July 19, 2020.

IMPERFECT SELF-DEFENSE REVISIONS

Ms. Klucznik described some public comments related to the committee’s imperfect self-defense instructions (CR1411, CR1450, CR1451, CR1452, and SVF1450). She indicated that, based on public comment, there are two issues to address:

- 1) the committee should consider removing reference to the word “guilty” in connection with the greater crime until and unless the State has disproved imperfect self-defense beyond a reasonable doubt; and
- 2) the current instructions do not address how to handle the situation where a defendant claims imperfect self-defense to all offenses (i.e., aggravated murder and the lesser offense of murder.

Ms. Klucznik walked the committee through proposed changes to several instructions—CR1411 (labeled CR1411B), CR1450, CR1451, CR1452, and SVF1450—as follows:

CR1411B MURDER with IMPERFECT SELF-DEFENSE

(DEFENDANT’S NAME) is charged [in Count __] with committing Murder [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.
 - a. Intentionally or knowingly caused the death of another[;]
 - b. Intending to cause serious bodily injury to another, (DEFENDANT’S NAME) committed an act clearly dangerous to human life that causes the death of another[;]
 - c. Acting under circumstances evidencing a depraved indifference to human life, (DEFENDANT’S NAME) knowingly engaged in conduct which created a grave risk of death to another and thereby caused the death of another[;]
 - d. While engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)],
 - i. (VICTIM’S NAME) was killed; and
 - ii. (DEFENDANT’S NAME) acted with the intent required as an element of the predicate offense[;]
 - e. recklessly caused the death of a peace officer or military service member in uniform while in the commission of
 - i. an assault against a peace officer;
 - ii. interference with a peace officer making a lawful arrest, if (DEFENDANT’S NAME) used force against a peace officer; or
 - iii. an assault against a military service member in uniform.]
3. The defense of self-defense, defense-of-others, defense-of-habitation does not apply.]

After you carefully consider all the evidence in this case, 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 of this crime.

~~On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, On the other hand, if you find Defendant GUILTY beyond a reasonable doubt,~~ then you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____.

CR1450 Practitioner's Note: Explanation Concerning Imperfect Self-Defense

Imperfect self-defense is an affirmative defense that can reduce aggravated murder to murder, attempted aggravated murder to attempted murder, murder to manslaughter, and attempted murder to attempted manslaughter. See Utah Code Ann. § 76-5-202(4) (aggravated murder); Utah Code Ann. § 76-5-203(4) (murder).

When the defense is asserted, the State must disprove the defense beyond a reasonable doubt before the defendant can be convicted of the greater crime. If the State cannot disprove the defense beyond a reasonable doubt, the defendant can be convicted only of the lesser crime.

Instructing the jury on imperfect self-defense has proved to be problematic because many practitioners have tried to include the defense as an element of either or both of the greater crime and the reduced crime. The inevitable result is that the elements instruction on the reduced crime misstates the burden of proof on the defense as it applies to that reduced crime. See, e.g., State v. Lee, 2014 UT App 4, 318 P.3d 1164.

To avoid these problems, these instructions direct the jury to decide the defense exclusively through a special verdict form. Under this approach, the jury is given a standard elements instruction on the greater offense, with no element addressing imperfect self-defense. If the jury finds that the State has proved the elements of the greater offense beyond a reasonable doubt, ~~the elements instruction on the greater offense directs the jury enters a guilty verdict on that offense. The jury is directed to to~~ the imperfect self-defense instructions and instructs ~~the jury~~ that it must complete the imperfect self-defense special verdict form. On the special verdict form, the jury must indicate whether it has unanimously found that the State disproved the defense beyond a reasonable doubt. If the jury indicates the State has disproved the defense ~~and that the defendant is thus guilty of the greater crime~~, the trial court enters a conviction for the greater crime. If the jury indicates the State has not disproved the defense ~~and that the defendant is thus guilty of the lesser crime~~, the trial court enters a conviction for the lesser crime.

~~The committee considered State v. Drej, 2010 UT 35, 233 P.3d 476, and concluded that it does not preclude this approach.~~

CR1451 Explanation of Perfect and Imperfect Self-Defense as Defenses

Perfect self-defense is a complete defense to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter]. The defendant is not required to prove that perfect self-defense applies. Rather, the State must prove beyond a reasonable doubt that perfect self-defense does not apply. The State has the burden of proof at all times. As Instruction ____ provides, for you to find the defendant guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter], the State must prove beyond a reasonable doubt that perfect self-defense does not apply. Consequently, your decision regarding perfect self-defense will be reflected in the “Verdict” form for Count [#].

You ~~do not have to~~ must consider imperfect self-defense ~~unless only if~~ OR You must consider imperfect self-defense if you find ~~that the State has proved all the elements the defendant guilty of~~ [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder] ~~;~~ beyond a reasonable doubt. Imperfect self-defense is a partial defense to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]. It applies when the defendant caused the death of another while incorrectly, but reasonably, believing that (his)(her) conduct was legally justified or excused. The effect of the defense is to reduce the level of the offense. The defendant is not required to prove that imperfect self-defense applies. Rather, before you can find the defendant guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder], the State must prove beyond a reasonable doubt that imperfect self-defense does not apply. The State has the burden of proof at all times. Your decision will be reflected in the special verdict form titled “Special Verdict Imperfect Self-Defense.”

References

Utah Code § 76-5-202(4)
Utah Code § 76-5-203(4)
Utah Code § 76-5-205
Utah Code § 76-2-402
Utah Code § 76-2-404
Utah Code § 76-2-405
Utah Code § 76-2-407

Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the “Special Verdict Imperfect Self-Defense” special verdict form;
- Do not include “imperfect self-defense” as a defense in the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction #3 above;
- Do not use an “imperfect self-defense manslaughter” elements instruction;
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Make sure that last paragraph of the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction contains the following languageAdd the following paragraph at the bottom of this elements instruction:

“If you are convinced that each and every element has been proven beyond a reasonable doubt, if you find Defendant GUILTY beyond a reasonable doubt of murder, you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____.”

CR1452 Special Verdict Form - Imperfect Self-Defense

If you find that the State has proved all the elements of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder] beyond a reasonable doubt, if you determine beyond a reasonable doubt that (DEFENDANT'S NAME) committed [Aggravated Murder][Attempted Aggravated

~~Murder~~~~[Murder]~~~~[Attempted Murder]~~, you must complete the special verdict form titled “Special Verdict Imperfect Self-Defense.”

- Check ONLY ONE box on the form.
- The foreperson MUST sign the special verdict form.

References

State v. Lee, 2014 UT App 4
State v. Ramos, 2018 UT App 161
State v. Navarro, 2019 UT App 2

Committee Notes

Whenever imperfect self-defense is submitted to the jury:

In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);

- Use the “Special Verdict Imperfect Self-Defense” special verdict form;
- Do not include “imperfect self-defense” as a defense in the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction element #3 above;
- Do not use an “imperfect self-defense manslaughter” elements instruction;
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Make sure that last paragraph of the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction contains the following language~~Add the following paragraph at the bottom of this elements instruction:~~

“If you are convinced that each and every element has been proven beyond a reasonable doubt, if you find Defendant GUILTY beyond a reasonable doubt of murder, you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____.”

Use Special Verdict Form SVF1450 in connection with this instruction.

SVF 1450. Imperfect Self-Defense.

(LOCATION) JUDICIAL DISTRICT COURT, [_____ DEPARTMENT,]
IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff,	:	SPECIAL VERDICT
	:	IMPERFECT SELF-DEFENSE
	:	
-vs-	:	Count (#)
	:	
(DEFENDANT’S NAME),		
Defendant.		Case No. (**)

Having found the State has proved all the elements of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder] beyond a reasonable doubt,~~the defendant, (DEFENDANT’S NAME), guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder],~~ as charged in Count [#],

Check ONLY ONE of the following boxes:

We unanimously find that the State has proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply, and thus we unanimously find that (DEFENDANT’S NAME) is guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder].

OR

We do not unanimously find that the State has proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply, and thus we unanimously find that (DEFENDANT’S NAME) is guilty of [Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter].

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

Foreperson

References

State v. Lee, 2014 UT App 4
State v. Ramos, 2018 UT App 161
State v. Navarro, 2019 UT App 2

Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the “Special Verdict Imperfect Self-Defense” special verdict form;
- Do not include “imperfect self-defense” as a defense in the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction element #3 above;
- Do not use an “imperfect self-defense manslaughter” elements instruction;

- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Make sure that last paragraph of the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction contains the following language~~Add the following paragraph at the bottom of this elements instruction:~~

“If you are convinced that each and every element has been proven beyond a reasonable doubt,~~If you find Defendant GUILTY beyond a reasonable doubt of murder,~~ you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____.”

The committee discussed the major points of these proposed changes. Judge Blanch expressed some concern, on the one hand, about making changes to MUJI instructions that have been favorably mentioned by the Supreme Court. On the other hand, Judge Blanch also felt these proposed changes do not change the parts of the instructions that were relevant to the Supreme Court.

The committee discussed other ways in which these same result could be accomplished for instructions and verdict forms involving imperfect self-defense. Ms. Johnson suggested that she had some concern with having a regular verdict form AND a special verdict form and the confusion that may result from how the various instructions and verdict forms would be explained to the jury. She suggested that it might be better to have a verdict form that was similar to the “lesser included” verdict form layout where the instruction explains, for instance, that a person has been charged with murder, but that a lesser included charge is manslaughter with mitigation. In order to find the person guilty of murder, here are the elements, for manslaughter, here are the elements, and then not guilty. Then on the verdict form, have options for murder, manslaughter with mitigation, and not guilty. The primary concern is to make sure the instruction and verdict form is laid out carefully to avoid juror confusion and ensure that the jury’s findings are accurately captured. For these reasons, Ms. Johnson wondered if it would be better to get rid of the special verdict form altogether.

After this discussion, Judge Blanch asked if Ms. Klucznik and Ms. Johnson would work together to take the proposed materials outlined above and convert them to the format Ms. Johnson had described. They agreed to work together on this prior to the next meeting. Judge Blanch then turned the committee’s attention to the next items of public feedback that Ms. Klucznik had prepared to address. Nothing on the proposed language for the materials—CR1411 (labeled CR1411B), CR1450, CR1451, CR1452, and SVF1450—was approved during this meeting.

CR1411 MURDER INSTRUCTION – VICTIM CANNOT BE PARTY TO THE OFFENSE

Ms. Klucznik noted that a few public comments identified that the felony murder alternative in CR1411 (murder) should include that the victim cannot be party to the predicate offense. She proposed the following change to incorporate the public feedback into the instruction:

CR1411 Murder

(DEFENDANT’S NAME) is charged [in Count ___] with committing Murder [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.
 - a. [intentionally or knowingly caused the death of (VICTIM’S NAME); or]
 - b. [intending to cause serious bodily injury to another, (DEFENDANT’S NAME) committed an act clearly dangerous to human life that caused the death of (VICTIM’S NAME); or]
 - c. [acting under circumstances evidencing a depraved indifference to human life, (DEFENDANT’S NAME) knowingly engaged in conduct which created a grave risk of death to another and thereby caused the death of (VICTIM’S NAME); or]
 - d. [while engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)],
 - i. (VICTIM’S NAME), who was not a party to the predicate offense, was killed; and
 - ii. (DEFENDANT’S NAME) acted with the intent required as an element of the predicate offense; or]
 - e. [recklessly caused the death of (VICTIM’S NAME), a peace officer or military service member in uniform while in the commission of
 - i. an assault against a peace officer;
 - ii. interference with a peace officer making a lawful arrest, if (DEFENDANT’S NAME) used force against a peace officer; or
 - iii. an assault against a military service member in uniform.]
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 § 76-5-203

Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the “Special Verdict Imperfect Self-Defense” special verdict form;
- Do not include “imperfect self-defense” as a defense in element #3 above;
- Do not use an “imperfect self-defense manslaughter” elements instruction;
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Add the following paragraph at the bottom of this elements instruction:

“If you find Defendant GUILTY beyond a reasonable doubt of murder, you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____.”

Last Revised – 04/03/2019

The committee discussed this proposed change. During the discussion, the committee made a number of revisions to Ms. Klucznik’s proposed draft, including:

- bracketing “[predicate offense(s)]”;
- splitting the first element into two separate elements (i. victim was killed; ii. victim was not a party to the [predicate offense(s)]); and
- other minor stylistic corrections, as follows:

CR1411 Murder

(DEFENDANT’S NAME) is charged [in Count ___] with committing Murder [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.
 - a. [intentionally or knowingly caused the death of (VICTIM’S NAME); or]
 - b. [intending to cause serious bodily injury to another, (DEFENDANT’S NAME) committed an act clearly dangerous to human life that caused the death of (VICTIM’S NAME); or]
 - c. [acting under circumstances evidencing a depraved indifference to human life, (DEFENDANT’S NAME) knowingly engaged in conduct which created a grave risk of death to another and thereby caused the death of (VICTIM’S NAME); or]
 - d. [while engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)],
 - i. (VICTIM’S NAME) was killed;
 - ii. (VICTIM’S NAME); who was not a party to [the predicate offense(s)];-was killed;and
 - iii. (DEFENDANT’S NAME) acted with the intent required as an element of [the predicate offense(s)]; or]
 - e. [recklessly caused the death of (VICTIM’S NAME), a peace officer or military service member in uniform while in the commission of
 - i. an assault against a peace officer;
 - ii. interference with a peace officer making a lawful arrest, if (DEFENDANT’S NAME) used force against a peace officer; or
 - iii. an assault against a military service member in uniform.]
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 § 76-5-203

Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions, use CR1451 (amended as appropriate);
- Use the “Special Verdict Imperfect Self-Defense” special verdict form;
- Do not include “imperfect self-defense” as a defense in element #3 above;
- Do not use an “imperfect self-defense manslaughter” elements instruction;
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Add the following paragraph at the bottom of this elements instruction:

“If you find Defendant GUILTY beyond a reasonable doubt of murder, you must decide whether the defense of imperfect self-defense applies and complete the special verdict form concerning that defense. Imperfect self-defense is addressed in Instructions _____.”

Last Revised – ~~04/03/2019~~09/02/2020

Ms. Klucznik moved to approve these changes; Ms. Johnson seconded the motion. The committee voted unanimously in support of the motion.

NEW INSTRUCTION – CR1411A ADDITIONAL INSTRUCTION WHEN FELONY MURDER IS CHARGED

Ms. Klucznik explained that public comment had identified a need to clearly state the relevant intent associated with the predicate offense(s). Often, practitioners only note in the murder instruction what the predicate offense is, but do not include any information about the intent for the predicate offense. One possible method is to create a new instruction (proposed CR1411A) for when felony murder is charged, as follows:

CR1411A Additional instruction when felony murder is charged

As Instruction _____ provides, you may find (DEFENDANT’S NAME) guilty of murder if:

while engaging in the commission, attempted commission, or immediate flight from the commission or attempted commission of [the predicate offense(s)], or as a party to [the predicate offense(s)].

- i. (VICTIM’S NAME), who was not a party to the predicate offense, was killed; and
- ii. (DEFENDANT’S NAME) acted with the intent required as an element of the predicate offense.

The relevant predicate offenses here are [name offenses].

The elements of [name predicate offense] are contained in Instruction _____. As that instruction states, the intent element for [name predicate offense] is _____.

[The elements of [name predicate offense] are contained in Instruction _____. As that instruction states, the intent element for [name predicate offense] is _____.]

After Ms. Klucznik explained the thinking behind this proposal, the committee discussed the language. Ms. Johnson recognized the need for an instruction like this, but found this particular formulation to be confusing. Ms. Klucznik and Ms. Johnson discussed other ways to accomplish the same result. Ms. Johnson suggested that this would need additional attention before the next meeting. Ms. Klucznik proposed that she and Mr. Field would tackle the drafting on this and on the “Imperfect Self-Defense Revisions” materials (above), since this is their area of responsibility. Once that work is completed, they would send the more polished materials to Ms. Johnson for review. Ms. Johnson found that to be a very agreeable plan. Nothing on this language was approved during this meeting.

CR522 DEFENSE OF HABITATION – PRESUMPTION

Ms. Klucznik explained that public feedback noted a concern with the use of the word “showing” may not adequately explain the state’s burden of proof necessary to overcome the presumption. To remedy this issue, she proposed the following revision to CR522:

CR522 Defense of Habitation – Presumption.

The person using force or deadly force in defense of habitation is presumed to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry:

1. is unlawful; and
2. is made or attempted:
 - a. by use of force; or in a violent and tumultuous manner; or
 - b. surreptitiously or by stealth; or
 - c. for the purpose of committing a felony.

The prosecution may defeat the presumption by proving beyond a reasonable doubt ~~showing~~ that the entry was 1) lawful or 2) not made or attempted by use of force, or in a violent and tumultuous manner; or surreptitiously or by stealth; or for the purpose of committing a felony. The prosecution may also rebut the presumption by proving beyond a reasonable doubt that in fact the defendant’s beliefs and actions were not reasonable.

References

Utah Code § 76-2-405
State v. Karr, 364 P.3d 49 (Utah App. 2015)

State v. Walker, 391 P.3d 380 (Utah App. 2017)
State v. Mitcheson, 560 P.2d 1120 (Utah 1977)
State v. Moritzsky, 771 P.2d 688 (Utah App. 1989)
State v. Patrick, 217 P.3d 1150 (Utah App. 2009)

Committee Notes

This instruction should be used with CR520, CR521, CR523, and CR510.

Amended Dates: 02/07/2018, 09/02/2020

Judge Blanch solicited feedback to the proposed revision. There was no committee feedback. Ms. Klucznik moved to approve; Mr. Phelps seconded. The committee voted unanimously in support of the motion.

CR530 DEFENSE OF SELF OR OTHER

Ms. Klucznik explained that public comment had suggested a very minor addition to CR530: add the word “person” immediately after the first instance of the word “another” in the second sentence, as follows:

CR530 Defense of Self or Other.

You must decide whether the defense of Defense of Self or Other applies in this case. Under that defense, the defendant is justified in using force against another person when and to the extent that the defendant reasonably believes that force is necessary to defend [himself] [herself], or a third party, against another person’s imminent use of unlawful force.

The defendant is justified in using force intended or likely to cause death or serious bodily injury only if the defendant reasonably believes that:

1. Force is necessary to prevent death or serious bodily injury to the defendant or a third person as a result of another person’s imminent use of unlawful force; or
2. To prevent the commission of [Forcible Felony], the elements of which can be found under jury instruction [_____].

The defendant is not justified in using force if the defendant:

1. Initially provokes the use of force against another person with the intent to use force as an excuse to inflict bodily harm upon the assailant;
2. Is attempting to commit, committing, or fleeing after the commission or attempted commission of [Felony], the elements of which can be found under jury instruction [_____]; or
3. Was the aggressor or was engaged in a combat by agreement, unless the defendant withdraws from the encounter and effectively communicates to the other person the defendant’s intent to do so

and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

The following do not, by themselves, constitute "combat by agreement":

1. Voluntarily entering into or remaining in an ongoing relationship; or
2. Entering or remaining in a place where one has a legal right to be.

References

Utah Code § 76-2-402(1) and (5)

Committee Notes

Under circumstances where the use of force is a reasonable response to factors unrelated to the commission, attempted commission, or fleeing after the commission of that felony, the parties should consider modifying the language in subsection 2 regarding when the defendant is “not justified” in using force, to reflect Utah Code §76-2-402(2)(a)(ii).

Amended Dates:

Approved: 03/07/2018

Committee note approved: 12/05/2018

The original draft of this proposed language also included a suggestion to delete the committee note and move that language into the instruction as part of the second “2.” so that the language in that subsection would read: “Is attempting to commit, committing, or fleeing after the commission or attempted commission of [Felony], the elements of which can be found under jury instruction [_____], unless the use of force is a reasonable response to factors unrelated to the commission, attempted commission, or fleeing after the commission of that felony; or”.

The committee discussed these proposed revisions based upon the public comments received. Ms. Johnson noted that the reason the committee note existed in the first place was because to include it in the instruction was too unwieldy. Judge Blanch agreed with that recollection. Ms. Johnson pointed out that some practitioners want the MUJI instructions to have every possible option included. The committee’s approach has typically been to focus on those instructions and options that are most likely to be used. Practitioners need to know when to include less common language when circumstances require it. Judge Blanch pointed out that this particular proposal was something that the committee had previously considered, but had specifically decided against. He asked whether anyone wanted to revisit the committee’s previous decision. No committee members wanted to do so.

Ms. Johnson made motion to add the word “person” as indicated in the proposed language above; Ms. Klucznik seconded. The committee unanimously voted in support of the motion.

Ms. Klucznik explained that public comment had identified a concern about how the instruction does not address those who have no duty to retreat. In response to the public comment, Ms. Klucznik prepared the following proposed language:

CR531 Defense of Self or Other – Imminence.

In determining imminence or reasonableness you may consider any of the following factors:

1. the nature of the danger;
2. the immediacy of the danger;
3. the probability that the unlawful force would result in death or serious bodily injury;
4. the other’s prior violent acts or violent propensities;
5. any patterns of abuse or violence in the parties’ relationship; or
- ~~5-6. whether any person involved had a duty to retreat;~~
- ~~6-7.~~ any other relevant factor.

If a person (including the defendant) has no duty to retreat, you may not consider their failure to retreat in determining whether the defendant acted reasonably in using or threatening to use force.

Ms. Klucznik pointed out that this can be particularly important in cases involving domestic violence. This language is complicated by the fact that when a person DOES have a duty to retreat it is permissible for the jury to consider that. She drafted the proposed language with both situations in mind (duty to retreat AND no duty to retreat). Ms. Lockwood asked whether the “no duty to retreat” language should be a separate instruction, particularly where this instruction is directed toward “imminence” and “reasonableness.” Judge Blanch asked if anyone on the committee believed the proposed new final sentence was an incorrect statement of the law. No committee member felt it was incorrect. The committee discussed whether this new language is situated correctly in this instruction OR whether it should be an instruction of its own. Ms. Lockwood opined that parties would include this language only where it was relevant in the case. Ms. Klucznik stated there is an instruction on “no duty to retreat” (CR533) and wondered whether the final sentence should be included in that instruction instead. Judge Blanch wondered whether the proposed “6.” should be included in this instruction at all. He noted that if the final sentence is an accurate statement of the law, then duty to retreat is not something to consider (i.e., if there is no duty to retreat, that ends the analysis). Ms. Klucznik explained that the jury can consider whether there is a duty to retreat, so “6.” is appropriate. If there answer to “6.” is “no one had a duty to retreat,” then the final sentence is appropriate. Ms. Johnson noted that the proposed language asks the jury to consider the same issue from both directions, which is confusing. Judge Blanch asked if changing the word “whether” in “6.” could be changed to “that” to avoid the confusion. Ms. Klucznik pointed out that statute (Utah Code § 76-2-402(5)) sets out the factors to consider. She added “6.” based on the provision in the statute (Utah Code § 76-2-402(4)(b)), which is addressed in the final sentence of her proposed language. Ms. Klucznik agreed that if there were to be a standalone instruction for the final sentence, then “6.” is not necessary in CR531. Ms. Klucznik offered to draft a standalone instruction for the next meeting. Judge Blanch agreed with that plan. None of this language was approved in this meeting.

(5) ADJOURN

The meeting adjourned at approximately 1:32 p.m. The next meeting will be held on October 7, 2020, starting at 12:00 noon.