

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

Via Webex
August 3, 2022 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Blanch
	Committee Membership Update			Michael Drechsel
	Entrapment		Tab 2	Judge Blanch
	Partial Defense Instructions (continued)		Tab 3	Ms. Johnson Ms. Lawrence Mr. Mann and 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):

September 7, 2022
October 5, 2022

November 2, 2022
December 7, 2022

TAB 1

Meeting Minutes – June 1, 2022

NOTES:

This is an explanation of this item, if necessary

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

Via Webex
June 1, 2022 – 12:00 p.m. to 1:30 p.m.

DRAFT

COMMITTEE MEMBER:	ROLE:	PRESENT	EXCUSED	GUESTS:
Hon. James Blanch	District Court Judge [Chair]	•		None
Jennifer Andrus	Linguist / Communications	•		
Sharla Dunroe	Defense Counsel	•		STAFF: Michael Drechsel
Sandi Johnson	Prosecutor	•		
Janet Lawrence	Defense Counsel		•	
<i>vacant</i>	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	•		
Hon. Linda Jones	<i>Emeritus</i>		•	

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting.
The committee considered the minutes from the April 6, 2022 meeting.
Mr. Mann moved to approve the draft minutes; Judge Welch seconded the motion.
The committee voted unanimously in support of the motion. The motion passed.

The committee discussed whether to have a July meeting. With the unanimous support of the committee, Judge Blanch determined that there would not be a MUJI Criminal Committee meeting in July. The next committee meeting will be on August 3, 2022.

(2) JURY UNANIMITY:

Judge Blanch turned the committee’s attention to the jury unanimity agenda item. Since the last meeting in April, Ms. Lawrence and Ms. Johnson worked on some revisions to the committee’s recently approved jury unanimity instructions (CR216, CR430, and CR431). In addition, they provided a new proposed jury unanimity instruction for circumstances where there is evidence of more occurrences presented to the jury than there are charges (proposed CR432). Ms. Lawrence was not able to attend the meeting today. Ms. Johnson presented to the committee the work that had been accomplished (as outlined in the meeting materials pages 11-22). Ms.

Johnson outlined the different approaches she and Ms. Lawrence see for use of these jury unanimity instructions. One option (Ms. Lawrence's view) is to have the jury unanimity language **incorporated** into the elements instruction for each offense. The other option (Ms. Johnson's view) is to have the jury unanimity instruction be a **standalone** (but tailored) instruction that accompanies the elements instruction(s) as a separate instruction. Ms. Johnson proposed that the committee first needs to decide on which approach is best. The committee discussed the pros and cons of the **incorporated** and **standalone** approaches. Judge Blanch indicated a preference for a standalone instruction that practitioners may modify with case-specific details. Ms. Johnson spent additional time walking the committee through the examples of how each of the three jury unanimity instructions might be used in conjunction with an elements instruction (meeting materials pages 19-22). After further discussion, Mr. Mann indicated support for the standalone instruction option. Judge Welch also expressed support for the standalone approach. Judge Blanch called for a committee vote on this issue and the committee unanimously preferred the standalone approach.

Ms. Johnson had to temporarily step away from the meeting. Judge Blanch asked staff to walk the committee through the specific changes outlined in proposed CR216 (meeting materials pages 12-13). Staff identified for the committee the proposed changes. The first was a proposal to add "you may not speculate" to the fourth sentence of CR216. Staff reminded the committee that this very language had been in Judge Jones' proposed revisions that the committee discussed in March 2022. At that time, the committee had discussed this language and had rejected adding it. The committee agreed that the prior decision should stand and that "you may not speculate" language will not be added to CR216 (for the same reasons articulated in the March meeting). The committee then turned its attention to the revised committee note in CR216. The committee first reviewed the existing CR216 committee note and then reviewed the proposed new version of the committee note. After making that review, the committee discussed the committee note. The committee was very pleased with the revised language. Mr. Mann asked about the language spread through the committee note that indicates that the elements instruction should be modified. He wondered whether that language was in conflict with the committee's decision to adopt the standalone approach to these unanimity instructions. The committee discussed Mr. Mann's concerns. Judge Welch and Judge Blanch noted that the elements instructions may have some modification to tailor those to the facts of the case for each unique count, while the jury unanimity component of the instructions can still be presented to the jury as standalone instructions.

Judge Blanch then asked the committee to direct its attention to the proposed changes in each of the three standalone specific jury unanimity instructions (CR430, CR431, and CR432). Staff reviewed with the committee the proposed changes to existing CR430 (meeting materials page 14). Judge Blanch noted that the modifications to CR430 would result in the instruction needing to be modified in each case with case-specific details. In his view this should help to avoid reversible error. Staff pointed out that the changes to each of the three instructions (CR430, CR431, and CR432) appear to have that same intended purpose. Ms. Johnson returned to the meeting and the committee continued its discussion of CR430. The committee expressed approval of the proposed changes; the committee did not suggest any modifications to the proposed language. The committee then turned its attention to CR431. The committee had no concerns with the proposed change to CR431. The committee then turned its attention to CR432. Ms. Johnson noted that the final section of the proposed instruction language (starting with "In this case...") should not be included in the instruction because it will often not be possible to tie each count to specific details. From committee discussion, this is what separates the use of CR431 from CR432:

- CR431 can be used where there are sufficient specific details to associate and differentiate each count; and
- CR432 can be used in circumstances where the evidence can't be matched up to specific counts due to similarity of the criminal act over the course of time (i.e., a child sex offense that happened each week in the same room over the course of a year resulting in 50+ nearly identical criminal acts, but where the prosecution files only five counts).

The committee agreed that the language Ms. Johnson identified should be omitted from CR432.

After an opportunity for further committee discussion, Judge Blanch asked if anyone on the committee was in a position to make a motion to approve the instructions that the committee had reviewed and discussed during the meeting today (CR216, CR430, CR431, and CR432). Judge Welch made a motion to approve the four instructions; Ms. Johnson seconded the motion, as follows:

CR216 JURY UNANIMITY AND DELIBERATIONS.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found “guilty” or “not guilty.” That is, you must be unanimous in your verdict for each count charged.

To help you in reaching unanimous agreement, I recommend that you not commit yourselves to a particular verdict before discussing all the evidence. In addition, you may not use methods of chance, such as drawing straws or flipping a coin.

Rather, in the jury room, consider the evidence and speak your minds with each other. Listen carefully and respectfully to each other’s views and keep an open mind about what others have to say. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with.

In the end, your vote must be your own. A unanimous verdict must reflect the individual, careful, and conscientious judgment of each juror as to whether the defendant is guilty or not guilty.

REFERENCES

- Utah Const. Art. I, § 10
- Utah R. Crim. P. 21(b)
- Utah R. Civ. P. 59(a)(2)
- Burroughs v. United States*, 365 F.2d 431, 434 (10th Cir. 1966)
- State v. Lactod*, 761 P.2d 23, 30-31 (Utah Ct. App. 1988)
- [*State v. Russell*, 733 P.2d 162 \(Utah 1987\)](#)
- [*State v. Tillman*, 750 P.2d 546 \(Utah 1987\)](#)
- [*State v. Johnson*, 821 P.2d 1150 \(Utah 1991\)](#)
- [*State v. Saunders*, 1999 UT 59](#)
- State v. Hummel*, 2017 UT 19
- State v. Alires*, 2019 UT App 206
- State v. Case*, 2020 UT App 81
- State v. Whytock*, 2020 UT App 107
- [*State v. Covington*, 2020 UT App 110](#)
- [*State v. Mendoza*, 2021 UT App 79](#)
- [*State v. Paule*, 2021 UT App 120](#)
- [*State v. Baugh*, 2022 UT App 3](#)
- 75 Am. Jur.2d Trial §§ 1647, 1753, 1781

COMMITTEE NOTES

Utah's courts have directed that, under certain circumstances, juries must be instructed on something more than simply being unanimous as to the verdict. In cases where different acts and mental states can satisfy the same element, practitioners should add or amend proposed jury instructions and verdict forms to address unanimity concerns.

Utah's appellate courts have tried to distinguish between elements of a crime—on which a jury must be unanimous—and theories of a crime—on which a jury does not have to be unanimous. The line between elements and theories, however, is not clearly defined in the case law. Thus, the nature of the additional required instruction will vary depending upon the crimes charged and the facts and circumstances of a particular case. Refer to CR430 and CR431 for model instructions regarding specific jury unanimity requirements in particular types of cases:

Increasingly, Utah's appellate courts are identifying circumstances where it is not clear that the jury was adequately instructed on the constitutional requirement that a jury's verdict be unanimous. See the references above for examples. In cases where different alleged acts can satisfy the same element, practitioners should add or amend proposed jury instructions and verdict forms to address unanimity concerns.

Because different facts and circumstances will require case-specific unanimity instructions, practitioners should tailor elements instructions and use CR430, CR431, and CR432 where appropriate to meet Utah's constitutional requirement that a jury's verdict be unanimous.

- CR430 should be used in circumstances where the prosecution presents evidence that, if believed, could support a finding that the defendant committed two or more acts that could have been charged as separate offenses, but were not. See, e.g., *State v. Paule*, 2021 UT App 120. For example, the prosecution presents evidence that the defendant obstructed justice by attempting to dispose of a weapon, disposing of his phone, and fleeing the state, but the defendant was charged with only one count of obstruction of justice. In addition to CR430, the committee encourages practitioners to use a special verdict form or forms to confirm that the jury reached a unanimous verdict.
- CR431 should be used in circumstances where multiple counts have identical elements but are alleged to have occurred on different occasions or are different acts allegedly committed on the same occasion. See, e.g., *State v. Alires*, 2019 UT App 206. For example, the prosecutor presents evidence of sexual abuse of a child on multiple occasions over time or different acts of touching on the same occasion. In addition to CR431, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.
- CR432 should be used in circumstances where the prosecution has presented evidence that the offense may have occurred more times than the prosecution has charged. See, e.g., *State v. Alires*, 2019 UT App 206. For example, an alleged victim testifies that sexual abuse happened on five occasions and the prosecution charges only three counts of sexual abuse. In addition to CR432, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.

The committee cautions against relying exclusively on the model instructions to ensure unanimity. Practitioners should amend the language of particular elements instructions and verdict forms to clarify which specific acts relate to which charged offenses. The instructions must instruct the jury that it must unanimously agree that all elements have been proven beyond a reasonable doubt for each count. The use

of special verdict forms is also encouraged. The committee recommends that practitioners employ additional approaches where needed to confirm that jury verdicts are unanimous.

Last Revised - 06/01/2022

CR430 JURY UNANIMITY – SINGLE OFFENSE IN MORE THAN ONE WAY.

Count (#) charges (DEFENDANT’S NAME) with (CRIME). Evidence was introduced that the defendant may have committed this offense either by [WAY 1] [WAY 2] [WAY 3]. The prosecution has charged that the defendant committed [Count ____] in more than one way.

You may not find (DEFENDANT’S NAME)the defendant guilty of that offense on this count unless you unanimously agree that the prosecution has proven that (DEFENDANT’S NAME)the defendant committed the offense (CRIME) in at least one of those specific ways AND you unanimously agree on the specific way(s) in which the defendant committed the offense.

REFERENCES

State v. Russell, 733 P.2d 162 (Utah 1987)
State v. Tillman, 750 P.2d 546 (Utah 1987)
State v. Johnson, 821 P.2d 1150 (Utah 1991)
State v. Saunders, 1999 UT 59
State v. Hummel, 2017 UT 19
State v. Alires, 2019 UT App 206
State v. Case, 2020 UT App 81
State v. Whytock, 2020 UT App 107
State v. Covington, 2020 UT App 110
State v. Mendoza, 2021 UT App 79
State v. Paule, 2021 UT App 120
State v. Baugh, 2022 UT App 3

COMMITTEE NOTES

CR430 should be used in circumstances where the prosecution presents evidence that, if believed, could support a finding that the defendant committed two or more acts that could have been charged as separate offenses, but were not. See, e.g., State v. Paule, 2021 UT App 120. For example, the prosecution presents evidence that the defendant obstructed justice by attempting to dispose of a weapon, disposing of his phone, and fleeing the state, but the defendant was charged with only one count of obstruction of justice. In addition to CR430, the committee encourages practitioners to use a special verdict form or forms to confirm that the jury reached a unanimous verdict.

Counsel and trial courts should consider the use of either CR430 or CR431 in certain cases to help eliminate confusion or ambiguity about whether the jury has reached a unanimous conclusion regarding a defendant’s guilt. When appropriate, these instructions should be included in addition to the general unanimity principles contained within instructions CR216 and CR218.

Increasingly, Utah’s appellate courts are identifying circumstances in which it is not clear, based on instructions given, that juries necessarily reached unanimous agreement as to all elements of a particular charged crime. Examples of such case law are set forth in the references above.

CR430 is meant for use in circumstances in which the prosecution has alleged the defendant committed a particular crime in more than one way, such as asserting the defendant committed two or more acts that each would constitute a charged offense of obstruction of justice. See, e.g., *State v. Mendoza*, 2021 UT App 79. The committee encourages the use of a special verdict form or forms to reduce further the possibility of confusion in this context.

CR431 is meant for use in circumstances in which the prosecution has alleged the defendant committed multiple crimes consisting of identical elements on separate occasions, such as asserting the defendant committed multiple acts constituting separate instances of aggravated sexual abuse of a child over a period of time. See, e.g., *State v. Alires*, 2019 UT App 206. In circumstances such as these, use of CR430 or CR431, in addition to the unanimity language in CR216 and CR218, should help reduce confusion or ambiguity over whether the jury has reached unanimous agreement as to whether the defendant committed a particular specific criminal act.

The committee cautions counsel and trial courts against relying exclusively on these instructions to ensure it is clear a jury's verdict is unanimous. To remove ambiguity, it may also be advisable to amend the language of particular elements instructions and verdict forms to ensure it is clear which specific acts relate to which charged offenses. The instructions must instruct the jury it must unanimously agree that the applicable mental state(s) and other essential elements have been proven for each count. The use of special verdict forms is also encouraged. The appellate courts have further encouraged counsel to explain clearly to jurors in closing arguments which specific acts relate to which charged offenses. The committee recommends to counsel and trial courts that they employ such approaches, in addition to use of the instructions described above, to ensure it is sufficiently clear that jury verdicts are unanimous.

Last Revised - 06/01/2022

CR431 JURY UNANIMITY – MULTIPLE OFFENSES WITH IDENTICAL ELEMENTS.

The prosecution has charged in Count _____(##) through Count _____(##) that ~~the defendant~~(DEFENDANT'S NAME) committed ~~[INSERT NAME OF OFFENSE](CRIME)~~ multiple times. Although each of these counts has similar or identical elements, you must consider each count separately and reach unanimous agreement ~~as to~~ on whether ~~the defendant~~ (DEFENDANT'S NAME) is guilty or not guilty of each ~~specific individual~~ count. You may not find the defendant guilty of any ~~one of these counts~~ unless you unanimously agree the prosecution has proven ~~on~~ the specific act ~~the prosecution has proven that is with~~ in the elements of the offense for each count AND you unanimously agree the prosecution has proven all other elements of the count. You may find the defendant guilty of all of these counts, none of these counts, or only some of these counts; but for each count your decision must be unanimous.

In this case:

- Count (##) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).
- Count (##) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).
- [Count (##) is based on the alleged conduct of (INSERT SPECIFIC CONDUCT AND OCCASION).]

REFERENCES

State v. Russell, 733 P.2d 162 (Utah 1987)

[State v. Tillman, 750 P.2d 546 \(Utah 1987\)](#)
[State v. Johnson, 821 P.2d 1150 \(Utah 1991\)](#)
State v. Saunders, 1999 UT 59
State v. Hummel, 2017 UT 19
State v. Alires, 2019 UT App 206
State v. Case, 2020 UT App 81
State v. Whytock, 2020 UT App 107
State v. Covington, 2020 UT App 110
State v. Mendoza, 2021 UT App 79
State v. Paule, 2021 UT App 120
State v. Baugh, 2022 UT App 3

COMMITTEE NOTES

CR431 should be used in circumstances where multiple counts have identical elements but are alleged to have occurred on different occasions or are different acts allegedly committed on the same occasion. See, e.g., *State v. Alires*, 2019 UT App 206. For example, the prosecutor presents evidence of sexual abuse of a child on multiple occasions over time or different acts of touching on the same occasion. In addition to **CR431**, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.

Counsel and trial courts should consider the use of either **CR430** or **CR431** in certain cases to help eliminate confusion or ambiguity about whether the jury has reached a unanimous conclusion regarding a defendant's guilt. When appropriate, these instructions should be included in addition to the general unanimity principles contained within instructions **CR216** and **CR218**.

Increasingly, Utah's appellate courts are identifying circumstances in which it is not clear, based on instructions given, that juries necessarily reached unanimous agreement as to all elements of a particular charged crime. Examples of such case law are set forth in the references above.

CR430 is meant for use in circumstances in which the prosecution has alleged the defendant committed a particular crime in more than one way, such as asserting the defendant committed two or more acts that each would constitute a charged offense of obstruction of justice. See, e.g., *State v. Mendoza*, 2021 UT App 79. The committee encourages the use of a special verdict form or forms to reduce further the possibility of confusion in this context.

CR431 is meant for use in circumstances in which the prosecution has alleged the defendant committed multiple crimes consisting of identical elements on separate occasions, such as asserting the defendant committed multiple acts constituting separate instances of aggravated sexual abuse of a child over a period of time. See, e.g., *State v. Alires*, 2019 UT App 206. In circumstances such as these, use of **CR430** or **CR431**, in addition to the unanimity language in **CR216** and **CR218**, should help reduce confusion or ambiguity over whether the jury has reached unanimous agreement as to whether the defendant committed a particular specific criminal act.

The committee cautions counsel and trial courts against relying exclusively on these instructions to ensure it is clear a jury's verdict is unanimous. To remove ambiguity, it may also be advisable to amend the language of particular elements instructions and verdict forms to ensure it is clear which specific acts relate to which charged offenses. The instructions must instruct the jury it must unanimously agree that the applicable mental state(s) and other essential elements have been proven for each count. The use of special verdict forms is also encouraged. The appellate courts have further encouraged counsel to explain clearly to jurors in closing arguments which specific acts relate to which charged offenses. The committee

recommends to counsel and trial courts that they employ such approaches, in addition to use of the instructions described above, to ensure it is sufficiently clear that jury verdicts are unanimous.

Last Revised - 06/01/2022

CR432 JURY UNANIMITY – EVIDENCE OF MORE OCCURRENCES THAN CHARGES.

The prosecution has charged in Count (#) through Count (#) that (DEFENDANT’S NAME) committed (CRIME). Evidence was introduced that (DEFENDANT’S NAME) may have committed (CRIME) more times than the number of charged counts. When determining whether (DEFENDANT’S NAME) committed (CRIME), you must be unanimous as to which occasion and which act (DEFENDANT’S NAME) committed for each count, and that the prosecution has proven all the elements for that count. You may find (DEFENDANT’S NAME) guilty of all these counts, none of these counts, or only some of these counts; but for each count your decision must be unanimous.

REFERENCES

State v. Russell, 733 P.2d 162 (Utah 1987)
State v. Tillman, 750 P.2d 546 (Utah 1987)
State v. Johnson, 821 P.2d 1150 (Utah 1991)
State v. Saunders, 1999 UT 59
State v. Hummel, 2017 UT 19
State v. Alires, 2019 UT App 206
State v. Case, 2020 UT App 81
State v. Whytock, 2020 UT App 107
State v. Covington, 2020 UT App 110
State v. Mendoza, 2021 UT App 79
State v. Paule, 2021 UT App 120
State v. Baugh, 2022 UT App 3

COMMITTEE NOTES

CR432 should be used in circumstances where the prosecution has presented evidence that the offense may have occurred more times than the prosecution has charged. See, e.g., *State v. Alires*, 2019 UT App 206. For example, an alleged victim testifies that sexual abuse happened on five occasions and the prosecution charges only three counts of sexual abuse. In addition to CR432, the committee encourages practitioners to specify in the elements instruction the particular act that is the basis for the charge and to use a special verdict form or forms where appropriate to confirm that the jury reached a unanimous verdict.

Adopted - 06/01/2022

The committee voted unanimously in favor of the motion. Judge Blanch expressed gratitude to Ms. Lawrence and Ms. Johnson for the excellent work putting these revisions and additions together for the committee’s consideration. Judge Blanch instructed staff to update the versions of these instructions online so that practitioners can begin using the new material immediately.

Judge Blanch informed the committee that it will resume its work at the August meeting with consideration of the partial defense materials included in the meeting materials today. Judge Blanch also asked staff to prepare a draft instruction related to entrapment. He will send staff some materials to form the basis of that effort.

(3) PARTIAL DEFENSE INSTRUCTIONS:

This agenda item was not discussed by the committee at this meeting.

(4) ADJOURN

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on August 3, 2022, starting at 12:00 noon via Webex.

TAB 2

Entrapment Instruction

NOTES:

At the conclusion of the June 1, 2022 meeting, Judge Blanch asked that staff prepare the following materials for committee consideration.

NEW: CR_____ Entrapment.

The jury shall find (DEFENDANT’S NAME) not guilty of (CRIME) if it finds the prosecution has failed to disprove beyond a reasonable doubt that the defendant was entrapped into committing the offense.

Entrapment occurs when a peace officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that a person would be induced or persuaded to commit an offense when that person was not otherwise ready to commit it. The entrapment determination is an objective standard focusing on whether the methods used by law enforcement create a substantial risk of inducement of an ordinary person, rather than a subjective standard focusing on a particular defendant's individual predisposition to commit a crime. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

The defendant carries no burden to prove the defense of entrapment. In other words, the defendant is not required to prove the defense of entrapment applies to his conduct. Rather, the prosecution must prove beyond a reasonable doubt that the defense of entrapment does NOT apply to the defendant's conduct. If the prosecution has not met this burden, then you must find the defendant not guilty.

References

Committee Notes

When using this instruction, practitioners should add to the relevant elements instruction a final numbered element stating, “The defense of entrapment does not apply.”

Last Revised - 00/00/0000

TAB 3

Partial Defenses (continued)

NOTES:

Ms. Johnson, Mr. Mann, and Ms. Lawrence collaborated on the following materials regarding battered person mitigation instructions and imperfect self-defense instructions.

CR505A Roadmap for mitigation defenses.

If you find the defendant guilty of (~~CHARGED CRIME~~) ~~or (LESSER INCLUDED CRIME)~~ ~~on~~ [in Count #], you will then need to decide whether ~~the mitigation defense of [imperfect self defense]~~ [extreme emotional distress special mitigation] [mental illness special mitigation] [or] [battered person mitigation] applies to that crime.

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

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

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

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

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

References

[Utah Code § 76-2-409](#)

[Utah Code § 76-2-305](#)

[Utah Code § 76-5-205.5](#)

[Utah Code § 77-16a-102](#)

Committee Notes

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

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

~~"Imperfect self defense" mitigation is only applicable to aggravated murder, murder, attempted aggravated murder, or attempted murder charges.~~

~~"Extreme Emotional Distress" mitigation is only applicable when the defendant causes the death of another or attempts to cause the death of another to homicide or attempted homicide charges. See Utah Code § 76-5-205.5.~~

~~"Battered Person" mitigation is applicable to any offense between cohabitants as defined in Utah Code § 78B-7-102 or the relationship of a minor to a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor. See Utah Code § 76-2-409.~~

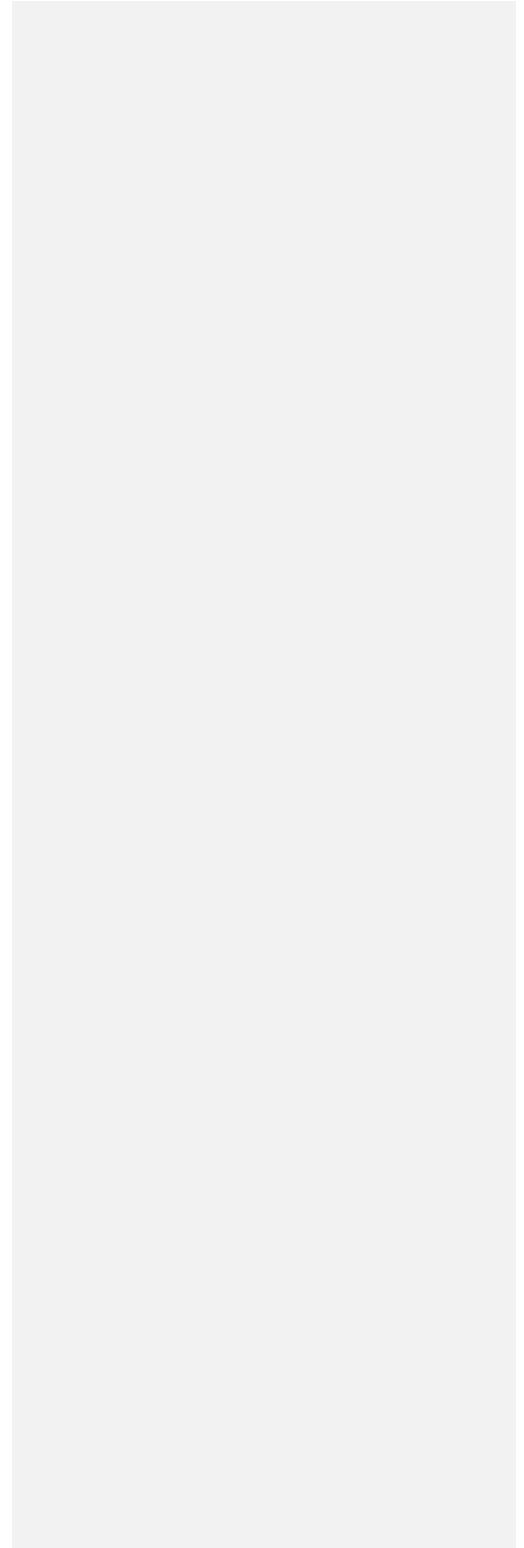
Mental Illness can be ~~both either a defense and or a mitigation depending on the crime charged.~~

- Under Utah Code § 76-2-305, ~~except for homicide or attempted homicide, mental illness it is a complete defense if it negates the mental state required as an element of the offense charged, except for homicide or attempted homicide.~~
- Under Utah Code § 76-5-205.5 ~~it mental illness is a special mitigation for homicide or attempted homicide when the defendant causes the death of another or attempts to cause the death of another, and will reduce the level of the offense; and. See Utah Code §§ 76-5-202(3)(f)(i), 76-5-202(3)(f)(ii), 76-5-203(3)(b)(i), and 76-5-203(3)(b)(ii).~~
 - Mental illness mitigation must be found by the trier of fact by a preponderance of the evidence.
 - If a jury is the trier of fact, a finding of mental illness mitigation must be unanimous.
- 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 ~~in accordance with Utah Code § 77-16a-104 and is a necessary finding by the trier of fact.~~
 - ~~Mental illness at the time of the offense must be found by the trier of fact by a preponderance of the evidence.~~

Commented [MCD1]: Similar language might need to be adjusted in recently approved new instructions CR1402B, CR1403B, and CR1411B (the agg murder / murder with mitigation instructions).

DRAFT: 06/01/2022

Approved: 08/04/2021
Reapproved: 04/06/2022



NEW: CR570 Elements with Mitigation (Battered Person/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. [Insert All Applicable Elements] [; and]
3. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

If you find the defendant guilty, you must then decide whether [Battered Person Mitigation] [or] [Mental Illness Special Mitigation] applies.

[Battered Person Mitigation is defined in Instruction [#].]

[Mental Illness Special Mitigation is defined in Instruction [#].]

References

Utah Code § 76-2-409

Utah Code § 76-2-305

Utah Code § 76-5-205.5

Utah Code § 77-16a-102

Committee Note

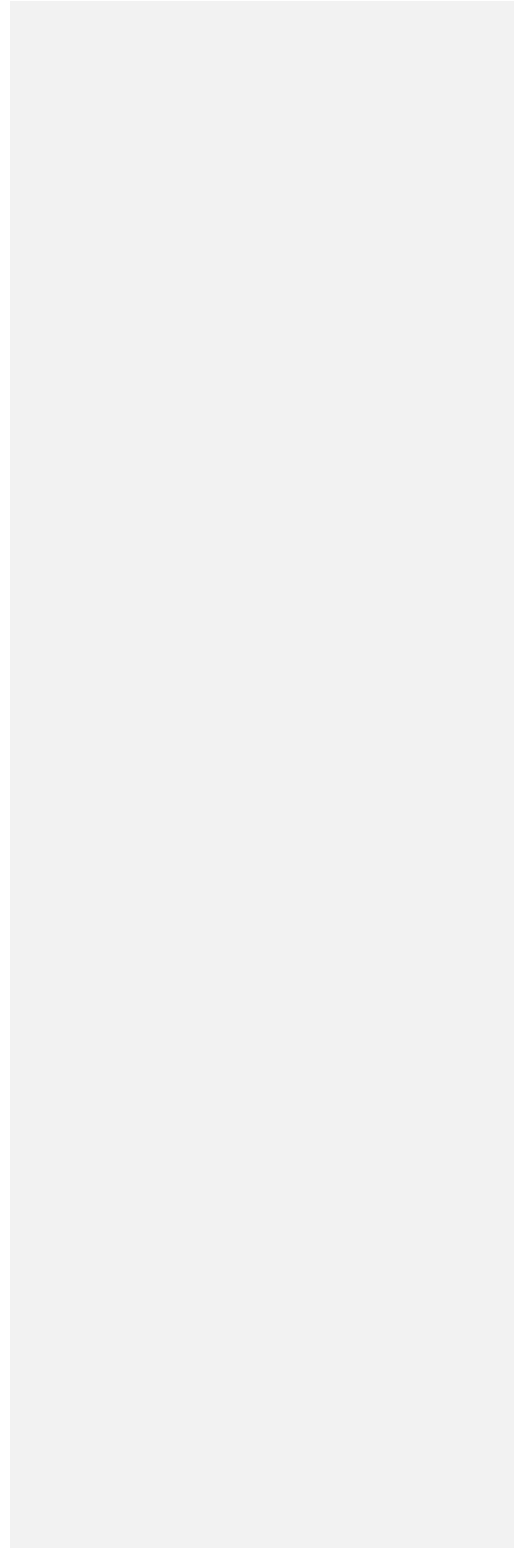
Battered Person Mitigation is applicable to any offense between cohabitants as defined in Utah Code § 78B-7-102 or the relationship of a minor and a natural parent, an adoptive parent, a stepparent, or an individual living with the minor's natural parent as if a stepparent to the minor. See Utah Code § 76-2-409.

Mental Illness can be either a defense or a mitigation depending on the crime charged.

- Under Utah Code § 76-2-305, except for homicide or attempted homicide mental illness is a complete defense if it negates the mental state required as an element of the offense charged.
- Under Utah Code § 76-5-205.5, mental illness is a special mitigation for homicide or attempted homicide and will reduce the level of the offense. See Utah Code §§ 76-5-202(3)(f)(i), 76-5-202(3)(f)(ii), 76-5-203(3)(b)(i), and 76-5-203(3)(b)(ii).
 - Mental illness mitigation must be found by the trier of fact by a preponderance of the evidence.
 - If a jury is the trier of fact, a finding of mental illness mitigation must be unanimous.
- 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 in accordance with Utah Code § 77-16a-104.
 - Mental illness at the time of the offense must be found by the trier of fact by a preponderance of the evidence.

DRAFT: 06/01/2022

BATTERED PERSON MITIGATION



NEW: CR571 Definitions Applicable to Battered Person Mitigation Defense

“Abuse” means

- [intentionally or knowingly causing or attempting to cause another individual physical harm;]
- [intentionally or knowingly placing another individual in reasonable fear of imminent physical harm;]
- [physical abuse;]
- [sexual abuse;]
- [sexual exploitation of a minor or aggravated sexual exploitation of a minor;]
- [sexual exploitation of a vulnerable adult;]
- [distribution of an intimate image or misuse of an intimate image during a criminal action;]
- [sexual extortion;]
- [unlawful distribution of a counterfeit intimate image;] [or]
- [human trafficking of a child for sexual exploitation.]

“Cohabitant” means at the time of the offense:

[(VICTIM’S NAME) was a minor and (DEFENDANT’S NAME) is (VICTIM’S NAME)’s natural parent, adoptive parent, stepparent, or an individual living with the minor’s natural parent as if a stepparent to the minor]

[OR]

[(VICTIM’S NAME) was 16 years of age or older at the time of the offense, and (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 by blood or marriage to (VICTIM’S NAME) as a [parent][grandparent][child][grandchild][aunt][uncle][niece][nephew][sibling][half-sibling];]
- [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, or 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;
- 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; and
- 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 the facts and circumstances of this case.]

References

Utah Code § 76-2-409

Keene v. Bonser, 2005 UT App 37

State v. Salt, 2015 UT App 72

Committee Note

Practitioners should tailor the definitions in this instruction so they include only those that are relevant to the charged crime.

For purposes of the battered person mitigation defense, “abuse” 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.

Battered Persons Mitigation has an expanded definition of “cohabitant” so practitioners should be deliberate when determining whether Battered Person mitigation applies.

If practitioners are relying on a definition of “abuse” that references a criminal offense, an instruction detailing the elements for that offense should be included.

- Sexual exploitation of a minor – see Utah Code § 76-5b-201.
- Aggravated sexual exploitation of a minor – see Utah Code § 76-5b-201.1.
- Sexual exploitation of a vulnerable adult – see Utah Code § 76-5b-202.
- Distribution of an intimate image or misuse of an intimate image during a criminal action – see Utah Code §§ 76-5b-203, 203.5.
- Sexual extortion – see Utah Code § 76-5b-204.
- Unlawful distribution of a counterfeit intimate image – see Utah Code § 76-5b-205.
- Human trafficking of a child for sexual exploitation – see Utah Code §§ 76-5-308.5(2) and (4)(b).

NEW: CR572 Battered Person Mitigation – Elements and Burden of Proof

Battered Person Mitigation is a mitigating circumstance that only applies if you have unanimously found that the defendant committed (CRIME) [in Count ____] beyond a reasonable doubt.

Battered Person Mitigation is the only time the defendant has the burden of proof. For Battered Person Mitigation to apply, you must unanimously find the defendant has proven by clear and convincing evidence that:

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 of (DEFENDANT'S NAME); and
3. (DEFENDANT'S NAME) reasonably believed committing (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 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

Essential Botanical Farms, LLC v. Kay, 2011 UT 71

CV118 “Clear and Convincing Evidence”

Committee Note

Whenever Battered Person Mitigation is submitted to the jury:

- Provide roadmap instruction CR505A and include each count to which the mitigation may apply;
- Use the elements instruction template in CR570 for every crime to which Battered Person Mitigation might apply;
- Include CR571, the definitional instruction for Battered Person Mitigation;
- Include CR572, the elements of Battered Person Mitigation and the Burden of Proof;
- Using SVF570, prepare a special verdict form for each count and offense to which Battered Person Mitigation might apply;
- Make sure the special verdict forms are labeled in the same way they are referenced in the roadmap instruction; and
- Include special verdict forms as outlined in the roadmap instruction.

DRAFT: 06/01/2022

NEW: CR573 Special Verdict Form – Battered Person Mitigation

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

- 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 Battered Person Mitigation is submitted to the jury:

- Provide roadmap instruction CR505A and include each count to which the mitigation may apply;
- Use the elements instruction template in CR570 for every crime to which Battered Person Mitigation might apply;
- Include CR571, the definitional instruction for Battered Person Mitigation;
- Include CR572, the elements of Battered Person Mitigation and the Burden of Proof;
- Using SVF570, prepare a special verdict form for each count and offense to which Battered Person Mitigation might apply;
- Make sure the special verdict forms are labeled in the same way they are referenced in the roadmap instruction; and
- Include special verdict forms as outlined in the roadmap instruction.

Commented [JL2]: I don't see that this is needed if CR505A is used.

NEW: SVF570. Battered Person Mitigation Defense

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

<p>THE STATE OF UTAH,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>(DEFENDANT'S NAME),</p> <p style="text-align: right;">Defendant.</p>	<p style="text-align: center;">SPECIAL VERDICT FORM BATTERED PERSON MITIGATION DEFENSE</p> <p style="text-align: center;">Count (#)</p> <p style="text-align: center;">Case No. (**)</p>
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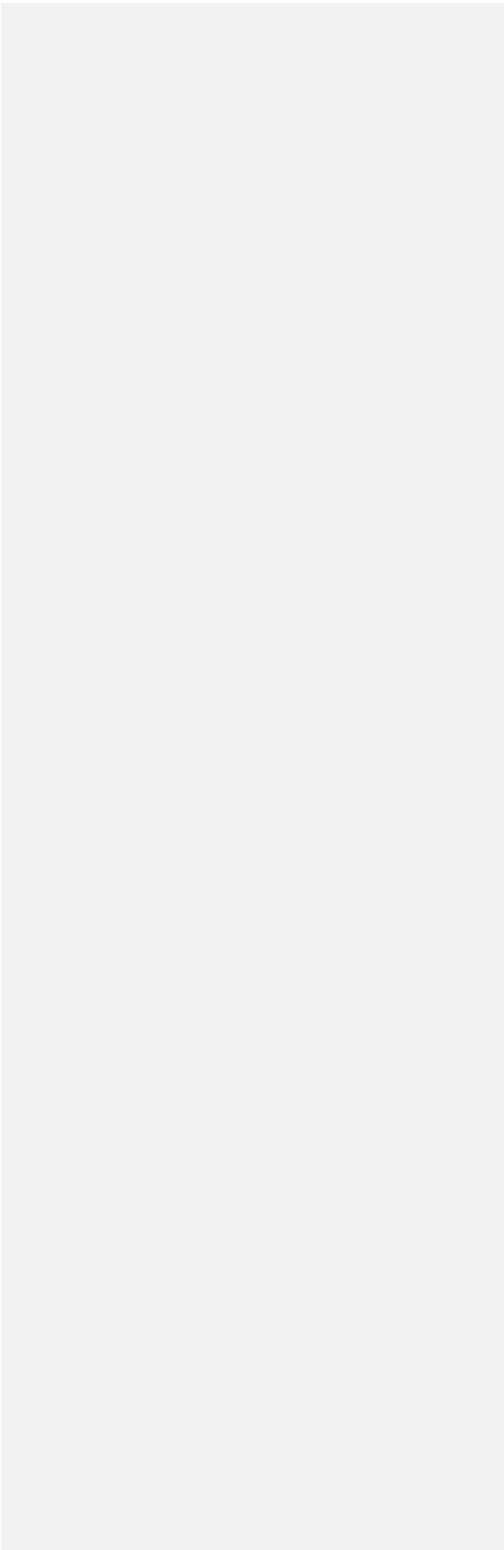
Having found (DEFENDANT'S NAME), guilty beyond a reasonable doubt of (CRIME), as charged in Count (#),

Check ONLY ONE of the following boxes:

- We unanimously find that (DEFENDANT'S NAME) has proven battered person mitigation by clear and convincing evidence.
- OR
- We do not unanimously find that (DEFENDANT'S NAME) has proven battered person mitigation by clear and convincing evidence.

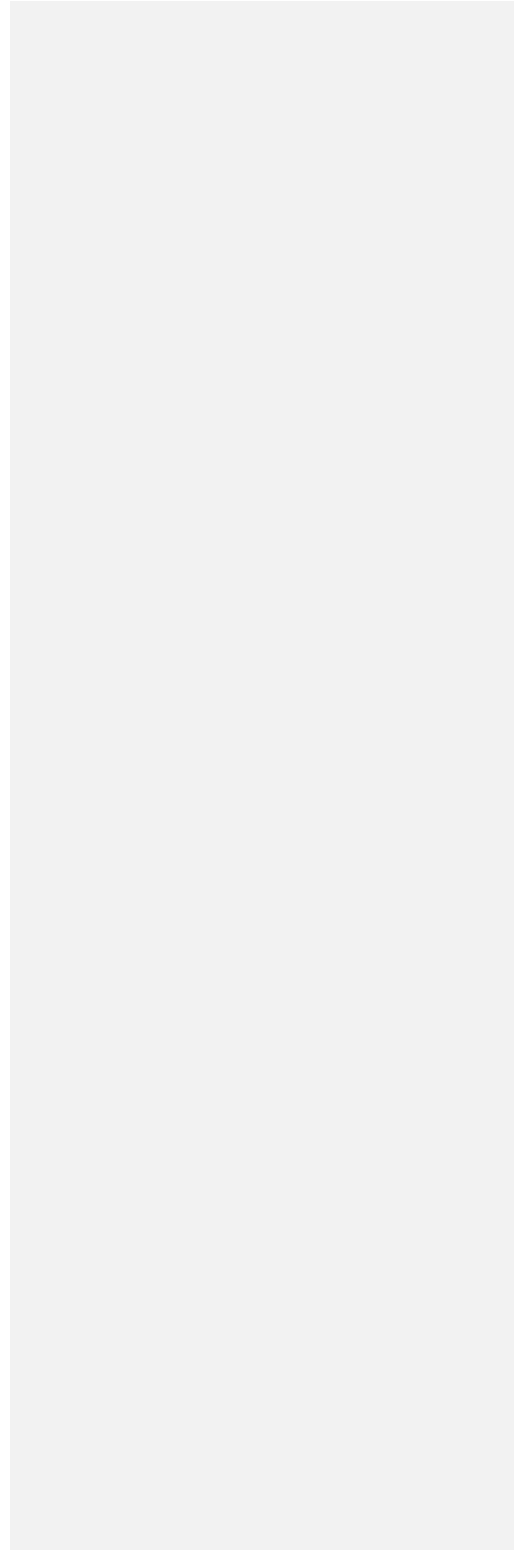
DATED this _____ day of (Month), 20(**).

Foreperson



DRAFT: 06/01/2022

IMPERFECT SELF-DEFENSE



CR1451 Explanation of Perfect and Imperfect Self-Defense as Defenses

Defense of Self or Other is also sometimes called Perfect *perfect* self-defense because it is a complete defense to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder][Manslaughter]. As explained, perfect self-defense applies when a defendant is justified in using force against another person when and to the extent that the defendant reasonably believes that force is necessary to defend [himself][herself], or a third party, against another person's imminent use of unlawful force.

Another form of self-defense is called *imperfect* self-defense because it is only a partial defense, not a complete defense, to [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]. Imperfect self-defense reduces the level of the offense to [Murder][Attempted Murder][Manslaughter][Attempted Manslaughter]. Imperfect self-defense applies when the defendant [causes the death of another] [attempts to cause the death of another] when [he][she] reasonably, but mistakenly, believes that the circumstances provide a legal justification or excuse for the use of deadly force. In other words, although a reasonable person in the defendant's circumstances could reasonably believe that [he][she] was justified in using deadly force, the use of deadly force was not actually legally justified under the circumstances.

The defendant is not required to prove that either perfect self-defense or imperfect self-defense applies. Rather, the prosecution must prove beyond a reasonable doubt that perfect self-defense and imperfect self-defense do not apply.

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 (#).

If you find the defendant guilty of [Aggravated Murder] [Attempted Aggravated Murder] [Murder] [Attempted Murder], you must also consider imperfect self-defense. Your decision regarding imperfect self-defense will be reflected in the special verdict form titled "Special Verdict Imperfect Self-Defense."

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~~

[State v. Silva, 2019 UT 36, 456 P.3d 718](#)

[State v. Low, 2008 UT 58, 192 P.3d 867](#)

[State v. Spillers, 2007 UT 13, 152 P.3d 315](#)

[State v. Lee, 2014 UT App 4, 318 P.3d 1164](#)

Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions ([see CR510 through CR540](#)), use CR1451 (~~amended as appropriate~~);
- Use the [SVF1450](#) “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. Imperfect self-defense does not apply to manslaughter;~~
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Add the following paragraph at the bottom of the [aggravated murder, attempted aggravated murder, murder, or attempted murder](#) elements instruction:

“If you find the ~~Defendant~~ ~~defendant~~ ~~GUILTY~~ ~~guilty~~ beyond a reasonable doubt of [\[Aggravated Murder\]](#) [\[Attempted Aggravated Murder\]](#) [\[Murder\]](#) [\[Attempted Murder\]](#) ~~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 ____.”

~~In the rare circumstance where imperfect self-defense is available but perfect self-defense is not available, practitioners will have to modify this instruction as appropriate. For example, practitioners should include CR510 through CR540, as applicable, because the jury will have to understand basic principles of perfect self-defense in order to understand imperfect self-defense. The imperfect self-defense instruction should state clearly that even though the jury should not consider perfect self-defense, it must still consider imperfect self-defense.~~

Last Revised – 04/03/2019

SVF 1450. Special Verdict Imperfect Self-Defense.

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

THE STATE OF UTAH, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> (DEFENDANT’S NAME), <p style="text-align: center;">Defendant.</p>	SPECIAL VERDICT IMPERFECT SELF-DEFENSE Count (#) Case No. (**)
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Having found the defendant, (DEFENDANT’S NAME), guilty beyond a reasonable doubt 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

Committee Notes

Whenever imperfect self-defense is submitted to the jury:

- In addition to other applicable imperfect self-defense instructions (see CR510 through CR540), use CR1451 (amended as appropriate);
- Use the SVF1450 “Special Verdict Imperfect Self-Defense” special verdict form;
- Do not include “imperfect self-defense” as a defense in the elements instruction;

Commented [MCD3]: Janet proposes that this language be changed to:

- > We unanimously find that the defense of imperfect self-defense applies.
- OR
- > We unanimously find that the defense of imperfect self-defense does not apply.

DRAFT: 06/01/2022

- Do not use an “imperfect self-defense manslaughter” elements instruction. Imperfect self-defense does not apply to manslaughter;
- Always distinguish between “perfect self-defense” and “imperfect self-defense” throughout the instructions; and
- Add the following paragraph at the bottom of the aggravated murder, attempted aggravated murder, murder, or attempted murder elements instruction:

“If you find the ~~Defendant~~ defendant ~~GUilty~~ guilty beyond a reasonable doubt of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder]~~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 ____.”

In the rare circumstance where imperfect self-defense is available but perfect self-defense is not available, practitioners will have to modify this instruction as appropriate. For example, practitioners should include CR510 through CR540, as applicable, because the jury will have to understand basic principles of perfect self-defense in order to understand imperfect self-defense. The imperfect self-defense instruction should state clearly that even though the jury should not consider perfect self-defense, it must still consider imperfect self-defense.

Last amended – 05/01/2019