

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

Via WebEx  
May 5, 2021 – 12:00 p.m. to 1:30 p.m.

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

**(1) WELCOME AND APPROVAL OF MINUTES:**

Judge Blanch welcomed the committee to the meeting.  
The committee considered the minutes from the March 10, 2021 meeting.  
Mr. Field moved to approve the draft minutes; Mr. Phelps seconded the motion.  
The committee voted unanimously in support of the motion. The motion passed.

**(2) ADVERSE INSTRUCTION RE: BODY-WORN CAMERAS:**

Judge Blanch turned the committee's attention to agenda item #4 and invited Mr. Nelson to introduce the proposed instruction to the committee members. Mr. Nelson walked the committee through the proposed instruction on page 44 of the meeting materials. After introducing the proposed instruction, the committee turned its attention to the proposed language. Mr. Phelps identified that the inference in the proposed instruction (that the recording would have been favorable to the defendant) is different than the inference identified in statute (against the officer). The committee discussed this observation, including the difference between intentional and unintentional violations of a body-worn camera and the effect of that failure on officer credibility. The committee discussed the specific requirements outlined in the statutory language and determined that the proposed instruction must reflect the inference against the officer. After discussion, Judge McCullagh made a motion to approve the following language:

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**CR\_\_\_\_\_416 Adverse inference for law enforcement failure to comply with activation or use of body-worn camera.**

Evidence was introduced at trial that [Officer Name] may have intentionally ~~failed to comply with~~ or recklessly disregarded the requirement that

[an officer shall activate the body-worn camera prior to any law enforcement encounter, or as soon as reasonably possible]

[an officer shall record in an uninterrupted manner until after the conclusion of a law enforcement encounter, and there was not an exception allowed by law]

[an officer may not deactivate the body-worn camera until the officer's direct participation in the law enforcement encounter is complete]

[~~any~~ other requirement].

~~You may infer that if the recording had been made, it would have been favorable to the defendant. Based upon that evidence, you may make an inference against the officer.~~ It is up to you to decide how much weight to give that evidence.

**REFERENCES**

Utah Code § 77-7a-104

Utah Code § 77-7a-104.1

*State v. DeJesus*, 2017 UT 22

**COMMITTEE NOTES**

Prior to giving this instruction, the court presiding over a jury trial must determine that the defendant has established by a preponderance of the evidence that the officer intentionally or with reckless disregard of the requirements, failed to comply with a requirement of section 77-7a-104 AND the officers' failure to comply with that requirement is reasonably likely to affect the outcome of the defendant's trial.

05/05/2021

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Ms. Andrus seconded the motion. The committee voted unanimously in support of the motion. The motion passed. Staff will complete the work of numbering and publishing the approved instruction.

**(3) SEXUAL OFFENSE INSTRUCTION UPDATES – HB0270-2019 “THROUGH CLOTHING” AMENDMENTS:**

Judge Blanch then turned the committee's attention to agenda item #3. Staff provided a brief overview of the materials related to this agenda item. The proposed changes are the result of HB0270-2019. The committee had not considered this change at the time that legislation was originally passed. The committee considered the proposed changes to CR1602, CR1604, and CR1611. After consideration of the proposed changes, Judge McCullagh made motion to approve changes to CR1602, CR1604, and CR1611, as follows:

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**CR1602 SEXUAL ABUSE OF A MINOR.**

(DEFENDANT’S NAME) is charged [in Count \_\_\_\_] with committing Sexual Abuse of a Minor [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:
  - a. [touched ~~the skin of~~ (MINOR’S INITIALS)’s anus, buttocks, or any part of (his)(her) genitals], even if accomplished through clothing; or
  - b. [touched ~~the skin of~~ (FEMALE MINOR’S INITIALS)’s breast], even if accomplished through clothing; or
  - c. [otherwise took indecent liberties with (MINOR’S INITIALS)]; or
  - d. [caused (MINOR’S INITIALS) to take indecent liberties with any person];
3. With the intent [to arouse or gratify the sexual desire of any person] [to cause substantial emotional or bodily pain to any person];
4. (MINOR’S INITIALS) was 14 or 15 years old at the time of the conduct; and
5. (DEFENDANT’S NAME) was seven or more years older than (MINOR’S INITIALS).

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 § 76-5-401.1  
Utah Code § 76-5-407

**COMMITTEE NOTES**

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

~~September 2015~~ Last amended: 05/05/2021

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**CR1604 UNLAWFUL SEXUAL CONDUCT WITH A 16 OR 17 YEAR OLD.**

(DEFENDANT’S NAME) is charged [in Count \_\_\_\_] with committing Unlawful Sexual Conduct with a 16 or 17 year old [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:
  - a. had sexual intercourse with (MINOR’S INITIALS)]; or
  - b. [engaged in any sexual act with (MINOR’S INITIALS) involving

- i. ~~the touching, however slight, of the genitals of one person with the mouth or anus of another, even if accomplished through clothing; and~~
- ~~the touching of (MINOR'S INITIALS)'s genitals, mouth or anus involved (MINOR'S INITIALS)'s skin;] or~~
- c. [caused the penetration, however slight, of the genital or anal opening of (MINOR'S INITIALS) by any foreign object, substance, instrument, or device, including a part of the human body;]
  - i. [with the intent to arouse or gratify the sexual desire of any person]; or
  - ii. [with the intent to cause substantial emotional or bodily pain to any person]]]; or
- d. [touched ~~the skin of~~ (MINOR'S INITIALS)'s anus, buttocks, or any part of (his)(her) genitals, even if accomplished through clothing, or touched ~~the skin of~~ (FEMALE MINOR'S INITIALS)'s breast, even if accomplished through clothing, or otherwise took indecent liberties with (MINOR'S INITIALS), or caused (MINOR'S INITIALS) to take indecent liberties with the defendant or another person;]
  - i. [with the intent to arouse or gratify the sexual desire of any person]; or
  - ii. [with the intent to cause substantial emotional or bodily pain to any person]].
- 3. At the time of the conduct, (MINOR'S INITIALS) was 16 or 17 years old; and
- 4. At the time of the conduct, (DEFENDANT'S NAME) was:
  - a. [seven or more but less than ten years older than (MINOR'S INITIALS), and (DEFENDANT'S NAME) knew or reasonably should have known (MINOR'S INITIALS)'s age]; or
  - b. [ten or more years older than (MINOR'S INITIALS)].

After you carefully consider all the evidence in this case, if you are convinced that each and every element [of one or more of the above variations] 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 [of at least one of the above variations] has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

## REFERENCES

Utah Code § 76-5-401.2  
Utah Code § 76-5-407

## COMMITTEE NOTES

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

If the State intends to rely on subsection 2d in combination with 2a, 2b, or 2c, use SVF 1604, Unlawful Sexual Conduct with a 16 or 17 year old special verdict form.

Subsection 2a should be used with 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.

Last amended: 05/05/2021~~September 2015~~

## CR1611 FORCIBLE SEXUAL ABUSE.

(DEFENDANT'S NAME) is charged [in Count\_\_] with committing Forcible Sexual Abuse [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:
  - a. touched ~~the skin of~~ ([VICTIM'S NAME] [MINOR'S INITIALS])'s anus, buttocks, or genitals, even if accomplished through clothing; or
  - b. touched ~~the skin of~~ ([FEMALE VICTIM'S NAME] [FEMALE MINOR'S INITIALS])'s breast, even if accomplished through clothing; or
  - c. took indecent liberties with ([VICTIM'S NAME] [MINOR'S INITIALS]); or
  - d. caused a person to take indecent liberties with (DEFENDANT'S NAME) or another;
3. Without (VICTIM'S NAME)'s consent;
4. (DEFENDANT'S NAME) acted with intent, knowledge or recklessness that (VICTIM'S NAME) did not consent;
5. Did so with the intent to:
  - a. cause substantial emotional or bodily pain to any person, or
  - b. arouse or gratify the sexual desire of any person; and
6. ([VICTIM'S NAME] [MINOR'S INITIALS]) was 14 years of age or older at the time of the conduct.

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 § 76-5-404  
 Utah Code § 76-5-406  
 Utah Code § 76-5-407  
*State v. Barela*, 2015 UT 22  
*State v. Jacobs*, 2006 UT App 356

## COMMITTEE NOTES

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

Last amended: 05/10/2021

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Mr. Nelson seconded the motion to approve the changes to CR1602, CR1604, and CR1611. The committee voted unanimously in support of the motion. The motion passed. Staff will make the necessary changes to the published instructions.

## (4) PARTIAL DEFENSE INSTRUCTIONS – IMPERFECT SELF-DEFENSE, BATTERED PERSON MITIGATION, AND EXTREME EMOTIONAL DISTRESS:

Judge Blanch then turned the committee's attention to agenda item #2 for continued discussion of this topic from previous meetings. He explained that the materials under Tab 2 in the agenda packet were prepared in response to the direction the committee agreed to take at the March 10 meeting. Mr. Field then provided the committee with an overview of the meeting materials, explaining that the materials are the result of a collaboration between Ms. Klucznik, Ms. Johnson, and Mr. Field. He described the various proposed instructions

and the reasons why those were included in the packet. He suggested that the committee should begin its discussion with the imperfect self-defense materials.

The committee considered the proposed changes to CR1450 (meeting materials, page seven). Before considering the language, Judge Blanch sought clarification of what in the proposed instruction was new, stating he was under the impression that the pink text was the new language. The committee agreed that was the new language. [It was later discovered by staff that there were additional revisions to the current language contained in the two paragraphs immediately preceding the pink paragraph in the meeting materials (in purple below); as a result, the proposed changes to CR1450 should be reviewed again at the next committee meeting.] The committee reviewed the new final paragraph of that current instruction, making the following minor corrections (in red below):

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#### **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 the defendant guilty 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 ~~that~~ that 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. In a separate roadmap instruction, the jury is instructed to record its finding on the defense on a special verdict form attached to the jury's specific guilty verdict.

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After review of the purple language above (but not making any consideration of any of the other language in the proposed instruction), Ms. Nelson make a motion to approve the proposed changes. Ms. Andrus seconded the

motion. The committee voted unanimously in support of the motion. The motion passed. Staff will wait to publish the approved instruction until the remaining proposed instructions are reviewed and approved by the committee.

The committee then turned its attention to proposed CR505A (meeting materials, page eight), an entirely new roadmap instruction for cases involving mitigation defenses. After discussion, the committee made a single revision, moving the final sentence of the first paragraph to be the first sentence of the third paragraph. The committee agreed that the format of this instruction will be helpful to the jury. Judge Blanch expressed that the primary risk is that one of the page number blanks won't get filled in or will be filled in with the wrong instruction number. He noted that judges and parties will have to pay careful attention to the numbering process as instructions are finalized. Mr. Field solicited specific committee feedback regarding the committee note. The committee did not have any concerns regarding the committee note. The proposed instruction was then finalized, as follows:

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#### **CR505A Road map for mitigation defenses.**

If you find the defendant guilty of (CHARGED CRIME) or (LESSER INCLUDED CRIME) on Count [#], you will then need to decide whether the mitigation defense of [imperfect self-defense] [extreme emotional distress special mitigation] [mental illness special mitigation] [or] [battered person mitigation] applies to that crime. Because each mitigation defense has its own elements and burden of proof, make sure to read their instructions carefully.

[The elements for imperfect self-defense are set forth in Instruction [#].]

[The elements for extreme emotion distress special mitigation are set forth in Instruction [#].]

[The elements for mental illness special mitigation are set forth in Instruction [#].]

[The elements for battered person mitigation are set forth in Instruction [#].]

Because each mitigation defense has its own elements and burden of proof, make sure to read the instructions carefully. For each mitigation defense listed, you must complete a special verdict form. You will find the special verdict form[s] for Count [#] immediately behind "General Verdict Form: Count (#)."

#### **Committee Notes**

A roadmap instruction such as this one should be prepared for each count that involves one or more lesser offenses and one or more mitigation defenses.

General verdict forms and special verdict forms should then be prepared as explained in the instruction.

Imperfect self-defense mitigation is only applicable to homicide or attempted homicide charges.

Extreme Emotional Distress mitigation is only applicable to homicide or attempted homicide charges.

Battered Person Mitigation is applicable to any offense between cohabitants.

Mental Illness can be both a defense and mitigation:

- Under Utah Code 76-2-305 it is a complete defense if it negates the mental state, except for homicide or attempted homicide
- Under Utah Code 76-5-205.5 it is a special mitigation for homicide or attempted homicide, and will reduce the level of the offense
- Under Utah Code 77-16a-102 it can be the basis for a finding of guilty with a mental illness at the time of the offense, which does not reduce the offense but changes sentencing requirements and is a necessary finding by the trier of fact.

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After making that single revision, and after further consideration of the entire instruction, Mr. Nelson made a motion to approve CR505A. Judge McCullagh seconded that motion. The committee voted unanimously in support of the motion. The motion passed. Staff will wait to publish the approved instruction until the remaining proposed instructions are reviewed and approved by the committee.

Because the committee was going to lose a quorum at 1:00 p.m., it was decided to end the meeting at this point in time. The committee will resume its consideration of the remaining materials at the next meeting.

**(5) ADJOURN**

The meeting adjourned at approximately 1:00 p.m. The next meeting will be held on June 2, 2021, starting at 12:00 noon via Webex. At the June meeting, the committee will discuss the summer meeting schedule.