

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

Via WebEx
February 3, 2021 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Blanch
	Move March 3 rd meeting to March 10 th ?	Action		Committee
	Pleasant Grove City v. Terry, 2020 UT 69 - <i>Update on proposed instruction</i> - <i>Review of proposed instruction?</i>		Tab 2	Ms. Johnson Ms. Lockwood
	Battered Person Mitigation Instructions		Tab 3	Ms. Klucznik
	Public Comment Review: Homicide Instructions		Tab 4	Committee
1:30	Adjourn			

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

UPCOMING MEETING SCHEDULE:

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

March 10, 2021
April 7, 2021
May 5, 2021
June 2, 2021

July 7, 2021
August 4, 2021
September 1, 2021
October 6, 2021

November 3, 2021
December 1, 2021

UPCOMING ASSIGNMENTS:

1. Sandi Johnson = Burglary; Robbery
2. Judge McCullagh = DUI; Traffic
3. Karen Klucznik & Mark Fields = Murder

4. Stephen Nelson = Use of Force; Prisoner Offenses
5. Judge Jones = Wildlife Offenses

TAB 1

Minutes – December 2, 2020

NOTES:

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

Via WebEx
December 2, 2020 – 12:00 p.m. to 1:30 p.m.

DRAFT

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

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting.
The committee considered the minutes from the October 7, 2020 meeting.
Mr. Phelps moved to approve the draft minutes; Ms. Johnson seconded the motion.
The committee voted unanimously in support of the motion. The motion passed.

(2) DISCUSSION RE: PLEASANT GROVE CITY V. TERRY, 2020 UT 69:

The committee discussed *Pleasant Grove City v. Terry*, 2020 UT 69. Judge Blanch provided a brief synopsis of the case, including the Utah Supreme Court’s holding regarding impossible verdicts. Judge Blanch asked the committee members whether there was a need for jury instructions in this area. Judge McCullagh suggested that once the committee drafts an instruction addressing the offense of domestic violence in the presence of a child, there should be a committee note included that advises practitioners of the issue addressed in the *Pleasant Grove* case. Ms. Johnson noted that she had heard word that the supreme court’s Advisory Committee on the Rule of Criminal Procedure may be considering some rule to address this issue. In her opinion, if the choice is between a rule or a jury instruction on this issue, a jury instruction is the preferable approach. She

offered to work with Ms. Lockwood on preparing a proposed instruction. Ms. Klucznik noted that this situation may not be limited to DV cases. The issue may arise in a number of other contexts and so may have broader application. Judge Blanch asked Ms. Johnson to work with Ms. Lockwood to prepare a proposed instruction to be considered at the next meeting. She agreed to do so and will reach out to Ms. Lockwood (who wasn't able to be present today) to coordinate.

(3) PUBLIC COMMENT REVIEW:

The committee then turned its attention to continued review of public comments.

Targeting a Law Enforcement Officer (continued discussion from October 7)

The committee began by picking up where it left off at the October 7 meeting on CR3122 (Aggravated Assault – Targeting a Law Enforcement Officer). Since the last meeting, Ms. Johnson had provided some new materials on this issue (pages 55-56 of the meeting materials). Ms. Johnson explained that she had prepared a version of an elements instruction based upon the discussion at the October 7 meeting. She also explained that in her view it would be better to instead use a special verdict instruction and form in combination with the standard aggravated assault instruction (CR1320). This would replace the current published version of CR1322. She reviewed the various materials with the committee. The committee then turned its attention to consideration of the materials. Judge Blanch solicited feedback from the committee on which approach the committee wanted to take. The committee members agreed that the special verdict form approach made the most sense in light of the issues that had been previously discussed in October and again today. The committee discussed the proposed language Ms. Johnson had prepared and made the following changes to what was included on page 56 of the meeting materials:

CR1322 Aggravated Assault – Targeting a Law Enforcement Officer – Special Verdict Instructions

If you find (DEFENDANT'S NAME) guilty of Aggravated Assault, you must determine whether (DEFENDANT'S NAME) Targeted a Law Enforcement Officer ~~and caused Serious Bodily Injury~~ at the time of this offense. To find (DEFENDANT'S NAME) Targeted a Law Enforcement Officer ~~and caused Serious Bodily Injury~~, you must find all three elements below beyond a reasonable doubt:

- 1) the aggravated assault resulted in serious bodily injury;
- 2) the defendant knowingly used force against a law enforcement officer; and
- 3) the defendant's use of force was in furtherance of political or social objectives in order to intimidate or coerce a civilian population or to influence or affect the conduct of a government or a unit of government.

The State must prove beyond a reasonable doubt that (DEFENDANT'S NAME) Targeted a Law Enforcement Officer ~~and caused Serious Bodily Injury~~. Your decision must be unanimous and should be reflected on the special verdict form.

References

Utah Code § 76-5-103(2)(b)
Utah Code § 76-5-210

Committee Note:

When relevant to the facts of the case, this instruction should be used in connection with CR1320 Aggravated Assault and SVF 1302 Aggravated Assault – Targeting a Law Enforcement Officer.

The committee then turned its attention to the companion special verdict form (SVF1302 Aggravated Assault – Targeting a Law Enforcement Officer):

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Aggravated Assault, as charged in Count(s) [#,#,#]. We also unanimously find the State:

- has
- has not

proven beyond a reasonable doubt (DEFENDANT'S NAME) Targeted a Law Enforcement Officer ~~and caused Serious Bodily Injury~~ at the time of [this][these] offense(s).

Judge McCullagh made motion to approve the instruction and special verdict form. Ms. Klucznik seconded the motion. The motion was unanimously approved.

Additional / Modified Assault Definitions in CR1301

The committee had received a number of public comments related to CR1301 Definitions. The committee carefully considered each comment. After discussion, the committee determined not to take any action on a number of the requests to include additional definitions in CR1301. The reason for this is because it is not the goal of the committee to include in MUJI every statutory definition. Practitioners should understand that certain general definitions exist within the Utah Code and should reference those in their instructions as appropriate. In the future, if new MUJI instructions are drafted that involve the definitions identified in these comments, the committee will consider adding a reference citation to the definition to point practitioners to the appropriate statutory source.

The committee did, however, agree that updates to some of the existing definitions are in order (specifically the definition of “Peace Officer” and “Military Servicemember in Uniform”). These definitions have previously been included in MUJI as part of existing elements instructions. The committee members made the following revisions to the existing definition of “Peace Officer”:

[“Peace officer” means:

1. a law enforcement officer, ~~certified~~ defined as [insert appropriate definition] under Section 53-13-103];
2. a correctional officer, defined as [insert appropriate definition] under Section 53-13-104];
3. a special function officer, defined as [insert appropriate definition] under Section 53-13-105]; or
4. a federal officer, defined as [insert appropriate definition] under Section 53-13-106.]]

Reference: Utah Code § 76-5-102.4(1)(c)

Ms. Johnson made motion to approve these changes; Ms. Klucznik seconded. The motion passed unanimously. Staff asked if the committee intended to make a similar change to the definition for “Military servicemember in uniform.” Ms. Johnson made motion; the motion was seconded by Ms. Nelson. The motion passed unanimously.

[Consistent with direction from the committee during the meeting, staff prepared the following definition after the meeting:]

[“Military servicemember in uniform” means:

1. a member of any branch of the United States military who is wearing a uniform as authorized by the member’s branch of service; or
2. a member of the National Guard ~~servicing as provided in Section 39-1-5 or 39-1-9.~~ordered into active service by the governor[called into service by the President of the United States].

Reference: Utah Code § 76-5-102.4(1)(b)

Assault instruction Committee Notes re: Cohabitancy Status and Mental State

The committee members discussed the comments regarding the committee’s previous decision to include a committee note in two of the assault instructions (CR1302 and CR1320) that reads: “Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated mens rea (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.” The committee reviewed the reasons why that committee note was first added to those instructions. After discussion, no committee member was willing to make a motion to revise or remove the language from the two committee notes.

Staff noted for the committee that the committee had now completed its review of public comments related to the assault instructions published in June 2020. Many revisions have been approved by the committee in response to the comments. There still remain public comments to address regarding DUI, Homicide, Sexual Offenses, Defense of Habitation/Self/Others, and Miscellaneous instructions.

Ms. Klucznik noted that she had prepared some materials in connection with the homicide instructions, as well as on battered person mitigation. Judge Blanch asked Ms. Klucznik to provide an overview of those materials to orient the committee in advance of the January meeting. Ms. Klucznik provided some explanation for the materials, which will be provided to the committee via email (and included in the agenda packet for the next meeting).

After Ms. Klucznik’s explanation, Judge Blanch took opportunity to again thank members of the public for making such detailed comments during the June-July 2020 public comment period. Staff was instructed to reach out to those who commented to communicate the committee’s sincere appreciation.

(4) ADJOURN

The meeting adjourned at approximately 1:23 p.m. The next meeting will be held on January 6, 2021, starting at 12:00 noon via Webex.

TAB 2

Pleasant Grove City v. Terry, 2020 UT 69

NOTES:

TAB 3

Battered Person Mitigation Instructions

NOTES:

Draft instructions for Battered Person Mitigation
(Utah Code Ann. § 76-2-409, effective May 12, 2020)

Note that the statute defining this mitigation defense does not identify the crimes to which it applies.

Also note that the definitions of “abuse” and “cohabitant” refer to statutes that were amended effective *after* May 12, 2020. The definitions contained in these instructions are the current ones. We should probably note in the Committee Note that some of the definitions were different before July 1, 2020.

RELEVANT STATUTES

Utah Code Add. § 76-2-409 (Battered Person Mitigation)

(1) As used in this section:

(a) “Abuse” means the same as that term is defined in Section 78B-7-102.

(b) “Cohabitant” means:

(i) the same as that term is defined in Section 78B-7-102; or

(ii) the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor.

(2)(a) An individual is entitled to battered person mitigation if:

(i) the individual committed a criminal offense that was not legally justified;

(ii) the individual committed the criminal offense against a cohabitant who demonstrated a pattern of abuse against the individual or another cohabitant of the individual; and

(iii) the individual reasonably believed that the criminal offense was necessary to end the pattern of abuse.

(b) A reasonable belief under Subsection (2)(a) is determined from the viewpoint of a reasonable person in the individual's circumstances, as the individual's circumstances are perceived by the individual.

(3) An individual claiming mitigation under Subsection (2)(a) has the burden of proving, by clear and convincing evidence, each element that would entitle the individual to mitigation under Subsection (2)(a).

(4) Mitigation under Subsection (2)(a) results in a one-step reduction of the level of offense of which the individual is convicted.

(5)(a) If the trier of fact is a jury, an individual is not entitled to mitigation under Subsection (2)(a) unless the jury:

(i) finds the individual proved, in accordance with Subsection (3), that the individual is entitled to mitigation by unanimous vote; and

(ii) returns a special verdict for the reduced charge at the same time the jury returns the general verdict.

(b) A nonunanimous vote by the jury on the question of mitigation under Subsection (2)(a) does not result in a hung jury.

(6) An individual intending to claim mitigation under Subsection (2)(a) at the individual's trial shall give notice of the individual's intent to claim mitigation under Subsection (2)(a) to the prosecuting agency at least 30 days before the individual's trial.

Statutes relevant to definition of “abuse”

Utah Code Ann. § 76-2-409(1)(a) (effective May 12, 2020) (the battered person mitigation defense statute)

(1)(a) “Abuse” means the same as that term is defined in Section 78B-7-102.

Utah Code Ann. § 78B-7-102 (1) (effective May 12 to July 1, 2020):

(1) “Abuse” means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.

Utah Code Ann. § 78B-7-102 (1) (effective July 1, 2020):

(1) “Abuse” means, except as provided in Section 78B-7-201, intentionally or knowingly causing or attempting to cause ~~a cohabitant physical harm or intentionally or knowingly placing a cohabitant~~ another individual physical harm or intentionally or knowingly placing another individual in reasonable fear of imminent physical harm.

Utah Code Ann. § 78B-7-201 (same as before May 12, 2020)

(1) “Abuse” means:

- (a) physical abuse;
- (b) sexual abuse;
- (c) any sexual offense described in Title 76, Chapter 5b, Part 2, Sexual Exploitation; or
- (d) human trafficking of a child for sexual exploitation under Section 76-5-308.5.

Statutes relevant to definition of “cohabitant”

Utah Code Ann. § 76-2-409(1)(b) (effective May 12, 2020) (the battered person mitigation defense statute)

(1)(b) “Cohabitant” means:

- (i) the same as that term is defined in Section 78B-7-102; or
- (ii) the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor’s natural parent as if a stepparent to the minor.

Utah Code Ann. § 78B-7-102(2),(3) (May 12, 2020 to July 1, 2020)

(3)(a) “Cohabitant” means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:

- (i) is or was a spouse of the other party;
- (ii) is or was living as if a spouse of the other party;
- (iii) is related by blood or marriage to the other party as the person’s parent, grandparent, sibling, or any other person related to the person by consanguinity or affinity to the second degree;
- (iv) has or had one or more children in common with the other party;
- (v) is the biological parent of the other party’s unborn child;
- (vi) resides or has resided in the same residence as the other party; or
- (vii) is or was in a consensual sexual relationship with the other party.

(b) “Cohabitant” does not include:

- (i) the relationship of natural parent, adoptive parent, or step-parent to a minor; or
- (ii) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(4) “Consanguinity” means the same as that term is defined in Section 76-1-601.

Utah Code Ann. § 76-1-601(6) (effective May 12, 2020)

(6) “Consanguinity” means a relationship by blood to the first or second degree, including an individual’s parent, grandparent, sibling, child, aunt, uncle, niece, or nephew.

Utah Code Ann. § 78B-7-102(4)(a),(b) (effective July 1, 2020)

~~(2)~~(5)(a) “Cohabitant” means an emancipated ~~person pursuant to~~ individual under Section 15-2-1 or a ~~person~~ an individual who is 16 years of age or older who:

~~(a)~~(i) is or was a spouse of the other party;

~~(b)~~(ii) is or was living as if a spouse of the other party;

~~(c)~~(iii) is related by blood or marriage to the other party as the ~~person's~~ individual's parent, grandparent, sibling, or any other ~~person~~ individual related to the ~~person~~ individual by consanguinity or affinity to the second degree;

~~(d)~~(iv) has or had one or more children in common with the other party;

~~(e)~~(v) is the biological parent of the other party's unborn child;

~~(f)~~(vi) resides or has resided in the same residence as the other party; or

~~(g)~~(vii) is or was in a consensual sexual relationship with the other party.

~~(3)~~(b) Notwithstanding Subsection ~~(2)~~ (4)(a), “cohabitant” does not include:

~~(a)~~(i) the relationship of natural parent, adoptive parent, or step-parent to a minor; or

~~(b)~~(ii) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(6) “Consanguinity” means the same as that term is defined in Section 76-1-601.

Utah Code Ann. § 76-1-601(6) (effective May 12, 2020)

(6) “Consanguinity” means a relationship by blood to the first or second degree, including an individual’s parent, grandparent, sibling, child, aunt, uncle, niece, or nephew.

CR___ Special Verdict Form - Battered Person Mitigation

If you find that the State has proved (DEFENDANT’S NAME) is guilty of [name applicable crime] beyond a reasonable doubt, you must complete the special verdict form titled “Special Verdict Battered Person Mitigation.”

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

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the “Special Verdict Battered - Person Mitigation” special verdict form; and
- add the following paragraph at the bottom of the underlying crime’s elements instruction:

“If you find Defendant GUILTY beyond a reasonable doubt of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____.”

CR___ Explanation of Battered Person Mitigation Defense

You do not have to consider the battered person mitigation defense unless if you find the defendant guilty of [name applicable crime]. The battered person mitigation defense is a partial defense to [name applicable crime]. The effect of the defense is to reduce the level of the offense. Your decision will be reflected in the special verdict form titled “Special Verdict Battered Person Mitigation Defense.”

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the “Special Verdict Battered - Person Mitigation” special verdict form; and
- add the following paragraph at the bottom of the underlying crime’s elements instruction:

“If you find Defendant GUILTY beyond a reasonable doubt of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____.”

CR___ Definition of Battered Person Mitigation Defense

The battered person mitigation defense applies if you unanimously find the defendant has proved by clear and convincing evidence that:

1. The defendant committed the offense against a cohabitant;
2. The cohabitant had demonstrated a pattern of abuse against the defendant or another cohabitant; and
3. The defendant reasonably believed the offense was necessary to end the pattern of abuse.

To prove something by clear and convincing evidence, the defendant must present sufficient evidence to persuade you to the point that there remains no serious or substantial doubt as to the truth of the fact. Proof by clear and convincing evidence thus requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use the applicable battered person mitigation instructions and the “Special Verdict Battered - Person Mitigation” special verdict form; and
- add the following paragraph at the bottom of the underlying crime’s elements instruction:

“If you find Defendant GUILTY beyond a reasonable doubt of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____.”

CR____. Definitions applicable to Battered Persons Mitigation Defense

The following definitions apply to the Battered Persons Mitigation Defense:

“Abuse” means

- a. intentionally or knowingly causing or attempting to cause another individual
 - i. physical abuse or harm; or
 - ii. sexual abuse;
- b. intentionally or knowingly placing another individual in reasonable fear of imminent physical harm; or
- c. committing or attempting to commit
 - i. sexual exploitation of a minor,
 - ii. sexual exploitation of a vulnerable adult,
 - iii. distribution of an intimate image,
 - iv. sexual extortion; or
 - v. human trafficking of a child.

“Cohabitant”

- a. “Cohabitant” means
 - i. an emancipated individual or an individual who is 16 years of age or older who:
 - a. is or was a spouse of the other party;
 - b. is or was living as if a spouse of the other party;
 - c. is related by blood or marriage to the other party as the person's individual's parent, grandparent, sibling, or any other person individual related to the person individual by consanguinity or affinity to the second degree;
 - d. has or had one or more children in common with the other party;
 - e. is the biological parent of the other party's unborn child;
 - f. resides or has resided in the same residence as the other party; or
 - g. is or was in a consensual sexual relationship with the other party.
 - ii. the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor’s natural parent as if a stepparent to the minor.

- b. “Cohabitant” does not include the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

“Reasonable belief” is determined from the viewpoint of a reasonable person in the individual’s circumstances, as the individual’s circumstances are perceived by the individual.

“Consanguinity” means a relationship by blood to the first or second degree, including an individual’s parent, grandparent, sibling, child, aunt, uncle, niece, or nephew.

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the “Special Verdict Battered - Person Mitigation” special verdict form; and
- add the following paragraph at the bottom of the underlying crime’s elements instruction:

“If you find Defendant GUILTY beyond a reasonable doubt of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____.”

SVF ____ . Battered Person Mitigation Defense

(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
BATTERED PERSON
MITIGATION DEFENSE**

Count (#)
Case No. (**)

Having found the State has proved all the elements of [name applicable crime], as charged in Count [#],

Check ONLY ONE of the following boxes:

We unanimously find (DEFENDANT’S NAME) has proved by clear and convincing evidence that the battered person mitigation defense applies.

OR

We do not unanimously find (DEFENDANT’S NAME) has proved by clear and convincing evidence that the battered person mitigation defense applies.

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

Foreperson

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the “Special Verdict Battered - Person Mitigation” special verdict form; and
- add the following paragraph at the bottom of the underlying crime’s elements instruction:

“If you find Defendant GUILTY beyond a reasonable doubt of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____.”

SVF ____ . Battered Person Mitigation Defense

(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
BATTERED PERSON
MITIGATION DEFENSE**

Count (#)
Case No. (**)

Having found the State has proved all the elements of [name applicable crime], as charged in Count [#],

Check ONLY ONE of the following boxes:

We unanimously find (DEFENDANT’S NAME) has proved by clear and convincing evidence that the battered person mitigation defense applies; thus, we unanimously find (DEFENDANT’S NAME) guilty of [the reduced charge].

OR

We do not unanimously find (DEFENDANT’S NAME) has proved by clear and convincing evidence that the battered person mitigation defense applies; thus, we unanimously find (DEFENDANT’S NAME) guilty of [the greater charge] .

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

Foreperson

Committee Note

Whenever the battered person mitigation defense is submitted to the jury,

- use both the applicable battered person mitigation instructions and the “Special Verdict Battered - Person Mitigation” special verdict form; and
- add the following paragraph at the bottom of the underlying crime’s elements instruction:

“If you find Defendant GUILTY beyond a reasonable doubt of [name applicable crime], you must decide whether the battered person mitigation defense applies and complete the special verdict form concerning that defense. The battered person mitigation defense is addressed in Instructions _____.”

TAB 4

Public Comment Review: Homicide Instructions

NOTES:

CR1411 – Felony Murder: level of intent

Sean Brian: (2)(d)(ii) A jury may not be able to determine the appropriate level of intent applicable to the predicate offense. The instruction would be clearer if the level of intent were directly stated.

CR1450-1452 / SVF1450 – imperfect self-defense

Tom Brunner: The [AG’s Appellate] Division has seen several cases with defective imperfect self-defense instructions. As the practitioner’s note points out, it has been particularly problematic when the instructions try to fold imperfect self-defense into the elements instruction. It has resulted in either misstating who has the burden of proof or potentially misleading the jury into believing that it must reach unanimity on whether the State had failed to disprove imperfect self-defense. So the Division agrees that the imperfect self-defense instruction should be separate from the elements instruction.

But the proposed MUJI procedure arguably conflicts with the rules. As relevant here, Utah R. Crim. P. 21(a) requires the jury to enter a verdict of “guilty” or “not guilty of the crime charged but guilty of a lesser included offense.” The proposed MUJI procedure, however, results in there being no verdict on the lesser crime.

As proposed, and as relevant here, the jury verdict is either guilty of the greater offense or guilty of the lesser offense for reasons other than imperfect self-defense. The jury is then instructed only to make a finding on imperfect self-defense. But it is not asked to enter a verdict on the lesser crime if it finds in favor of the defendant on imperfect self-defense. So contrary to rule 21’s requirement, there is no verdict on the lesser offense.

The parties sometimes agree to bifurcate proceedings so that the jury enters a verdict on a particular crime and the judge decides whether aggravating circumstances that enhance the crime—usually prior convictions—exist. But in that case, the defendant has agreed to waive a jury verdict on the second step. Here, the defendant has not expressly waived the jury verdict on the lesser offense. Rather than entering a verdict on the lesser offense, the jury enters a verdict on the greater offense and only enters a finding that results in a lesser offense.

It may be that the disconnect between the rule and the proposed MUJI won't make a difference. But a fix would eliminate the problem.

A related concern is that the proposed instructions speak in terms of the jury finding the defendant guilty of the greater offense before considering imperfect self-defense. For example, CR 1451 states, "You must consider imperfect self-defense only if you find the defendant guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]." But if the jury ultimately finds that the State has not disproven imperfect self-defense beyond a reasonable doubt, then the defendant is not guilty of the greater crime. We therefore recommend that when describing the jury's finding on the greater offense the instructions should speak in terms of the jury having found that the State proved all the elements of the greater offense, or some similar phrasing, not that the jury has found the defendant guilty of the greater offense. This change would need to be incorporated into CR 1450, 1451, 1452, and the Special Verdict Form.

Sean Brian: [For SVF1450] "Having found 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.

OR

We do not unanimously find that the State has **NOT (ADD THIS "NOT")** proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply **(ADD THIS:) and therefore the level of offense should be reduced.**"

Notes/ Explanation:

The phrasing could be misinterpreted to negate the unanimity requirement, so the "not" is moved so that it clearly modifies "proved."

The emphasis should be placed on the difference between the two options. It may also be helpful to the jury to clarify the consequence of their selection. The verdict form appears to successfully avoid the issue raised in *State v. Campos*, 2013 UT App 213, 309 P. 3d 1160, where the instruction failed to place the burden of proof on the State.

Fred Burmester: The proposal to make imperfect self-defense subject to a special verdict has some logic to it in my opinion, but the defense results in a lesser included manslaughter. The supporting practitioners' notes only refer to a court of appeals case Lee and in the end *Drej*. *State v. Lee* does not take on the issue straight ahead. It has dicta that the method of the instruction misplaced the burden which is a pitfall I think the MUJI drafters were trying to avoid. *Drej* does not apply (it is a mitigation case and not an affirmative defense case). The problem is that *State v. Shumway*, a Supreme Court case, says that you cannot instruct the jury on a specific order of deliberation with a lesser included manslaughter. However, the proposed instruction tells the jury they can only consider the affirmative defense (lesser included manslaughter) if they first find the defendant guilty of murder, a thing I think *Shumway* prohibits. I have attached the citations for the relevant cases at the bottom of this note. *Shumway*, 63 P.3d 94; LEE, 318 P.3d 1164; LOW, 192 P.3d 867

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 Murder. [You may now consider any lesser offense of Murder, as explained in Instruction ____.]

On the other hand, if you are convinced that each and every element of Murder has been proven beyond a reasonable doubt, then you must decide whether the defense of imperfect self-defense applies.

The defense of imperfect self-defense is defined in Instructions ____. The defendant has no burden to prove this defense. Rather, to convict the defendant of Murder, the State must disprove the defense beyond a reasonable doubt. If you unanimously find that the

State has disproved imperfect self-defense beyond a reasonable doubt, then you must find the defendant GUILTY of Murder.

If you are unable to unanimously find that the State has disproved imperfect self-defense beyond a reasonable doubt, then the original charge of Murder is reduced to Manslaughter with imperfect self-defense (Murder reduced to Manslaughter). Your verdict must reflect this reduction.

Committee Note

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

STATE OF UTAH,

Plaintiff,

vs.

(DEFENDANT'S NAME),

Defendant.

VERDICT FORM

Count (#)

Case No. (**)

We, the jury, find on Count (#) [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder], that the defendant (DEFENDANT'S NAME) is:

(Check only ONE of the following verdicts)

____ NOT GUILTY

____ [GUILTY of Aggravated Murder]

____ [GUILTY of Murder with imperfect self-defense]

(Aggravated Murder reduced to Murder)

____ [GUILTY of Murder as lesser offense of Aggravated Murder]

____ [GUILTY of Manslaughter with imperfect self-defense]

(Murder reduced to Manslaughter)]

____ [GUILTY of Manslaughter as a lesser offense of Aggravated Murder]

DATED this ____ day of (Month), 20(**)

Foreperson

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 separately from the charged offense. Under this approach, the jury is given a standard elements instruction on the greater offense, with no element addressing imperfect self-defense. The final paragraphs of the elements instruction then explain how the jury should proceed based on whether it has found all the elements of the charged offense:

- If the jury finds that the State *has not* proved the elements of the greater offense beyond a reasonable doubt, the elements instruction on the greater offense directs the jury to find the defendant NOT GUILTY of the charged offense. The instruction then directs the jury that it may consider any lesser offenses included in the instructions.
- If the jury finds the State *has* proved the elements of the greater offense beyond a reasonable doubt, the elements instruction on the greater offense directs the jury to the imperfect self-defense instructions to determine whether the State has disproved the imperfect self-defense beyond a reasonable doubt.
 - the elements instruction on the greater offense further instructs the jury that
 - (a) if it **unanimously** finds the State has disproved the defense beyond a reasonable doubt, the jury must find the defendant guilty of the greater offense; and
 - (b) if it **unanimously** finds the State has not disproved the defense, the jury must find the defendant guilty of the lesser offense with mitigation.

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]. Imperfect self-defense is a partial defense to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]. Please carefully review the instructions applicable to these defenses.

CR1451A

Perfect self-defense is a complete defense to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter]. Thus, as Instruction ____ provides, ~~you can for you to~~ find the defendant guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter], only if you find that the State ~~has~~ must proved beyond a reasonable doubt that perfect self-defense does not apply. ~~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.~~

Perfect self-defense is defined in Instructions ____ ~~. 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.~~

CR1451B

Imperfect self-defense is a partial defense to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]. You do not need to consider ~~this defense imperfect self-defense~~ unless you unanimously find that the State has proved all the elements of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder] **[OR the lesser offense of [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] **[OR [Murder][Attempted Murder] as a lesser offense]**, 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 verdict form.

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);
- Do not include “imperfect self-defense” as a defense in the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction;
- 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 the last paragraphs of the aggravated murder/murder/attempted aggravated murder/attempted murder elements instruction contains the following language:

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 [Aggravated Murder/Murder/Attempted Aggravated Murder/Attempted Murder]. [You may now consider whether the defendant is guilty of any lesser offense of Murder, as explained in the Roadmap Instruction ____.]

On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must decide whether the defense of imperfect self-defense applies

The defense of imperfect self-defense is defined in Instructions _____. The defendant has no burden to prove this defense. Rather, to convict the defendant of [Aggravated Murder/Attempted Aggravated Murder/Murder/Attempted

Murder], the State must disprove the defense beyond a reasonable doubt. If you unanimously find that the State has disproved imperfect self-defense beyond a reasonable doubt, then you must find the defendant GUILTY of the charged offense [Murder/ Attempted Aggravated Murder][Manslaughter][Attempted]Manslaughter].

If you are unable to unanimously find that the State has disproved imperfect self-defense beyond a reasonable doubt, then the [Aggravated Murder/Murder/ Attempted Aggravated Murder/ Attempted Murder] charge is reduced to [Murder/ Attempte

ALTERNATIVE APPROACH

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.

SVF 1450. Imperfect Self-Defense.

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

CR1411A - Additional instruction when felony murder is charged

To convict (DEFENDANT'S NAME) of murder based on [a predicate offenses][predicate offenses], you must find that (DEFENDANT'S NAME) acted with the intent required to commit [a predicate offenses][predicate offenses].

A person acts with the intent to commit [the first predicate offense] if (he/she) [set out statutory intent required to commit the predicate offense].

A person acts with the intent to commit [the second predicate offense] if (he/she) [set out statutory intent required to commit the predicate offense].

COMMITTEE NOTE

Example 1:

To convict (DEFENDANT'S NAME) of murder based on robbery, you must find that (DEFENDANT'S NAME) acted with the intent required to commit robbery.

A person acts with the intent to commit robbery if he

a. intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property;

or

b. intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

Example 2:

To convict (DEFENDANT'S NAME) of murder based on a predicate offense, you must find that (DEFENDANT'S NAME) acted with the intent required to commit the predicate offense.

Here, the predicate offenses alleged are rape and forcible sexual abuse.

A person acts with the intent to commit rape if he intentionally, knowingly, or recklessly has sexual intercourse with another person without that person's consent and he acts intentionally, knowingly, or recklessly with respect to that person's lack of consent.

A person acts with the intent required to commit forcible sexual abuse if he

a. Intentionally, knowingly, or recklessly:

i. touched the skin of ([VICTIM'S NAME] [MINOR'S INITIALS])'s anus, buttocks, or genitals; or

ii. touched the skin of ([FEMALE VICTIM'S NAME] [FEMALE MINOR'S INITIALS])'s breast;

or

iii. took indecent liberties with ([VICTIM'S NAME] [MINOR'S INITIALS]); or caused a person to take indecent liberties with (DEFENDANT'S NAME) or another; AND

b. acted with intent, knowledge or recklessness that (VICTIM'S NAME) did not consent;

AND

c. acted with the intent to

i. cause substantial emotional or bodily pain to any person, or

ii. arouse or gratify the sexual desire of any person