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

Via Webex
December 01, 2021 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Blanch
	Court of Appeals Invitation: a Specific Jury Unanimity Instruction - *per State v. Paule, 2021 UT App 120, fn. 4*		Tab 2	Judge Blanch Judge Jones
	Finish CR1402B, CR1403B, and CR1411B (agg. murder / murder with mitigation)		Tab 3	Committee
	Partial defense instructions (continued): - *Imperfect self-defense* - *Battered person mitigation* - *Mental illness mitigation* - *Extreme emotional distress*		Tab 4	Committee
1:30	Adjourn			

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

UPCOMING MEETING SCHEDULE:
Meetings are held via Webex, on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

January 5, 2022
February 2, 2022
March 2, 2022
April 6, 2022
May 4, 2022
June 1, 2022
July 6, 2022
August 3, 2022
September 7, 2022
October 5, 2022
November 2, 2022
December 7, 2022

TAB 1

Meeting Minutes – November 3, 2021

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

Via Webex
November 3, 2021 – 12:00 p.m. to 1:00 p.m.

DRAFT

COMMITTEE MEMBER:	ROLE:	PRESENT	EXCUSED
Hon. James Blanch	District Court Judge [Chair]	•	
Jennifer Andrus	Linguist / Communications	•	
Sharla Dunroe	Defense Counsel		•
Sandi Johnson	Prosecutor	•	
Janet Lawrence	Defense Counsel	•	
Elise Lockwood	Defense Counsel		•
Jeffrey Mann	Prosecutor	•	
Hon. Brendan McCullagh	Justice Court Judge	•	
Debra Nelson	Defense Counsel		•
Stephen Nelson	Prosecutor		•
Richard Pehrson	Prosecutor	•	
Hon. Teresa Welch	District Court Judge	•	
vacant	Criminal Law Professor		•
Hon. Linda Jones	*Emeritus*		•

GUESTS:

Gage Hansen

STAFF:

Michael Drechsel

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting.
The committee considered the minutes from the October 6, 2021 meeting.
Ms. Johnson moved to approve the draft minutes; Mr. Mann seconded the motion.
The committee voted unanimously in support of the motion. The motion passed.

(2) REVIEW CR1402A, CR1403A, AND CR1411A, AND CR1402B, CR1403B, AND CR1411B FOR CONSISTENCY:

Mr. Drechsel explained the materials to the committee. These materials compare CR1402A, CR1403A, and CR1411A (agg. murder / murder without mitigation) and CR1402B, CR1403B, and CR1411B (agg. murder / murder with mitigation) to ensure the instructions are consistent with the committee's intentions. The committee reviewed the various instructions, starting with CR1402A and CR1403A. Mr. Pehrson asked why there is language in the Committee Notes section under "Elements" regarding "date and/or location." The committee discussed the need for this language, reviewing the history of the instruction. After discussion, the committee agreed that this language should not be included in the committee note. The relevant committee note language being removed from CR1402A, CR1403A, CR1402B, and CR1403B is:

~~If the date and/or location of a crime is an element of the offense, those can be included within the list of elements. In some circumstances, identifying the specific counts might assist the jury in sorting through offenses with overlapping elements. In those circumstances, the specific count to which the instruction applies should be identified in the first paragraph.~~

The committee then considered feedback from Mr. Mann about the passive "has been proven" language used in the concluding paragraph of the elements instruction. Ms. Johnson pointed out that the same language is used in each of the element instructions across the full collection of MUJI criminal instructions. Ms. Andrus pointed out that the language would be improved if it were changed from a passive construction. Judge McCullagh suggested that this be reviewed in the future as a general to-do item for the committee to tackle. Mr. Drechsel captured that as a future item.

The committee then turned its attention to CR1411A and whether the committee note should include the same "unanimity uncertainty" language as exists in the other instructions under consideration. At the last meeting, Judge Jones had begun some mid-meeting research on the topic while the committee moved on to the other matters. The committee did not have time at the last meeting to circle back around to finalize its discussion of this language for CR1411A. Ms. Johnson suggested that the language remain included in CR1411A, noting her belief that the same uncertainty applies to both aggravated murder (a la CR1402A, CR1403A, CR1402B, and CR1403B) as it does to murder (CR1411A and CR1411B). After discussion and review, the committee agreed that the language should remain in the two versions of the murder instruction.

Having made a review of CR1402A, CR1403A, and CR1411A, and not finding any additional issues with the proposed language, the committee turned its attention to the "with mitigation" versions of the same instructions (CR1402B, CR1403B, and CR1411B). Ms. Johnson pointed the committee's attention to pages 40-43 of the meeting materials (specifically the "CR1450-1452 / SVF1450 – imperfect self-defense" public comments from Tom Brunker and Fred Burmester from back in 2020 when the imperfect self-defense instructions were originally published for public comment). The committee discussed these comments in light of the approach that the committee has elected to take with CR1402B, CR1403B, and CR1411B (the special verdict form approach). The committee reviewed those public comments and concluded that most of the feedback speaks to the "lesser included offense" context than to the special mitigation reduction scenario. Mr. Mann noted his concern about the issue identified in the final paragraph of Mr. Brunker's comment (regarding finding the defendant "guilty" of the greater offense before addressing the special mitigation component). The committee discussed the elements instruction language in the concluding two paragraphs of CR1402B, CR1403B, and CR1411B:

> … On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Aggravated Murder.
>
> If you find the defendant guilty, you must then decide whether the mitigation defense[s] of [imperfect self-defense][extreme emotional distress special mitigation][mental illness special mitigation][battered person mitigation] applies.

Judge Welch pointed out that, in her view, the primary difference between special mitigation and a lesser included offense is that in the lesser included offense context some proof related to the greater charge was missing, while in the special mitigation context, everything for the greater offense has been proven, but there is something more that needs to be addressed beyond that (the additional evidence regarding special mitigation). Order of deliberation concerns are relevant in the lesser-included context, but not the special mitigation context.

The committee considered whether that distinction was adequately expressed in the language above. The concern is that the elements instruction requires the jury to find the defendant guilty of the greater offense, but then also consider something more. Mr. Mann suggested that perhaps it would be more advisable in the elements instruction to say something less final, like "then you must find that all of the elements have been proven…" (as opposed to "then you must find the defendant guilty"). Ms. Johnson asked what the verdict form would then look like under that scenario, since the committee has been pursuing a verdict form / special verdict form approach on this issue. Mr. Mann acknowledged that was a good question, but that he didn't have an answer at this point. Judge Welch and Ms. Lawrence agreed that Mr. Mann's suggestion would more clearly align with what the jury is actually finding in this special mitigation context. Judge Blanch asked, though, what the issue would be if a defendant were first found guilty of aggravated murder, but then, after special mitigation was resolved, was ultimately sentenced only to murder (consistent with the special verdict form on special mititation). Judge Blanch asked what the issue on appeal would be in that scenario. Mr. Mann acknowledged that there likely would never be an appeal in that circumstance, but suggested that one possible issue would be in the circumstance where the jury finds special mitigation does not apply, and a defendant argues that because the elements instruction language required the jury to find the defendant guilty of aggravated murder the jury didn't adequately consider the special mitigation issue. Judge Blanch suggested that if that were the case, the jury would not have followed the instructions as currently proposed. Judge Blanch asked that the committee members continue to reflect on this issue in preparation for the next meeting, where the committee will resume its discussion on how to approach and resolve this issue.

Prior to adjourning the meeting, Mr. Pehrson made a motion to approve all changes to these six proposed instructions (up to, but not including, this final issue) as previously discussed by the committee during the meeting. Judge Welch seconded that motion. The motion passed. This resulted in CR1402A, CR1403A, and CR1411A being approved by the committee in the following form:

CR1402A Aggravated Murder Elements – Utah Code § 76-5-202(1) – Without Mitigation Defenses.

The defendant, (DEFENDANT'S NAME), is charged with Aggravated Murder. You cannot convict (him)(her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, (DEFENDANT'S NAME);
2. Intentionally or knowingly;
3. Caused the death of (VICTIM'S NAME);
4. Under one or more of the following circumstances: [insert all applicable aggravating circumstances][; and]
5. [The defense of [perfect self-defense][defense-of-others][defense-of-habitation] 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 of Aggravated Murder. On the other hand, if you are not convinced that all of these elements have been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Aggravated Murder.

Committee Notes

Elements

There is some uncertainty in the case law regarding a unanimity requirement as it relates to the aggravating circumstances in element 4. See State v. Hummel, 2017 UT 19. Therefore, if more than one aggravating circumstance applies in element 4, practitioners are encouraged to use a special verdict form requiring the

jury to identify the aggravating circumstance(s) they unanimously find. See State v. Mendoza, 2021 UT App 79; State v. Alires, 2019 UT App 206; State v. Saunders, 1999 UT 59; State v. Tillman, 750 P.2d 546 (Utah 1987).

Mitigation
Whenever any mitigation defense (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation) is submitted to the jury, do not use CR1402A, but instead use CR1402B.

CR1403A Aggravated Murder Elements – Utah Code § 76-5-202(2) – Without Mitigation Defenses.

The defendant, (DEFENDANT'S NAME), is charged with Aggravated Murder. You cannot convict (him)(her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, (DEFENDANT'S NAME);
2. With reckless indifference to human life;
3. Caused the death of (VICTIM'S NAME); and
4. That the defendant did so incident to an act, scheme, course of conduct, or criminal episode during which (he)(she) was a major participant in the commission or attempted commission of: [insert all applicable predicate felonies][; and]
5. [The defense of [perfect self-defense][defense-of-others][defense-of-habitation] 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 of Aggravated Murder. On the other hand, if you are not convinced that all of these elements have been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Aggravated Murder.

Committee Notes
Elements
There is some uncertainty in the case law regarding a unanimity requirement as it relates to the predicate felony in element 4. See State v. Hummel, 2017 UT 19. Therefore, if more than one predicate felony applies in element 4, practitioners are encouraged to use a special verdict form requiring the jury to identify the predicate felony or felonies they unanimously find. See State v. Mendoza, 2021 UT App 79; State v. Alires, 2019 UT App 206; State v. Saunders, 1999 UT 59; State v. Tillman, 750 P.2d 546 (Utah 1987).

Mitigation
Whenever any mitigation defense (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation) is submitted to the jury, do not use CR1403A, but instead use CR1403B.

CR1411A Murder – Without Mitigation Defenses.

(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 causes 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) was not a party to [the predicate offense(s)]; and
      ii. (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][; and]
3. [The defense of [perfect self-defense][defense-of-others][defense-of-habitation] 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.

Committee Notes

Elements

There is some uncertainty in the case law regarding a unanimity requirement as it relates to proving the alternatives in element 2. See State v. Hummel, 2017 UT 19. Therefore, if more than one alternative applies in element 2, practitioners are encouraged to use a special verdict form requiring the jury to identify the alternative(s) they unanimously find. See State v. Mendoza, 2021 UT App 79; State v. Alires, 2019 UT App 206; State v. Saunders, 1999 UT 59; State v. Tillman, 750 P.2d 546 (Utah 1987).

Mitigation

Whenever any mitigation defense (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation) is submitted to the jury, do not use CR1411A, but instead use CR1411B.

Staff will revise CR1402B, CR1403B, and CR1411B accordingly and bring them back around for further discussion on the unresolved topic at the next meeting.

(3) ADJOURN

The meeting adjourned at approximately 1:00 p.m. The next meeting will be held on December 1, 2021, starting at 12:00 noon.

TAB 2

Court of Appeals Invitation: a Specific Jury Unanimity Instruction

NOTES:
On November 12, 2021, the Utah Court of Appeals published *State v. Paule*, 2021 UT App 120. In *Paule*, the court of appeals stated in a footnote:

> While there exists a model Utah jury instruction discussing the general unanimity requirement, there does not exist a model instruction regarding specific unanimity as to the underlying factual circumstance. We urge the Advisory Committee on Model Utah Criminal Jury Instructions to consider including such an instruction in its set of model instructions.

Id. at ¶43, footnote 4. The following materials are a starting point for committee discussion on a possible jury instruction.

Instruction No. _____

(UNANIMITY AND ALTERNATIVE ELEMENTS/CIRCUMSTANCES)

In [count __], the prosecution has charged [an act/element in alternative ways] [alternative dates] for [the offense] [NAME THE OFFENSE]. Before you may find the defendant guilty of that offense, you must be unanimous in your decision that the prosecution has proved [the element/act/date] beyond a reasonable doubt in at least one alternative way. In other words, you may not find the defendant guilty of that offense unless you all agree that the prosecution has proved [the act occurred on a specific date] [one variation of the element/act] AND you all agree on that specific [date/element/act]. On the other hand, if you all agree that an [element/act/offense] has been proved but you do not agree on which [element/act/date] has been proved, you are not in agreement as to the alternative.

The prosecution has charged that defendant committed [count 1] [the offense] [NAME THE OFFENSE] in alternative ways. You may not find the defendant guilty of that offense unless you all agree that the prosecution has proved that the defendant committed the act in at least one alternative way AND you all agree on which act the defendant committed.

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
ELBERT JOHN PAULE,
Appellant.

Opinion
No. 20200555-CA
Filed November 12, 2021

Fourth District Court, Provo Department
The Honorable Lynn W. Davis
No. 191400658

Douglas J. Thompson and Margaret P. Lindsay,
Attorneys for Appellant

Sean D. Reyes and Nathan Jack,
Attorneys for Appellee

JUDGE RYAN M. HARRIS authored this Opinion, in which JUDGES GREGORY K. ORME and DAVID N. MORTENSEN concurred.

HARRIS, Judge:

¶1 Elbert John Paule shot and killed his friend (Friend), and police later discovered the weapon used in the shooting—a shotgun—lying in the grass below the balcony of Paule's apartment. Paule was charged with, among other things, murder (for shooting Friend) and obstruction of justice (for allegedly throwing the shotgun off the balcony). After a nine-day trial, a jury credited Paule's account that he shot Friend in self-defense and acquitted him of murder, but nevertheless convicted him of obstruction of justice. Paule now appeals that conviction, asserting that the trial court erred by denying his motion to arrest judgment and that his trial attorneys rendered ineffective assistance. We affirm.

BACKGROUND[1]

¶2 Paule and Friend became acquainted a month or two prior to the shooting. While the depth of their friendship was not entirely clear from trial testimony, witnesses testified that Paule and Friend often spent time together hanging out, eating dinner, and playing video games, and that Paule had stayed the night at Friend's residence several times. However, in the days leading up to the shooting, their relationship began to deteriorate, and the two of them exchanged heated words, largely through digital messages. At one point, Paule suggested that the two of them settle their dispute with a fight; Friend, for his part, told Paule that he was going to come over to Paule's apartment so the two could "fight it out," that it was not "going to end good for [Paule]," and that he was going to "take [Paule] out." Paule later testified that he took these threats seriously and was concerned for his safety.

¶3 On the day of the shooting, Friend—with his fiancée (Fiancée) and infant child in tow—went over to Paule's apartment, ostensibly to "squash the beef" between himself and Paule. Accompanied by Fiancée and their infant, Friend climbed the three flights of stairs to Paule's apartment and knocked on the door. Paule was home at the time and, fearing it was Friend at the door, went into his bedroom to retrieve his shotgun. Accounts differ as to whether Friend or Paule opened the door first, and as to whether Friend had a knife in his hand, but one thing is certain: as soon as Paule realized that Friend was standing in his doorway, and before any meaningful dialogue

1. "On appeal, we recite the facts from the record in the light most favorable to the jury's verdict and present conflicting evidence only as necessary to understand issues raised on appeal." *Layton City v. Carr*, 2014 UT App 227, ¶ 2 n.2, 336 P.3d 587 (quotation simplified).

occurred, Paule pulled the shotgun's trigger and fatally shot Friend.

¶4 After the shooting, Paule fled the scene, allegedly assaulting Fiancée in his attempt to escape the apartment. Somehow, the shotgun made its way down onto the grass below the balcony of Paule's apartment, and Paule's phone was lost—and never found—during his departure from the apartment complex. Paule then traveled to California, where he eventually turned himself in to the local authorities and was extradited back to Utah. The officer who booked Paule into jail in California asked Paule if he knew why he was being taken into custody, and Paule responded: "I'm here for murder" and "I used a shotgun."

¶5 After investigation, the State charged Paule with four crimes: (1) murder, a first-degree felony; (2) obstruction of justice, a second-degree felony; (3) reckless endangerment, a class A misdemeanor; and (4) assault, a class B misdemeanor. The case eventually proceeded to a jury trial, which lasted nine days. During his opening statement at trial, the prosecutor explained to the jury that the murder charge was "for shooting and killing" Friend; the obstruction of justice charge was for throwing the shotgun "off the balcony in order to hinder, delay, or prevent the investigation"; the reckless endangerment charge was for endangering Fiancée and the infant by "just randomly fir[ing]" a shotgun in their vicinity; and the assault charge was for "punch[ing]" and "push[ing]" past Fiancée after the shooting.

¶6 At trial, the State presented testimony from many witnesses, including Fiancée—who testified about what she saw at the time of the shooting—and several law enforcement officers. One of the officers testified that, while searching the apartment's balcony, he could see a "long rifle" or "shotgun" in the grass "almost directly below the balcony." Another officer

testified that he retrieved that gun—which he determined to be a shotgun—from the grass below the balcony, and he stated that the position in which the gun was found was consistent with it having been thrown to the ground. That same officer also testified that a live round was found in the chamber of the shotgun, and that the round inside the gun was "the same brand" as the spent shell casing discovered inside the apartment. And yet another officer testified that the only prints recovered from the shotgun were Paule's finger and palm prints.

¶7 At the close of the State's case, Paule moved for a directed verdict as to the obstruction of justice count. In support of that motion, Paule made one argument: that the State had presented insufficient evidence indicating that it had been Paule—as opposed to someone else—who had thrown the shotgun off the balcony. During argument on the motion, which took place outside the jury's presence, all participants (including the court) appeared to assume that the obstruction of justice count concerned *only* the allegation that Paule had attempted to dispose of the shotgun; indeed, inherent in Paule's request—which asked the court to order an acquittal on the obstruction count—was the notion that the only thing Paule had been accused of doing that could constitute obstruction of justice was throwing the gun off the balcony. The State opposed the motion on the sole ground that there existed "sufficient circumstantial evidence" that Paule had been the person who threw the gun off the balcony. That is, the State did not assert any other factual bases on which the jury could convict Paule of obstruction of justice. The court denied the motion, concluding that, based on the circumstantial evidence, "the jury could make a determination" that Paule had been the one who threw the gun off the balcony.

¶8 Paule testified in his own defense, and gave a much different account of the shooting than Fiancée, claiming that he shot Friend in self-defense. He also testified that he did not do

anything with the shotgun after the shooting, and instead claimed that one of his roommates took the shotgun from his hands and "ran out to the balcony."

¶9 After Paule rested his case, the trial court instructed the jury. The instruction for the obstruction of justice charge stated that the jury could not convict Paule unless it was able to find, beyond a reasonable doubt, that Paule had "conceal[ed] or remove[d] any item or other thing" with the "intent to hinder, delay, or prevent the investigation . . . of any person regarding conduct that constitutes a criminal offense." The court also instructed the jury that, "[i]n all criminal cases, including this case, the unanimous agreement of all jurors is required before a verdict can be reached." No further instruction regarding jury unanimity was given.

¶10 During closing argument, the prosecutor discussed the obstruction of justice charge and—as he had during his opening statement—made clear to the jury that this charge was for "when [Paule] threw the gun over the balcony." He pointed out that "only [Paule's] prints [were] on that" gun, and urged the jury to convict Paule on the obstruction charge because the evidence indicated that Paule had been the one who threw the gun off the balcony. At no point did the prosecutor identify any other act as being the basis for the obstruction of justice charge, nor did he ask the jury to convict Paule on that count for any other act.

¶11 At certain points in his closing argument, the prosecutor mentioned that Paule had "got rid of" his phone while fleeing the scene and that Paule had traveled to California immediately thereafter. But these comments were made much earlier in the argument than the prosecutor's discussion of the obstruction charge, and were made in the context of discussing Paule's guilt on the murder charge. The prosecutor prefaced the discussion by saying, "[n]ow, as to Paule's guilt" on the murder charge, and argued that a person who was truly scared of Friend and who

had acted in self-defense would not have "got rid of his phone" and "fled to" California.

¶12 The jury ultimately acquitted Paule of murder, reckless endangerment, and assault, but convicted him of obstruction of justice. Paule subsequently filed a motion to arrest judgment, arguing that the jury's verdict was legally inconsistent because "the jury found [Paule] was legally justified" in shooting Friend and that there had been "no crime for [Paule] to obstruct." Paule therefore asked the court to either enter an acquittal on the obstruction of justice charge or, in the alternative, to reduce Paule's conviction from a second-degree felony to a class A misdemeanor. In its written opposition to Paule's motion, the State continued to take the position that the obstruction of justice count had been about Paule throwing the shotgun off the balcony. But at oral argument on the motion, the State for the first time asserted that there might have been other factual bases upon which the jury might have convicted Paule of obstruction of justice, including disposing of his phone and fleeing to California. After argument, the trial court denied Paule's motion.

¶13 A few weeks later, at Paule's sentencing hearing, the State asked the court to deviate from the sentencing guidelines—which indicated that probation would be appropriate—and sentence Paule to prison. As part of its argument, the State represented that it had spoken "with the jurors" and that they had "mentioned" three things Paule did that they thought might have constituted obstruction of justice: throwing the shotgun off the balcony; disposing of the cell phone; and "absconding to California." The State discussed all three of those things in its argument, and urged the court to deviate from the guidelines because, among other reasons, Paule had taken "deliberate and intentional steps to obstruct not only the investigation, but to obstruct the entire prosecution." Paule's attorney objected to the State's discussion of anything that jurors might have told the State after trial, and asked the court to strike those statements;

the court granted that request. Nevertheless, at the conclusion of the sentencing hearing the court sentenced Paule to prison, consistent with the State's request.

ISSUES AND STANDARDS OF REVIEW

¶14 Paule appeals his obstruction of justice conviction, and asks us to consider two issues. First, he asserts that the trial court erred when it denied his motion to arrest judgment; among other things, he argues that his conviction for obstruction of justice is legally inconsistent with his acquittal on the other charges. "We review a trial court's ruling on a motion to arrest judgment for correctness." *State v. Hand*, 2016 UT App 26, ¶ 10, 367 P.3d 1052; *see also Pleasant Grove City v. Terry*, 2020 UT 69, ¶ 11, 478 P.3d 1026 (noting that "legally impossible verdicts involve a question of law" and that such questions are reviewed "for correctness").

¶15 Second, Paule asserts that his trial attorneys rendered ineffective assistance by failing to object to allegedly incomplete jury instructions. "When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review and we must decide whether the defendant was deprived of the effective assistance of counsel as a matter of law." *State v. Beckering*, 2015 UT App 53, ¶ 18, 346 P.3d 672 (quotation simplified).

ANALYSIS

I

¶16 Paule challenges the trial court's denial of his motion to arrest judgment and, in support of that challenge, makes two independent arguments. First, he takes issue with the conviction as a whole, asserting that the guilty verdict on the obstruction of justice charge is legally inconsistent with his acquittal on the

other charges and should therefore be vacated. Second, he takes issue with the level of conviction, arguing in the alternative that even if the verdict is not legally inconsistent, there is insufficient evidence to support a felony conviction, and asks that the conviction be instead entered as a misdemeanor. We address each of Paule's arguments, in turn, and reject them because they are grounded in a misinterpretation of the obstruction of justice statute.

A

¶17 Paule's first argument—for complete vacatur of his conviction—is that the jury's verdict was legally inconsistent. As Paule sees it, his conviction for obstruction of justice is inherently inconsistent with his acquittals on the remaining counts, because the acquittals mean that there was no underlying criminal conduct to obstruct. We first discuss the obstruction of justice statute, including material amendments made in 2001, and then address the merits of Paule's argument.

1

¶18 Prior to 2001, a person could be found guilty of obstruction of justice under Utah law if that person "conceal[ed], destroy[ed], or alter[ed] any physical evidence that might aid in the discovery, apprehension, or conviction of [an] offender," and did so "with intent to hinder, prevent, or delay the discovery, apprehension, prosecution, conviction, or punishment of another *for the commission of a crime*." Utah Code Ann. § 76-8-306(1)(f) (Lexis Supp. 2000) (emphasis added).

¶19 In 2001, our legislature materially amended the obstruction of justice statute. Among other changes, the legislature added "investigation" to the list of things that an actor cannot hinder, delay, or prevent without potentially committing obstruction of justice. *See* Act of Apr. 30, 2001, ch. 307, § 2, 2001 Utah Laws 1385, 1385. And, notably for present

purposes, the legislature deleted "for the commission of a crime" and replaced that text with "regarding conduct that constitutes a criminal offense," and then included a statutory definition of the phrase "conduct that constitutes a criminal offense." *Compare* Utah Code Ann. § 76-8-306(1), *with* Act of Apr. 30, 2001, at 1385–86. According to that definition, "'conduct that constitutes a criminal offense' means conduct that *would be* punishable as a crime and is separate from a violation of this section, and includes . . . any violation of a criminal statute or ordinance of this state." Act of Apr. 30, 2001, at 1386 (emphasis added).

¶20 Thus, under current Utah law, as relevant here, "[a]n actor commits obstruction of justice if the actor" does any one of ten enumerated acts with the "intent to hinder, delay, or prevent the investigation . . . of any person regarding . . . conduct that *would be* punishable as a crime." *See* Utah Code Ann. § 76-8-306(1), (2)(a) (LexisNexis Supp. 2021) (emphasis added).[2] In our view, the 2001 amendments broadened the scope of the statute. The inclusion of the word "investigation" bespeaks a legislative intent to criminalize interference with law enforcement criminal investigations, and not just the apprehension, prosecution, conviction, or punishment of persons who commit crimes. And the replacement of the phrase "commission of a crime" with the phrase "conduct that constitutes a criminal offense," along with the inclusion of the statutory definition of that phrase—especially that definition's use of the conditional verb construction "would be"—indicates legislative intent that obstruction of justice can be present even if the underlying conduct is never ultimately found to constitute a crime. Indeed, we have previously so held. *See State v. Hamilton*,

2. Because the current iteration of the statute is not materially different, for purposes of this case, from the version of the statute in effect at the time of the shooting, we cite the current statute for convenience.

2020 UT App 11, ¶ 15, 457 P.3d 447 (stating that "the obstruction of justice statute does not require a conviction of the underlying crime").

¶21 In this case, the enumerated act Paule was accused of committing was "alter[ing], destroy[ing], conceal[ing], or remov[ing] any item or other thing." *See* Utah Code Ann. § 76-8-306(1)(c). Thus, to obtain a conviction, the State needed to prove, beyond a reasonable doubt, that Paule (1) concealed or removed the shotgun (2) with the intent to hinder, delay, or prevent an investigation (3) into "conduct that *would be* punishable as a crime." *See id.* § 76-8-306(1)(c), (2)(a) (emphasis added).

2

¶22 Citing *Pleasant Grove City v. Terry*, 2020 UT 69, 478 P.3d 1026, Paule asserts that the verdict in this case is "legally impossible." In Paule's view, it is impossible to reconcile the jury's conviction for obstruction of justice with the jury's acquittal on all other counts. As Paule sees it, the jury's verdict means that no underlying crime was ever committed, and that therefore no criminal conduct ever occurred whose investigation he could have been guilty of obstructing. We reject Paule's argument because *Terry* does not apply here, and because Paule misinterprets the obstruction of justice statute.

¶23 In *Terry*, our supreme court determined that a defendant who was "acquitted on [a] predicate offense but convicted on [a] compound offense" was subject to a "legally impossible" verdict and, in that situation, the defendant's conviction on the compound offense had to be vacated. *Id.* ¶¶ 54, 56. The court distinguished between "legally impossible" verdicts and "factually inconsistent" verdicts, and held that the former "cannot stand" while the latter are sometimes permissible. *Id.* ¶¶ 38, 56. The court defined "legally impossible" verdicts as those "that are inconsistent as a matter of law because it is impossible to reconcile the different determinations that the jury

would have had [to] make to render them." *Id.* ¶ 13 (quotation simplified). The court also noted that its decision was "narrow" and "limited" to situations "in which a defendant is acquitted on the predicate offense but convicted on the compound offense." *Id.* ¶ 54.

¶24 *Terry* simply does not apply here. Neither murder nor any of the other charges on which Paule was acquitted is a predicate offense for an obstruction of justice conviction. *See* Utah Code Ann. § 76-8-306(1). A person can legally be convicted of obstruction of justice without also being convicted of murder, reckless endangerment, or assault. Indeed, as noted, a person can legally be convicted of obstruction of justice even in the absence of *any* conviction on *any* underlying crime. *See Hamilton*, 2020 UT App 11, ¶ 15. The verdict the jury rendered here is simply not a "legally impossible" verdict as defined in *Terry*.

¶25 Moreover, Paule's argument is founded on an incorrect interpretation of the obstruction of justice statute. As Paule sees it, the statute requires the presence of underlying "conduct that constitutes a criminal offense," *see* Utah Code Ann. § 76-8-306(1), and he contends that there was no such conduct here because the jury acquitted him of all underlying charges. But Paule overlooks the included statutory definition of the phrase "conduct that constitutes a criminal offense." As noted, our legislature defined that phrase as "conduct that *would be* punishable as a crime." *See id*. § 76-8-306(2)(a) (emphasis added). In particular, Paule overlooks the legislature's use of the conditional verb form "would be" in the statutory definition. "When we interpret statutes, our primary objective is to ascertain the intent of the legislature," and that intent is sometimes expressed through verb tense or verb form. *See Scott v. Scott*, 2017 UT 66, ¶ 22, 423 P.3d 1275 (quotation simplified); *see also id.* ¶ 24 ("A statutory reading that credits a verb's tense is not uncommon."). Because "the best evidence of the legislature's

intent is the plain language of the statute itself, we look first to the plain language of the statute." *Id.* ¶ 22 (quotation simplified). "In so doing, we presume that the legislature used each word advisedly," including verb tense and verb form. *Id.* ¶¶ 22, 24 (quotation simplified). In our view, the legislature's choice to use a conditional verb form ("would be") in the obstruction statute indicates that the underlying conduct need not necessarily result in a criminal conviction.

¶26 Indeed, the legislature added the word "investigation" to the statute in 2001, along with the amendment that defined "conduct that constitutes a criminal offense." *See* Act of Apr. 30, 2001, ch. 307, § 2, 2001 Utah Laws 1385, 1385–86. Since 2001, it has been a crime to interfere with an "investigation" of any person regarding "conduct that would be punishable as a crime." *See* Utah Code Ann. § 76-8-306(1), (2)(a). Thus, in cases like this one where the allegation is that the actor hindered a law enforcement investigation, the statutory focus is squarely placed on the conduct being investigated at the time of the alleged obstruction, and not necessarily on any conduct that a factfinder ultimately finds, after trial, to have actually occurred. If the conduct under investigation at the time of the alleged obstruction "would be punishable as a crime," then that conduct qualifies as "conduct that constitutes a criminal offense," as that phrase is statutorily defined. *See id.*

¶27 And all of this remains true, under the statutory language, even if it is later determined—whether by law enforcement officers or prosecutors who decide not to file charges, or by a jury who acquits—that no underlying criminal activity occurred. *See Hamilton*, 2020 UT App 11, ¶ 15 (stating that "the obstruction of justice statute does not require a conviction of the underlying crime—it simply requires a finding that the defendant took certain actions with the intent to hinder, delay, or prevent the investigation . . . of any person regarding conduct that constitutes a criminal offense" (quotation simplified)). Paule's

argument—that the jury's acquittal on the underlying counts is inconsistent with his conviction for obstruction—founders principally because the conduct ultimately found to have occurred by the jury on the underlying charges is, in this case, not particularly relevant to the obstruction count. Instead, the conduct that matters for purposes of the obstruction count is twofold: (a) the actions Paule took that allegedly constitute obstruction, and (b) the underlying conduct being investigated at the time of the alleged obstruction.

¶28 Paule's contrary interpretation of the statute is not only incompatible with the statutory text, but could also lead to seemingly absurd results and could incentivize individuals to commit even more obstruction. Imagine a situation in which a driver is involved in an auto-pedestrian accident with a fatality, but the driver observed all traffic laws and did not act even negligently, let alone intentionally. The driver panics, however, upon seeing that the pedestrian died and—before police arrive, and out of a concern that police might think a homicide was committed—takes the body and hides it in a nearby ditch. Police investigate the incident, based on the evidence found at the crash site, as a potential homicide, and while conducting that investigation they discover the body and learn that the driver attempted to conceal it. Later, however, police conclude that the crash was completely accidental and that no provable criminal conduct occurred in connection with it, and no underlying criminal charges are ever filed. Under Paule's interpretation of the statute, the driver could never be charged with obstruction of justice for hiding the body, because there was no underlying conduct that constituted a criminal offense. But Paule's interpretation is incorrect: in this situation, the driver can still be charged with obstruction of justice, even though there is no underlying criminal conduct, because at the time of the obstruction the police were investigating a potential homicide, and the driver hid the body with the intent to hinder or delay that investigation. The possible homicide being investigated is

"conduct that would be punishable as a crime" if the facts end up turning out the way police investigators suspect, and therefore that conduct, under the applicable statutory definition, is "conduct that constitutes a criminal offense," even though such conduct may never actually be proved or even prosecuted. *See* Utah Code Ann. § 76-8-306(1), (2)(a).

¶29 In addition, Paule's interpretation of the obstruction statute would incentivize individuals interested in obstructing justice to go all out in such efforts, because if they hinder the investigation well enough to prevent any convictions on the underlying charges, they will be immune from conviction for obstruction of justice as well. Such a result is not only incompatible with the text of the statute, but it is a result that is unlikely to have been intended by legislative drafters.

¶30 Thus, the jury's ultimate conclusion that Paule acted in self-defense in shooting Friend does not insulate him from charges that he obstructed justice by impeding the investigation into the underlying incident. At the time Paule threw the shotgun off the balcony, police were investigating (or were about to start investigating) potential criminal conduct associated with the shooting death of Friend. Put in terms of the statutory text, that investigation was "regarding conduct . . . that would be punishable as a crime" if the facts had developed as suspected. *See id.* The jury's later acquittal of Paule on the underlying charges does not mean that the State failed to prove any of the elements of obstruction of justice. In appropriate cases, when supported by the facts, a defendant who is acquitted on the underlying charges may still—without any inconsistency in the verdict—be convicted of obstruction of justice.

¶31 Accordingly, we conclude that the jury's verdict in this case was not legally impossible, as that term is discussed in *Terry*, and that the trial court correctly rejected Paule's argument to the contrary in denying his motion to arrest judgment.

B

¶32 Second, and in the alternative, Paule takes issue with the level of his conviction, and asserts that the trial court erred when it refused to reduce his obstruction of justice conviction from a second-degree felony to a class A misdemeanor. At trial, during proceedings in connection with the motion to arrest judgment, as well as here on appeal, Paule couches these arguments in terms of insufficiency of the evidence—that is, he asserts that the evidence presented at trial was insufficient to support a conviction as a second-degree felony, as opposed to a misdemeanor. In assessing a sufficiency of the evidence challenge, we will reverse only where "the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." *State v. Jok*, 2021 UT 35, ¶ 17, 493 P.3d 665 (quotation simplified). That standard is not met here, and on that basis we reject Paule's argument.

¶33 Under Utah law, obstruction of justice can constitute either a second-degree felony, a third-degree felony, or a class A misdemeanor, depending on the severity of the "conduct that constitutes an offense." *See* Utah Code Ann. § 76-8-306(3). Obstruction of justice is a second-degree felony "if the conduct which constitutes an offense would be a . . . first degree felony," but it is a class A misdemeanor if, among other reasons, the underlying offense is a misdemeanor. *See id.* The State charged Paule with second-degree-felony obstruction of justice, asserting that the investigation he obstructed was about whether Paule (or someone else) had committed first-degree murder.

¶34 Paule contends that, because he was ultimately charged with three different underlying counts—one first-degree murder charge and two misdemeanor charges—"it is impossible to know whether the underlying offense" found by the jury "was

murder, endangerment, assault, or some other offense." Paule thus asserts that the evidence is insufficient to support a second-degree-felony conviction in this case.

¶35 But there was copious evidence in the record to support a determination that the investigation at issue here was principally an investigation of a potential first-degree felony. In this case, police were clearly investigating Friend's death as a possible murder. Just two days after the shooting, police charged Paule with first-degree murder; indeed, in the initial information filed in this case, that was the *only* charge the State brought against him. And on that very same day, when Paule turned himself in to officers in California, he told them—in response to their query as to what he was being held for—that he was "here for murder."

¶36 We therefore have no trouble concluding that sufficient evidence existed to support a determination that the underlying investigation concerned conduct that would be punishable as a first-degree felony. Accordingly, the trial court did not err in denying Paule's motion to arrest judgment.[3]

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3. In a related argument, Paule asserts that his trial attorneys rendered ineffective assistance by failing to request an additional instruction that might have further defined the phrase "conduct that constitutes a criminal offense," and for failing to request some unspecified mechanism—perhaps a special verdict form—that would have allowed the jurors to "inform the court which *conduct that constitutes a criminal offense* they determined beyond a reasonable doubt Paule acted to obstruct." Paule devotes less than one page to this argument; to the extent Paule's argument here intends to incorporate by reference his earlier contentions regarding his interpretation of the obstruction of justice statute, we reject that argument for the same reasons already articulated.

(continued…)

II

¶37 Next, Paule asserts that his trial attorneys rendered constitutionally ineffective assistance by failing to object to the absence of a specific instruction regarding jury unanimity. In particular, Paule asserts that certain evidence at trial supported three different factual bases on which the jury might have found that he had obstructed justice—throwing the gun off the balcony, disposing of his phone, and fleeing to California—but notes that he was charged with only one count of obstruction, and he correctly observes that the jury was not instructed that any guilty verdict needed to be unanimous with regard to which factual episode formed the basis for the conviction. Paule faults his attorneys for not asking for a specific instruction in this regard, and asserts that the outcome of the case would have been different if they had. We find Paule's argument unpersuasive because the State offered the jury only one potential basis upon which to ground a conviction for obstruction of justice.

¶38 To establish that his attorneys rendered constitutionally ineffective assistance, Paule must show both (1) that his attorneys' performance was deficient, in that it "fell below an objective standard of reasonableness," and (2) that this deficient

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(…continued)
But even assuming, without deciding, that Paule's trial attorneys performed deficiently in failing to request these items, Paule does not carry his burden of persuading us that there exists a reasonable likelihood of a different result if they had, especially in light of other evidence in the record, including Paule's own admission (to the California officer) that he knew he was "here for murder." *See State v. Scott*, 2020 UT 13, ¶ 43, 462 P.3d 350 ("The burden is on the defendant to demonstrate a reasonable probability that the outcome of his or her case would have been different absent counsel's error.").

performance "prejudiced the defense" such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *accord State v. Scott*, 2020 UT 13, ¶ 28, 462 P.3d 350; *State v. Ray*, 2020 UT 12, ¶ 24, 469 P.3d 871. "A defendant must satisfy both parts of this test in order to successfully establish ineffective assistance." *State v. Whytock*, 2020 UT App 107, ¶ 26, 469 P.3d 1150. Thus, "it is unnecessary for a court to address both components of the inquiry if we determine that a defendant has made an insufficient showing on one." *Id.* (quotation simplified).

¶39 The first part of the test requires Paule to show that his attorneys' performance "fell below an objective standard of reasonableness." *Scott*, 2020 UT 13, ¶ 31 (quotation simplified). In evaluating the reasonableness of trial counsel, courts will often look to whether counsel acted strategically by taking the disputed action. *See id.* ¶ 35 ("[T]he performance inquiry will often include an analysis of whether there could have been a sound strategic reason for counsel's actions."). "If it appears counsel's actions could have been intended to further a reasonable strategy, a defendant has necessarily failed to show unreasonable performance." *Ray*, 2020 UT 12, ¶ 34.

¶40 Paule's claim of ineffective assistance raises the issue of a non-unanimous jury verdict on the obstruction of justice charge. Specifically, Paule asserts that some (but not all) members of the jury could have believed that he obstructed justice by throwing the shotgun off the balcony, some (but not all) members of the jury could have believed that he obstructed justice by disposing of his phone, and still other (but not all) members of the jury could have believed that he obstructed justice by fleeing to California; in that event, Paule could have been convicted of obstruction of justice even though not all jurors would have agreed that he committed any particular act of obstruction. Because the jurors were not instructed that they had to agree on

the act underlying the obstruction charge, Paule contends that the instructions were not legally correct and that his trial attorneys were ineffective for not objecting to them.

¶41 Paule correctly understands Utah's jury unanimity jurisprudence. Our state constitution provides that "[i]n criminal cases the verdict shall be unanimous." Utah Const. art. I, § 10. "At its most basic level, this provision requires the full concurrence of all empaneled jurors on their judgment as to the criminal charges submitted for their consideration." *State v. Hummel*, 2017 UT 19, ¶ 25, 393 P.3d 314. Additionally, it is "well-established" that our constitutional unanimity requirement "'is not met if a jury unanimously finds only that a defendant is guilty of a crime.'" *See id.* ¶¶ 26, 30 (emphasis omitted) (quoting *State v. Saunders*, 1999 UT 59, ¶ 60, 992 P.2d 951). Our constitution "requires unanimity as to each count of each distinct crime charged by the prosecution and submitted to the jury for decision." *Id.* ¶ 26 (emphasis omitted). Indeed, "a generic 'guilty' verdict that does not differentiate among various charges would fall short," as would "a verdict of 'guilty of some crime.'" *Id.* ¶¶ 26–27. For example,

> a verdict would not "be valid if some jurors found a defendant guilty of robbery committed on December 25, 1990, in Salt Lake City, but other jurors found him guilty of a robbery committed January 15, 1991, in Denver, Colorado, even though all jurors found him guilty of the elements of the crime of robbery."

Id. ¶ 28 (quoting *Saunders*, 1999 UT 59, ¶ 60). "These are distinct counts or separate instances of the crime of robbery, which would have to be charged as such." *Id.*

¶42 In *State v. Alires*, 2019 UT App 206, 455 P.3d 636, we held that a jury verdict violated constitutional unanimity principles where a defendant was charged with "six identically-worded

counts" of sexual abuse, the counts were not distinguished by act or alleged victim, the victims described more than six acts that could have qualified as abuse, and the jury convicted the defendant on only two counts. *See id.* ¶¶ 22–23. This situation was problematic because "the jurors could have completely disagreed on which acts occurred or which acts were illegal." *Id.* ¶ 23. And even more recently, in *State v. Mendoza*, 2021 UT App 79, we applied these principles to the obstruction of justice statute, and concluded that "the obstruction of justice statute's various ways to perform the actus reus of the crime constitute alternative elements, the commission of any one of which could satisfy that statutory element, but which also require the jury to agree that the same underlying criminal act has been proved beyond a reasonable doubt." *See id.* ¶ 13 (quotation simplified). In *Mendoza*, we held that a trial attorney performed deficiently in an obstruction of justice case by failing to request a specific jury unanimity instruction or a special verdict form that would have required the jury "to specify which statutorily prohibited act [the defendant] engaged in." *Id.* ¶ 16.

¶43 In cases like these, jury unanimity problems can be mitigated in one of two ways. First, a trial court can give a specific jury unanimity instruction—over and above the general unanimity instruction, *see* Model Utah Jury Instructions 2d CR216 (2018), https://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=30#216 [https://perma.cc/TY2Y-DCEA]—informing the jurors that "all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt."[4] *See State v. Vander Houwen*, 177 P.3d 93, 99 (Wash. 2008)

4. While there exists a model Utah jury instruction discussing the general unanimity requirement, there does not exist a model instruction regarding specific unanimity as to the underlying factual circumstance. We urge the Advisory Committee on (continued…)

(en banc) (quotation simplified), *quoted with approval in Alires*, 2019 UT App 206, ¶ 22. Alternatively, the prosecutor can specifically identify for the jury—usually in opening statement or in closing argument—"which act supported each charge." *See Alires*, 2019 UT App 206, ¶ 22; *see also State v. Santos-Vega*, 321 P.3d 1, 18 (Kan. 2014) (stating that, in order to remedy a jury unanimity problem, "either the State must have informed the jury which act to rely upon for each charge . . . or the [trial] court must have instructed the jury to agree on the specific criminal act for each charge"), *quoted with approval in Alires*, 2019 UT App 206, ¶ 22; *Mendoza*, 2021 UT App 79, ¶¶ 19–20 (noting that, if the prosecutor had "put[] all his eggs in one basket" and identified "one particular action" that formed the basis for the obstruction charge, the court "might be inclined to" reject the defendant's ineffective assistance of counsel claim "for lack of prejudice"); *Whytock*, 2020 UT App 107, ¶ 31 (observing that the State could have used the jury instructions or closing arguments to "indicate to the jury which factual occasion was the one being charged").

¶44 In this case, Paule correctly notes that he was charged with only one count of obstruction of justice. He alleges, however, that the State put on evidence of three distinct underlying acts that each could have independently formed the basis for a conviction on that count. Paule therefore contends that, as in *Alires*, "the jurors could have completely disagreed on which acts occurred or which acts were illegal," and yet could have nonetheless convicted him of obstruction of justice. *See* 2019 UT App 206, ¶ 23.

¶45 We disagree with Paule's characterization of the evidence and arguments presented at trial. At no point during trial did the

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(…continued)
Model Utah Criminal Jury Instructions to consider including such an instruction in its set of model instructions.

prosecutor ever argue that the obstruction count was for any act other than throwing the shotgun off the balcony. To the contrary, the State consistently maintained during trial, in representations made both to the jury and outside its presence, that the underlying act for which it sought conviction for obstruction was the act of throwing the shotgun off the balcony. During his opening statement, the prosecutor informed the jury that the obstruction count was for "when, after he shot [Friend], [Paule] took that shotgun, [and] threw it off the balcony in order to hinder, delay, or prevent the investigation." During the mid-trial argument regarding the directed verdict motion, the State again made clear its view that the act underlying the obstruction count was only the act of throwing the shotgun off the balcony. And in his closing argument, the prosecutor reemphasized that the obstruction charge was for "when [Paule] threw the gun over the balcony," and asked for a conviction on that count because "only [Paule's] prints are on that" gun and that fact, combined with other evidence, indicated that Paule had been the one who threw the gun off the balcony.

¶46 Paule resists this conclusion by directing our attention to the fact that the jury heard evidence that Paule lost his phone while leaving the apartment complex and that he fled to California immediately thereafter, and to comments made by the prosecutor during closing argument discussing that evidence. But in our view, Paule misperceives the context in which this evidence was introduced and discussed. The prosecutor discussed that evidence during closing only in connection with his argument on the murder charge, not on the obstruction charge, and only as a way to discuss Paule's potential consciousness of guilt and to argue that Paule did not shoot Friend out of self-defense; specifically, the prosecutor argued that a person who was truly scared of Friend and who had acted in self-defense would not have "got rid of his phone" and "fled to" California. These comments were not reasonably likely to have diluted the State's otherwise-clear position: that it was

asking for an obstruction of justice conviction *only* for the act related to the shotgun, and not for any acts related to the cell phone or flight to California.[5]

¶47 And any comments the State made after the jury had been discharged—for instance, at sentencing, or in defending against Paule's motion to arrest judgment—cannot have had any effect on the jury's perception of the factual basis for the obstruction charge. Without commenting on whether those comments were well-advised, we can readily conclude that any comment made days or weeks after the jury's discharge cannot possibly have countermanded or diluted, in the jury's mind, the reach of the State's otherwise-clear guidance to the jury regarding the scope of the obstruction charge.

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5. The trial court struck from the record any statements proffered by the State that jurors had told prosecutors that they considered the other acts—related to the phone and flight to California—to be in play related to the obstruction of justice charge. Not only have those comments been stricken from the record, and on that basis alone are not to be considered on appeal, our consideration of those comments would appear to violate at least two rules of evidence. *See* Utah R. Evid. 606(b)(1) (stating that "a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment"); *id.* R. 802 ("Hearsay is not admissible except as provided by law or by these rules."). Paule mentions these statements in his reply brief, even though he acknowledges that they are "inadmissible hearsay" and were stricken from the record. Those statements should not have been included in the reply brief, and we therefore grant the State's motion to strike all references to those statements; we do not consider them for any purpose in this opinion.

¶48 Therefore, in this case the State properly took advantage of one of the pathways identified in our case law to obviate any jury unanimity problem: it clearly identified for the jury which factual circumstance formed the basis for its obstruction of justice charge. *See Alires*, 2019 UT App 206, ¶ 22. And because the State made this clear to the jury, Paule's attorneys did not act unreasonably by electing not to seek further relief at trial. Thus, Paule cannot demonstrate that his attorneys performed deficiently, and on this basis we reject Paule's ineffective assistance of counsel claim.

CONCLUSION

¶49 The trial court did not err when it denied Paule's motion to arrest judgment because the jury verdict was not legally inconsistent. And Paule has failed to demonstrate that his trial attorneys rendered constitutionally ineffective assistance. Accordingly, we affirm Paule's conviction.

TAB 3

Finish CR1402B, CR1403B, and CR1411B

NOTES:
The final paragraphs of the minutes for the last meeting describe where the committee's consideration of these instructions left off (please review above). The versions of CR1402B, CR1403B, and CR1411B are the most up-to-date version the committee has approved.

WITH MITIGATION:

CR1402B Aggravated Murder Elements – Utah Code § 76-5-202(1) with Mitigation Defenses.
CR1403B Aggravated Murder Elements – Utah Code § 76-5-202(2) with Mitigation Defenses.
CR1411B Murder with Mitigation Defenses.

CR1402B Aggravated Murder Elements – Utah Code § 76-5-202(1) – With Mitigation Defenses.

The defendant, (DEFENDANT'S NAME), is charged with Aggravated Murder. You cannot convict (him)(her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, (DEFENDANT'S NAME);
2. Intentionally or knowingly;
3. Caused the death of (VICTIM'S NAME);
4. Under one or more of the following circumstances: [insert all applicable aggravating circumstances][; and]
5. [The defense of [perfect 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. On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find ~~the~~ that all of the elements of Aggravated Murder have been met~~defendant GUILTY of Aggravated Murder~~.

If you find ~~the defendant guilty~~that all of the elements of Aggravated Murder have been met, you must then decide whether the mitigation defense[s] of [imperfect self-defense][extreme emotional distress special mitigation][mental illness special mitigation][battered person mitigation] applies.

[Imperfect self-defense is defined in Instruction [#].]
[Extreme emotional distress special mitigation is defined in Instruction [#].]
[Mental illness special mitigation is defined in Instruction [#].]
[Battered person mitigation is defined in Instruction [#].]

Committee Notes

Elements

There is some uncertainty in the case law regarding a unanimity requirement as it relates to the aggravating circumstances in element 4. *See State v. Hummel,* 2017 UT 19. Therefore, if more than one aggravating circumstance applies in element 4, practitioners are encouraged to use a special verdict form requiring the jury to identify the aggravating circumstance(s) they unanimously find. *See State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59*; State v. Tillman*, 750 P.2d 546 (Utah 1987).

Mitigation

For mitigation defenses (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation), the committee has prepared other definitional instructions and special verdict forms that should be used together with this elements instruction.

"Imperfect Self-defense" mitigation is potentially applicable to aggravated murder and attempted aggravated murder. 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" or any other mitigation defense as a defense in element #5 above;
- do not use an "imperfect self-defense manslaughter" elements instruction; and
- always distinguish between "perfect self-defense" and "imperfect self-defense" throughout the instructions.

"Extreme Emotional Distress" mitigation is potentially applicable to aggravated murder and attempted aggravated murder (Utah Code § 76-5-205.5; CR____).

"Battered Person" mitigation is potentially applicable to offenses between cohabitants (Utah Code § 76-2-409; CR____)

"Mental Illness":

- is never a complete defense to aggravated murder or attempted aggravated murder (Utah Code § 76-2-305);
- can be a special mitigation, reducing the level of an aggravated murder or attempted aggravated murder offense (Utah Code § 76-5-205.5); and
- can be the basis for a finding of guilty with a mental illness at the time of the aggravated murder and attempted aggravated murder, which does not reduce the offense, but is a necessary finding by the trier of fact and changes sentencing requirements (Utah Code §§ 77-16a-102 and 77-16a-104).

CR1403B Aggravated Murder Elements – Utah Code § 76-5-202(2) – With Mitigation Defenses.

The defendant, (DEFENDANT'S NAME), is charged with Aggravated Murder. You cannot convict (him)(her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, (DEFENDANT'S NAME);
2. With reckless indifference to human life;
3. Caused the death of (VICTIM'S NAME); and
4. That the defendant did so incident to an act, scheme, course of conduct, or criminal episode during which (he)(she) was a major participant in the commission or attempted commission of: [insert all applicable predicate felonies][; and]
5. [The defense of [perfect 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. On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Aggravated Murder.

If you find the defendant guilty, you must then decide whether the mitigation defense[s] of [imperfect self-defense][extreme emotional distress special mitigation][mental illness special mitigation][battered person mitigation] applies.

[Imperfect self-defense is defined in Instruction [#].]
[Extreme emotional distress special mitigation is defined in Instruction [#].]
[Mental illness special mitigation is defined in Instruction [#].]
[Battered person mitigation is defined in Instruction [#].]

Committee Notes

Elements

There is some uncertainty in the case law regarding a unanimity requirement as it relates to the predicate felony in element 4. *See State v. Hummel,* 2017 UT 19. Therefore, if more than one predicate felony applies in element 4, practitioners are encouraged to use a special verdict form requiring the jury to identify the predicate felony or felonies they unanimously find. *See State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59*; State v. Tillman*, 750 P.2d 546 (Utah 1987).

Mitigation

For mitigation defenses (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation), the committee has prepared other definitional instructions and special verdict forms that should be used together with this elements instruction.

“Imperfect Self-defense” mitigation is potentially applicable to aggravated murder and attempted aggravated murder. 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” or any other mitigation defense as a defense in element #5 above;
- do not use an “imperfect self-defense manslaughter” elements instruction; and
- always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions.

“Extreme Emotional Distress” mitigation is potentially applicable to aggravated murder and attempted aggravated murder (Utah Code § 76-5-205.5; CR____).

“Battered Person” mitigation is potentially applicable to offenses between cohabitants (Utah Code § 76-2-409; CR____)

“Mental Illness”:

- is never a complete defense to aggravated murder or attempted aggravated murder (Utah Code § 76-2-305);
- can be a special mitigation, reducing the level of an aggravated murder or attempted aggravated murder offense (Utah Code § 76-5-205.5); and
- can be the basis for a finding of guilty with a mental illness at the time of the aggravated murder and attempted aggravated murder, which does not reduce the offense, but is a necessary finding by the trier of fact and changes sentencing requirements (Utah Code §§ 77-16a-102 and 77-16a-104).

CR1411B Murder – With Mitigation Defenses

(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 causes 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) was not a party to [the predicate offense(s)]; and
      ii. (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][; and]
3. [The defense of [perfect 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.
On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Murder.

If you find the defendant guilty, you must then decide whether the mitigation defense[s] of [imperfect self-defense][extreme emotional distress special mitigation][mental illness special mitigation][battered person mitigation] applies.

[Imperfect self-defense is defined in Instruction [#].]
[Extreme emotional distress special mitigation is defined in Instruction [#].]
[Mental illness special mitigation is defined in Instruction [#].]
[Battered person mitigation is defined in Instruction [#].]

Committee Notes

Elements

There is some uncertainty in the case law regarding a unanimity requirement as it relates to proving the alternatives in element 2. *See State v. Hummel,* 2017 UT 19. Therefore, if more than one alternative applies in element 2, practitioners are encouraged to use a special verdict form requiring the jury to identify the alternative(s) they unanimously find. *See State v. Mendoza*, 2021 UT App 79; *State v. Alires*, 2019 UT App 206; *State v. Saunders*, 1999 UT 59*; State v. Tillman*, 750 P.2d 546 (Utah 1987).

Mitigation

For mitigation defenses (imperfect self-defense mitigation, extreme emotional distress mitigation, battered person mitigation, or mental illness mitigation), the committee has prepared other definitional instructions and special verdict forms that should be used together with this elements instruction.

"Imperfect Self-defense" mitigation is potentially applicable to murder and attempted murder. 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" or any other mitigation defense as a defense in element #5 above;
- do not use an "imperfect self-defense manslaughter" elements instruction; and
- always distinguish between "perfect self-defense" and "imperfect self-defense" throughout the instructions.

"Extreme Emotional Distress" mitigation is potentially applicable to murder and attempted murder (Utah Code § 76-5-205.5; CR____).

"Battered Person" mitigation is potentially applicable to offenses between cohabitants (Utah Code § 76-2-409; CR____)

"Mental Illness":
- is never a complete defense to murder or attempted murder (Utah Code § 76-2-305);

- can be a special mitigation, reducing the level of a murder or attempted murder offense (Utah Code § 76-5-205.5); and
- can be the basis for a finding of guilty with a mental illness at the time of the murder and attempted murder, which does not reduce the offense, but is a necessary finding by the trier of fact and changes sentencing requirements (Utah Code §§ 77-16a-102 and 77-16a-104).

TAB 4

Partial Defense Instructions (continued)

NOTES:
The materials that follow are a continuation of the specific work the committee addressed on May 5, 2021, and again on August 4, 2021. The following materials have not yet been discussed by the committee at any point in time.

OVERVIEW

Mitigation Defenses:

- Imperfect self-defense
- Extreme emotional distress
- Battered person
- Mental Illness

For the mitigation defenses we have done the following:

- For aggravated murder and murder, we anticipate two elements instructions as templates: 1) elements instruction with no mitigation defenses; 2) elements instruction with mitigation defenses. The reason for this is that imperfect self-defense always gets inserted erroneously into the "defenses" element, so we are trying to make sure practitioners do not include it in the elements instruction.
- For all other crimes, we will have a generic template for when practitioners will have a mitigation defense
- There will be a roadmap instruction for when a mitigation defense is raised
- For each mitigation defense, we will have
    - definition/elements instructions
    - special verdict form

In Summary:

Completed at August 4, 2021 Meeting:

- ~~Modify CR1450 to add a note~~
- ~~Create new instruction CR505A for roadmap with mitigation defenses~~
- ~~Create new CR numbers for Aggravated Murder without mitigation defenses – 1402A, 1403A~~
- ~~Create new elements instructions for Aggravated Murder with mitigation defenses – 1402B, 1403B~~
- ~~Create new CR number for Murder without mitigation defenses – 1411A~~
- ~~Create new elements instruction for Murder with mitigation defenses – 1411B~~
- ~~Delete Murder with Extreme Emotional Distress in the elements 1404~~

Remaining Issues to Address:

- Modify current Imperfect Self-Defense instructions
- Need to add more imperfect self-defense instructions
- Added Mental Illness Special Mitigation Definitions/instructions
- Added Mental Illness Special Mitigation Special Verdict Form
- Added Battered Person Mitigation definitions/instructions
- Add elements template for any other crime involving mitigation defenses of Battered Person or a finding of Guilty but Mentally Ill
- Added Battered Person Special Verdict Form
- Need to add Extreme Emotional Distress Special Mitigation Definitions/instructions
- Need to add Extreme Emotional Distress Special Mitigation Special Verdict Form

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 must consider imperfect self-defense only if you find the defendant guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]. 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, 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 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
- Add the following paragraph at the bottom of the 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

CR1452 Special Verdict Form - Imperfect Self-Defense

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 specific Aggravated Murder or Murder elements instruction(s) in CR1402B, CR1403B, or CR1411B;
- Use the "SVF1450 Special Verdict Imperfect Self-Defense" special verdict form;
- Do not include "imperfect self-defense" as a defense in element #3 of the elements instruction~~above~~;
- Do not use an "imperfect self-defense manslaughter" elements instruction; and
- 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 _____."~~

~~Use Special Verdict Form SVF1450 in connection with this instruction.~~

Last Revised – 04/03/2019

SVF 1450. Imperfect Self-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** **IMPERFECT SELF-DEFENSE** Count (#) Case No. (**)

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 proved beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply.

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

CR570 Battered Person Mitigation Defense

The battered person mitigation defense is a partial defense to Count [#] (CRIME). The battered person mitigation defense does not result in an acquittal, but instead is a mitigating circumstance.

The battered person mitigation defense is the only time the defendant has the burden of proof. For the battered person mitigation defense to apply, you must unanimously find the defendant has proved by clear and convincing evidence:

1. (VICTIM'S NAME) was a cohabitant of [DEFENDANT'S NAME];
2. (VICTIM'S NAME) engaged in a pattern of abuse against (DEFENDANT'S NAME) or another cohabitant; and
3. (DEFENDANT'S NAME) reasonably believed committing the crime 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.

References

Utah Code § 76-2-409

Committee Note

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

- include CR570, the definitional instruction for the defense;
- provide roadmap instruction CR505A and include each count to which the defense may apply;
- use the elements instruction template in CR572 for every crime to which the defense applies;
- using SVF570, prepare a special verdict form for each count and offense to which the defense might apply;
- make sure the special verdict forms are labeled in the same way they are referenced in the roadmap instruction; and
- present the special verdict forms in the same manner provided by the roadmap instruction.

CR571 Definitions Applicable to Battered Person Mitigation Defense

"Cohabitant"[MD1] means the (DEFENDANT'S NAME) and (VICTIM'S NAME) were 16 years of age or older, and at the time of the offense, (DEFENDANT'S NAME):

- [is or was a spouse of (VICTIM'S NAME);]
- [is or was living as if a spouse of (VICTIM'S NAME);]
- [is related to the other party as the person's [parent][grandparent][child][aunt][uncle][niece][nephew];]
- [is a natural, adoptive, step, or foster sibling to the other party, provided at least one of the siblings is over 18 years of age;]
- [has or had one or more children in common with (VICTIM'S NAME);]
- [is the biological parent of (VICTIM'S NAME)'s unborn child;]
- [resides or has resided in the same residence as (VICTIM'S NAME);] or
- [is or was in a consensual sexual relationship with (VICTIM'S NAME)].

"Reside" means to dwell permanently or for a length of time; to have a settled abode for a time; to dwell permanently or continuously.

"Residence" is defined as "a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit." It does not require an intention to make the place one's home. It is possible that a person may have more than one residence at a time.

When determining whether (DEFENDANT'S NAME) and (VICTIM'S NAME) resided in the same residence, factors to consider include the following:

- the amount of time one spends at the shared abode and the amount of effort expended in its upkeep;
- whether a person is free to come and go as he pleases, treating the place as if it were his own home;
- whether there has been a sharing of living expenses or sharing of financial obligations for the maintenance of a household;
- whether there has been sexual contact evidencing a conjugal association;
- whether furniture or personal items have been moved into a purported residence;
- voting, owning property, paying taxes, having family in the area, maintaining a mailing address, being born or raised in the area, working or operating a business, and having children attend school in the forum.

In deciding whether (DEFENDANT'S NAME) and (VICTIM'S NAME) were residing in the same residence, you are not limited to the factors listed above, but you may also apply the common, ordinary meaning of the definition to all of the facts and circumstances of this case.

"Preponderance of the Evidence" means the fact is more likely to be true than not true.

References

Utah Code § 76-2-409

Committee Note

For purposes of the battered person mitigation defense, "abuse"[MD2] and "cohabitant" are defined by reference to statutory definitions in other parts of the Utah Code. *See* Utah Code § 76-2-409. Where possible, this instruction integrates those references into a unified whole.

Because Battered Persons Mitigation Defense can only be used between cohabitants, it is likely the cohabitant definitions[MD3] will already be given, in which case this instruction is not necessary.

CR572 Elements with Battered Person Mitigation / Mental Illness Special Mitigation.

(DEFENDANT'S NAME) is charged [in Count ____] with committing (CRIME) [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. ELEMENT ONE…;
3. ELEMENT TWO…;
4. [That 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.~~

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. On the other hand, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY.

If you find the defendant guilty, you must then decide whether the mitigation defense[s] of [battered person mitigation][mental illness special mitigation] applies.

[Battered person mitigation is defined in Instruction [#].]
[Mental illness special mitigation is defined in Instruction [#].]

CR573 Special Verdict Form – Battered Person Mitigation

If you determine beyond a reasonable doubt that (DEFENDANT'S NAME) committed Count [#] (CRIME), you must complete the special verdict form titled "Special Verdict Form Battered Person Mitigation Defense."

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

References

Utah Code Ann. § 76-2-409

Committee Notes

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

- include CR570, the definitional instruction for the defense;
- provide roadmap instruction CR505A and include each count to which the defense may apply;
- use the elements instruction template in CR572 for every crime to which the defense applies;
- using SVF570, prepare a special verdict form for each count and offense to which the defense might apply;
- make sure the special verdict forms are labeled in the same way they are referenced in the roadmap instruction; and
- present the special verdict forms in the same manner provided by the roadmap instruction.

SVF570. 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 FORM** **BATTERED PERSON** **MITIGATION DEFENSE** Count (#) Case No. (**)

Having found (DEFENDANT'S NAME), guilty beyond a reasonable doubt of (CRIME), as charged in Count [#],

Check ONLY ONE of the following boxes:

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

OR

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

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

_____
Foreperson

Mental Illness
Special Mitigation

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
    - Must be found by the trier of fact by a preponderance of the evidence
- 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.
    - Must be found by the trier of fact by a preponderance of the evidence

CR580 Mental Illness Special Mitigation

Mental illness special mitigation is a partial defense to Count [#], [Aggravated Murder] [Attempted Aggravated Murder] [Murder] [Attempted Murder]. It does not result in an acquittal, but instead is a mitigating circumstance that reduces [Aggravated Murder to Murder] [Attempted Aggravated Murder to Attempted Murder] [Murder to Manslaughter] [Attempted Murder to Attempted Manslaughter].

Mental illness special mitigation exists when a person [causes] [attempts to cause] the death of another under circumstances that are not legally justified, but the person acts under a delusion attributable to a mental illness, and the nature of the delusion is such that, if the facts existed as the defendant believed them to be in [his] [her] delusional state, those facts would provide a legal justification for [his] [her] conduct.

Mental illness special mitigation applies only if the defendant's actions, in light of [his] [her] delusion, were reasonable from the objective viewpoint of a reasonable person.

A person who was under the influence of voluntarily consumed, injected or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not avail [himself] [herself] of special mitigation based on mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

References

Utah Code Ann. § 76-2-305
Utah Code Ann. § 76-5-205.5

Committee Note

Whenever mental illness special mitigation is submitted to the jury,

- Include CR580, the definitional instruction for the defense;
- provide roadmap instruction CR505A and include each count to which the defense may apply;
- use the elements instruction template in CR572 for every crime to which it applies;
- using SVF580, prepare a special verdict form for each count and offense to which the defense might apply;
- make sure the special verdict forms are labeled in the same way they are referenced in the roadmap instruction; and
- present the special verdict forms in the same manner provided by the roadmap instruction.

CR581 Definitions Applicable to Mental Illness Special Mitigation

"Mental illness" means a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a condition as the result of a birth defect, the result of injury, or a residual effect of a physical or mental disease and includes, but is not limited to, intellectual disability.

"Intellectual disability" means a significant subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested prior to age 22.

"Mental illness" does not mean an abnormality manifested primarily by repeated criminal conduct.

"Preponderance of the evidence" means the fact is more likely to be true than not true.

References

Utah Code Ann. § 76-2-305

Committee Note

CR582 Special Verdict Form – Mental Illness Special Mitigation

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 Form Mental Illness Special Mitigation."

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

References

Utah Code Ann. § 76-5-205.5(7)

Committee Notes

Whenever mental illness special mitigation is submitted to the jury:

- Use the specific Aggravated Murder or Murder Elements Instructions in CR1402B, 1403B, or 1411B
- Use the "SVF580 Special Verdict Mental Illness Special Mitigation" special verdict form;
- Do not include "mental illness special mitigation" as a defense in element #3 of the elements instruction; and
- Always distinguish between "mental illness defense" and "mental illness special mitigation" throughout the instructions.

SVF580. Mental Illness Special Mitigation

(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 FORM** **MENTAL ILLNESS** **SPECIAL MITIGATION** Count (#) Case No. (**)

Having found (DEFENDANT'S NAME), guilty beyond a reasonable doubt of (CRIME), as charged in Count [#],

Check ONLY ONE of the following boxes:

☐ We unanimously find that (DEFENDANT'S NAME) has proved by a preponderance of the evidence that mental illness special mitigation exists.

OR

☐ We do not unanimously find that (DEFENDANT'S NAME) has proved by a preponderance of the evidence that mental illness special mitigation exists.

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

_____
Foreperson

Extreme Emotional Distress Special Mitigation

- 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
    - Must be found by the trier of fact by a preponderance of the evidence

TAB 5

Public Comments: Homicide Instructions

NOTES:
The following comments have not yet been specifically addressed by the committee.

==========
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 Brunker: 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, CR1451 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 CR1450, CR1451, CR1452, 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.