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

Via Hybrid Meeting – Matheson Courthouse and Webex
February 7th, 2024 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Welch
	Discussion: Failure to Respond to an Officer's Signal to Stop Instruction		Tab 2	Judge Welch/Judge Jones
	Discussion: Driving With a Measurable Controlled Substance Instruction		Tab 3	Judge Welch/McKay Lewis
	Discussion: Negligently Operating a Vehicle Resulting in Bodily Injury Instruction		Tab 4	Judge Welch/McKay Lewis
	Discussion: Update on General Adverse Instruction Research/Discussion of Future or Ongoing Projects			Judge Welch
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):

March 6th, 2024
April 3rd, 2024
May 1st, 2024
June 5th, 2024
July 3rd, 2024
August 7th, 2024
September 4th, 2024
October 2nd, 2024
November 6th, 2024
December 4th, 2024

TAB 1

Meeting Minutes – December 6th, 2023

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

Via Webex
December 6, 2023 – 12:00 p.m. to 1:30 p.m.

DRAFT

COMMITTEE MEMBER:	ROLE:	PRESENT	EXCUSED
Hon. Teresa Welch	District Court Judge [Chair]	•	
Hon. Brendan McCullagh	Justice Court Judge	•	
Jennifer Andrus	Linguist/Communications Professor		•
Hon. Linda Jones	Emeritus District Court Judge	•	
Hon. Matthew Bates	District Court Judge		•
Sharla Dunroe	Defense Attorney		•
Janet Lawrence	Defense Attorney	•	
Jeffrey Mann	Prosecutor	•	
Richard Pehrson	Prosecutor	•	
Dustin Parmley	Defense Attorney		•
Freyja Johnson	Defense Attorney	•	
McKay Lewis	Prosecutor	•	
Nic Mills	Prosecutor	•	

GUESTS:

None

STAFF:

Bryson King

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Welch welcomed the committee to the meeting and welcomed new members, McKay Lewis and Nic Mills. Judge Welch asked McKay and Nic to introduce themselves to the Committee. Following their introductions, the Committee reviewed the previous month's minutes. Richard Pehrson moved to approve the minutes and Freya Johnson seconded the motion. Without opposition, the motion carries and the minutes are approved.

(2) AGENDA ITEM 2: GENERAL ADVERSE INFERENCE INSTRUCTION

Judge Welch then asked the Committee to discuss a proposed general adverse inference instruction. Utah has an adverse instruction, which the Committee has worked on, for body-worn cameras, but no other adverse inference instruction for criminal rules. Janet Lawrence then reviewed with the Committee a proposed general adverse inference instruction she volunteered to draft. Janet discusses the similarities and differences of this instruction with the civil spoilation instruction. Judge Welch invites Committee members to discuss when and how a general adverse instruction has been used in their practice. Richard Pehrson discusses his experience with such an instruction. Judge Jones also discusses existing case law that calls for a remedy in scenarios where an adverse instruction might be appropriate, but doesn't reach as far as providing what that instruction should be. Freya Johnson also discusses how case law guides when an instruction should be given under due process considerations. Jeffrey Mann also discusses the different approaches and conclusions offered in the *Tiedeman* and *DeJesus* cases. Judge Welch then asks the Committee to discuss whether the Committee should begin the

process of developing a formal general adverse instruction, given the relative lack of guidance from the appellate courts in Utah on the subject. Judge McCullagh argues against the Committee providing a general adverse instruction given the lack of appellate guidance on the subject, while offering support for the idea that when the case is appropriate, parties could craft an instruction that fits the unique facts of their case. Judge Jones explains that other jurisdictions, including federal courts, have a general instruction available that differs in remedies, but could be used to craft Utah's instruction. McKay Lewis offers his insight on when an instruction could be given. The Committee continues its discussion on the practicality and timing of crafting the instruction, including pointing to the Utah Civil MUJI instructions on spoilation and other jurisdictions' instructions on adverse inferences and remedies. Judge Welch proposes that the Committee work on a general adverse instruction, without committing to finalizing and publishing such an instruction that would be made available to the public. Additional discussion ensues following that proposition. Judge Welch again proposes that the Committee continue to work on an instruction, while watching for appellate guidance on the subject if/when a case goes on appeal. Judge Welch asks whether there is a Committee member willing to take on the project of researching other jurisdictions' rules/laws on the topic. Janet Lawrence volunteers take on the research project. Nic Mills also volunteers to assist Janet.

(3) AGENDA ITEM 3: REVIEW OF PUBLIC COMMENTS ON PUBLISHED RULES

Following that discussion, the Committee turned its attention to published rules. Following the closure of the comment period, no member of the public commented on the published rules. Without public comments to review, the Committee turns its attention to future projects.

(4) AGENDA ITEM 4: DISCUSSION OF FUTURE PROJECTS

McKay Lewis then asks whether the Committee has a goal for elements instructions on existing offenses, specifically DUI cases. Judge Welch reviews how the Committee chooses its projects. Judge McCullagh and McKay Lewis discuss the possibility of a DUI refusal instruction for the Committee to consider at a future meeting. McKay Lewis also offers to draft an instruction on Negligently Operating a Vehicle Resulting in Death/Bodily Injury.

(5) ADJOURN

The Committee reviews its meeting schedule and cancels the July meeting due to the holiday. The meeting adjourned at approximately 1:06 p.m. The next meeting will be held on February 7th, 2024, starting at 12:00 noon.

TAB 2

Failure to Respond to an Officer’s Signal to Stop Instruction

345 P.3d 1141
Supreme Court of Utah.

STATE of Utah, Petitioner,
v.
Dustin Lynn **BIRD**, Respondent.

No. 20120906
|
Jan. 23, 2015.

Synopsis
Background: Defendant was convicted in the Third District Court, Salt Lake Department, William W. Barrett, J., of failure to respond to an officer's signal to stop. Defendant appealed. The Court of Appeals, 286 P.3d 11, reversed and remanded for new trial. State's petition for certiorari review was granted.

Holdings: The Supreme Court, Parrish, J., held that:

[1] trial court should have given mens rea instruction on charge for failure to respond to an officer's signal to stop, and

[2] failure to respond to officer's signal to stop required finding that defendant knowingly received visual or audible signal from police officer to stop his vehicle, and that he must have intended to flee or elude officer.

Judgment of Court of Appeals affirmed.

Lee, J., filed dissenting opinion.

West Headnotes (12)

[1] **Criminal Law** Decisions of Intermediate Courts

On certiorari, the Supreme Court reviews the decision of the court of appeals for correctness and may affirm its decision on any ground supported in the record.

[2] **Criminal Law** Elements of offense and defenses

Defendant adequately preserved for appellate review claim that jury should have been instructed on applicable mens rea on charge for failure to respond to officer's signal to stop, where he argued that terms "receive" visible or audible signal to stop and "attempt" to flee or elude, as elements of charge, incorporated mens rea element, he immediately objected to proposed instruction when presented by trial court, and objection was presented in clear manner.

4 Cases that cite this headnote

[3] **Criminal Law** Presentation of questions in general

To preserve an issue for review, counsel must raise the issue in the trial court in such a way that the trial court has an opportunity to rule on that issue.

3 Cases that cite this headnote

[4] **Criminal Law** Presentation of questions in general
Criminal Law Necessity of specific objection

A reviewing court looks to three factors to determine whether the trial court had an opportunity to rule on an objection, as required for the issue to preserved for appellate review: (1) whether the issue was raised in a timely fashion, (2) whether it was raised specifically, (3) and whether the party introduced supporting evidence or relevant legal authority.

2 Cases that cite this headnote

[5] **Criminal Law** Intent, motive, and malice
Obstructing Justice Fleeing, evading, or eluding; failure to stop

Trial court should have given mens rea instruction on charge for failure to respond to an officer's signal to stop; mens rea was basic element, while jury might have common understanding of meaning of term "receive" to require some level of defendant's knowledge of existence of signal, it could not be assumed that jury would understand significance of knowledge requirement as element of mens rea, term "attempt," in context of element that defendant made attempt to flee or elude police, carried distinct meaning in criminal law that lay juror could not be expected to understand without instruction, and although "attempt" implicated mental state, it did not necessarily implicate applicable mens rea, namely, that defendant acted intentionally. West's U.C.A. § 41–6a–210(1)(a).

7 Cases that cite this headnote

[6] **Criminal Law** Elements and Incidents of Offense, and Defenses in General
Criminal Law Elements and incidents of offense; definitions

The general rule for jury instructions is that an accurate instruction upon the basic elements of an offense is essential, and the failure to so instruct constitutes reversible error.

8 Cases that cite this headnote

[7] **Criminal Law** Acts prohibited by statute
Criminal Law Elements and incidents of offense

A mens rea element is an essential element of an offense; thus, failure to instruct the jury as to the required mens rea, when it is an element of the crime, is reversible error.

7 Cases that cite this headnote

[8] **Criminal Law** Intent, motive, and malice

A trial court should provide the jury with a mens rea instruction when a criminal statute includes terms that have mens rea implications.

4 Cases that cite this headnote

[9] **Criminal Law** Intent, motive, and malice

An appropriate jury instruction must distinguish between the general and specific intent requirements of an offense.

5 Cases that cite this headnote

[10] **Criminal Law** Criminal Intent and Malice
Criminal Law Intent, motive, and malice

Mens rea is a legal term of art that ought to be explicitly explained to a jury.

[11] **Criminal Law** Mandate and proceedings in lower court

Although appellate courts have the discretion to provide guidance on remand, they are not required to do so.

[12] Obstructing Justice Fleeing, evading, or eluding; failure to stop

Failure to respond to an officer's signal to stop required jury finding that defendant knowingly received visual or audible signal from a police officer to stop his vehicle, and that defendant must have intended to flee or elude a peace officer. West's U.C.A. § 41–6a–210(1)(a).

5 Cases that cite this headnote

Attorneys and Law Firms

***1143** Sean D. Reyes, Att'y Gen., Karen A. Klucznik, Asst. Att'y Gen., Salt Lake City, for petitioner.

Linda M. Jones, Noella A. Sudbury, Salt Lake City, for respondent.

Justice PARRISH authored the opinion of the Court, in which Chief Justice DURRANT, Justice DURHAM, and Judge ELIZABETH HRUBY–MILLS joined.
Justice LEE authored a dissenting opinion.

Having recused himself, Associate Chief Justice NEHRING does not participate herein; Judge ELIZABETH HRUBY–MILLS sat.

On Certiorari to the Utah Court of Appeals

Justice PARRISH, opinion of the Court:

INTRODUCTION

¶ 1 On certiorari, we are asked to review the court of appeals' ruling that the trial court erred by not providing a mens rea jury instruction for the charge of failure to respond to an officer's signal to stop under Utah Code section 41–6a–210. We are also asked to determine whether the court of appeals erred by failing to provide guidance on remand regarding a correct jury instruction. We affirm the court of appeals, but exercise our discretion to provide such guidance.

BACKGROUND

¶ 2 On the evening of October 12, 2009, Salt Lake City police officer Alma Sweeny was patrolling the Glendale area in an unmarked police vehicle. Officer Sweeny drove past a blue Ford Mustang and observed that the driver, Dustin Lynn Bird, and the passenger looked "nervous" and appeared to be "ducking down in the vehicle." Officer Sweeny decided to follow the Mustang and observed the driver and the passenger leaning over, causing the vehicle to swerve. The Mustang approached a stop sign and slowly rolled through it without coming to a complete stop. Officer Sweeny thereafter activated the lights in his police vehicle. The Mustang immediately slowed in speed but did not pull over. Officer Sweeny testified that "[t]here were several safe places" to pull over, but the Mustang continued driving and turned onto a different street. After making the turn, the Mustang slowed down and pulled to the curb as though it were going to stop, but then quickly pulled away and continued driving for approximately half a block before stopping. While the Mustang was still rolling to a stop, the passenger exited the vehicle and began running. Officer Sweeny stopped his vehicle behind the Mustang, stepped out, and walked toward the Mustang. After seeing the passenger flee, he returned to his vehicle without saying anything to Mr. Bird. He then drove past the Mustang and around the corner, where he parked the police vehicle and pursued the passenger on foot.

¶ 3 After apprehending the passenger, Officer Sweeny observed the Mustang pull quickly away from the curb and drive off. Officer Sweeny called for backup. Shortly thereafter, another officer located the Mustang and activated his lights. The second officer testified that Mr. Bird stopped "immediately." Mr. Bird was then taken into custody and later charged with failure to respond to an officer's signal to stop (failure to respond), a third degree felony under section 41–6a–210 of the Utah Code. That statute provides that "[a]n operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not: ... attempt to flee or elude a peace officer by vehicle or other means." UTAH CODE § 41–6a–210(1)(a).

¶ 4 Mr. Bird's case was tried to a jury. At the close of evidence, the trial court presented ***1144** the proposed jury instructions to the parties. After reviewing the instructions, defense counsel objected to the elements instruction for the failure-to-respond charge on the

grounds that it did not "outlin[e] the mental state" required for the offense and that the requisite mental state "need[ed] to be defined for the jury." The trial court disagreed, asserting, "I think it's got the elements here." Defense counsel continued to press for an instruction that included a mental state of either willfully or recklessly. Although the State conceded to a "low knowingly" mental state, the court disagreed, ending the colloquy by stating to defense counsel, "You've made your record, I've denied it." The court thereafter adopted the following instruction, which tracked the statutory language:

> The defendant, Dustin Lynn Bird is charged with Failure to Respond to Officer's Signal to Stop. You cannot convict him of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:
>
> 1. That on or about October 12th, 2009;
>
> 2. the defendant, Dustin Lynn Bird;
>
> 3. did operate a motor vehicle, and;
>
> 4. having received a visible or audible signal from a peace officer to bring the vehicle to a stop;
>
> 5. did attempt to flee or elude a peace officer by vehicle or other means.

In its closing, the prosecution argued that the jury "[did] not have to look in to the defendant's mind" to determine his culpability. The jury returned a guilty verdict.

¶ 5 Mr. Bird timely appealed his conviction to the court of appeals where he argued that the trial court erred "when it failed to instruct the jury on the mental state required for conviction of failure to respond to an officer's signal to stop." *State v. Bird,* 2012 UT App 239, ¶ 8, 286 P.3d 11, *cert. granted,* 298 P.3d 69 (Utah 2013). The court of appeals agreed with Mr. Bird, reversing the trial court. *Id.* ¶ 17. Although the court of appeals remanded Mr. Bird's case to the trial court for a new trial, it did not provide guidance for the trial court on remand. It asked the trial court "to determine in the first instance what the contents of any requested mental state instruction should be." *Id.* ¶ 17 n. 6.

¶ 6 We granted the State's petition for certiorari. We have jurisdiction pursuant to Utah Code section 78A–3–102(3)(a).

STANDARD OF REVIEW

[1] ¶ 7 "On certiorari, we review the decision of the court of appeals for correctness" and may affirm its decision "on any ground supported in the record." *Collins v. Sandy City Bd. of Adjustment,* 2002 UT 77, ¶ 11, 52 P.3d 1267 (internal quotation marks omitted).

ANALYSIS

I. MR. BIRD PRESERVED HIS OBJECTION TO THE JURY INSTRUCTION

[2] ¶ 8 The State first argues that the court of appeals erred in finding that Mr. Bird preserved his objection. It contends that Mr. Bird did not preserve his mens rea argument because his only request to the trial court was "that the mental states [intentionally, knowingly, or recklessly] be added to the elements instruction," whereas on appeal, Mr. Bird argues that the trial court should have defined the terms "receive" and "attempt." In response, Mr. Bird asserts that his argument on appeal is not that the trial court should have defined "receive" and "attempt," but rather that it should have identified the requisite mental state for the jury because the mens rea implications of the terms "receive" and "attempt" are unclear. Mr. Bird also argues that continuing to pursue his objection in the trial court would have been futile in light of the court's comment to Mr. Bird that "[he had] made [his] record." We agree with the court of appeals and hold that Mr. Bird sufficiently preserved his jury instruction objection.

¶ 9 First, the State misconstrues Mr. Bird's argument on appeal. Although his brief includes a discussion of the terms "receive" and "attempt," the essence of his argument on appeal is that these terms incorporate a mens rea element into the failure-to-respond offense. Mr. Bird has not argued that "receive" and "attempt" should have ***1145** been defined to the jury, but instead that the jury should have been instructed on the mental states embodied by these terms. In short, Mr. Bird's argument on appeal is the same argument he made to the trial court.

[3] [4] ¶ 10 Second, Mr. Bird presented his argument to the trial court in a clear manner. To preserve an issue, counsel must raise the issue in the trial court "in such a way that the trial court has an opportunity to rule on that issue." *Pratt v. Nelson,* 2007 UT 41, ¶ 15, 164 P.3d 366. We look to three factors to determine whether the trial court had such an opportunity: (1) whether the issue was raised in a timely fashion, (2) whether it was raised specifically,

(3) and whether the party "introduce[d] supporting evidence or relevant legal authority." *Id.*

¶ 11 In this case, Mr. Bird's objection was timely. Defense counsel raised the objection at her first opportunity to object to the proposed jury instructions. The objection was also specific. The State attempts to characterize Mr. Bird's objection as overly narrow. But counsel objected on the grounds that she did not "see anything outlining the mental state," and argued that "there needs to be [an] explanation that [Mr. Bird acted] ... recklessly or willfully." In short, Mr. Bird specifically objected to the lack of a mens rea instruction for the failure-to-respond offense as a whole. Finally, although defense counsel did not introduce relevant legal authority, counsel was given only a brief moment to review the statute-based language in the jury instructions and make her objection. Where there was not an opportunity to gather relevant legal authority, it is sufficient—for preservation purposes—that counsel relied on the statutory language in making her objection.

¶ 12 In sum, we conclude the issue was preserved for appeal because Mr. Bird presented his argument to the trial court in a way that gave the court an opportunity to rule on the issue. Thus, we turn to the merits.

II. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON THE REQUIRED MENS REA

[5] ¶ 13 The court of appeals held that the trial court erred by not defining the required mental state for each element of the failure to respond charge under Utah Code section 41–6a–210(1)(a). The failure-to-respond statute provides, "An operator who *receives* a visual or audible signal from a peace officer to bring the vehicle to a stop may not: ... *attempt* to flee or elude a peace officer by vehicle or other means." UTAH CODE § 41–6a–210(1)(a) (emphasis added). The court of appeals explained that the terms "receive" and "attempt" indicate that the offense "incorporates its own set of mental state requirements on which [Mr.] Bird was entitled to a jury instruction." *State v. Bird,* 2012 UT App 239, ¶ 15, 286 P.3d 11. It acknowledged that these are common terms, but reasoned that "the criminal law mens rea implications of those terms would [not] necessarily be obvious to a jury." *Id.* ¶ 16 n. 5. We agree with the court of appeals and hold that the trial court erred in not instructing the jury on the mens rea requirement for the failure-to-respond charge.

A. Mens Rea Is a Basic Element of an Offense and Requires an Instruction

[6] [7] ¶ 14 The general rule for jury instructions is that "an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." *State v. Bluff,* 2002 UT 66, ¶ 26, 52 P.3d 1210 (internal quotation marks omitted). A mens rea element is an "essential element of [an] offense." *State v. Cobo,* 90 Utah 89, 60 P.2d 952, 959 (1936). Thus, failure to instruct the jury as to the required mens rea, when it is an element of the crime, is reversible error.

[8] ¶ 15 A trial court should provide the jury with a mens rea instruction when a criminal statute includes terms that have mens rea implications. In *State v. Stringham,* 957 P.2d 602, 609 (Utah Ct.App.1998), for example, the defendant was convicted of communications fraud, but the court of appeals reversed and remanded for a new trial because the trial court failed to instruct the jury on the mens rea element. *Id.* It explained, "It is too long a reach to suggest the jury divined that defendant had to act intentionally ***1146** because such a level of volition is inherent in the concept of 'devis[ing] a scheme.' " *Id.* (alteration in original).

¶ 16 Of particular concern is an instruction that leaves the erroneous impression that a crime is one of strict liability, when it in fact contains a mens rea element. In *State v. Pearson,* the defendant had been convicted of failure to disclose a transaction to a government employer. 1999 UT App 220, ¶ 1, 985 P.2d 919. The court of appeals reversed the conviction, reasoning that "[b]y selectively applying the mens rea to some, but not all, of the elements of the offense, the jury could easily have believed defendant was strictly liable for [the remaining element]." *Id.* ¶ 12.

[9] ¶ 17 An appropriate jury instruction must also distinguish between the general and specific intent requirements of an offense. *State v. Potter,* 627 P.2d 75, 78 (Utah 1981). In *Potter,* we remanded for a new trial "[b]ecause the instructions given ... failed to explain adequately the distinction between the general and specific intent requirements." *Id.* Thus, a trial court must instruct the jury on the proper mens rea for the offense charged. And the instruction must identify the mens rea implicated by the statutory language, must include a mens rea for all elements, and must distinguish between general and specific intent.

B. The Required Mens Rea for Failure to Respond

¶ 18 In this case, both parties agree that the failure-to-respond offense includes a mens rea element. Violations of the Utah Traffic Code, such as this, are strict liability offenses "unless specifically provided by law." UTAH CODE § 76–2–101(2). In this case, however, the terms "receive" and "attempt," which are contained in the statutory language, indicate that this crime includes some level of mental appreciation. What the parties dispute is whether a jury instruction that simply lists the statutory elements of the offense is sufficient to alert the jury to the mens rea element.

[10] ¶ 19 The State argues that because the terms "receive" and "attempt" are terms of common usage, it was unnecessary to instruct the jury as to the meaning of these terms. We agree that the jury would have understood the plain meaning of the terms "receive" and "attempt." But we cannot assume that the jury understood the mens rea implications of these terms. Indeed, mens rea is a "legal term of art" that ought to be explicitly explained to a jury. *See* *State v. Jeffs,* 2010 UT 49, ¶ 43, 243 P.3d 1250.

¶ 20 We can expect a lay juror to understand that the term "receive" contemplates a level of knowledge. *See* WEBSTER'S NEW COLLEGE DICTIONARY 1195 (2007) (including among the definitions of "receive," "to apprehend mentally; get knowledge of or information about"). Therefore, a juror would likely have perceived that the "receives a visual or audible signal from a peace officer" element of the offense requires knowledge of the peace officer's signal. But we cannot assume that a juror would recognize the significance of this knowledge requirement as an essential mens rea element. Thus, it was error for the trial court not to instruct the jury that the charge included a knowingly mens rea element and define what would satisfy that element.

¶ 21 The trial court's error in not including a mens rea instruction is even more apparent in the context of the "attempt to flee or elude a police officer" element. The term "attempt" carries a distinct meaning in criminal law that we cannot expect a lay juror to understand without instruction. The common dictionary definition of attempt is "to try, solicit," or "to make an effort to do, get, have, etc." *Id.* at 91. In contrast, the statutory definition of attempt means something more than to try or make an effort. As explained in Utah Code section 76–4–101(1), attempt means to "engage[ ] in conduct constituting a substantial step toward commission of the crime" and to "intend [ ] to commit the crime." Thus, the statutory meaning of attempt connotes a conscious decision with more specific action than does the common dictionary definition of the term.

¶ 22 Although the term "attempt" implicates a mental state requirement, it does not necessarily indicate the applicable level of mens rea. For example, the crime of assault, like failure to respond, includes attempt ***1147** as one of its elements. UTAH CODE § 76–5–102(1) ("Assault is ... an attempt, with unlawful force or violence, to do bodily injury to another...."). But we have explained that the assault statute itself does not prescribe the requisite mental state. *State v. Hutchings,* 2012 UT 50, ¶ 12, 285 P.3d 1183. In other words, the requisite mens rea is not apparent from the statute's use of the term "attempt." Utah Code section 76–2–102 explains that "intent, knowledge, or recklessness shall suffice to establish criminal responsibility" "when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability." Thus, intent, knowledge, or recklessness must "be found to establish criminal responsibility" in the context of assault. *Id.* ¶ 12.

¶ 23 In the context of the failure-to-respond offense, the "attempt to flee or elude" element implicates an intentional mens rea. To flee or elude means something more than to merely leave or depart; the terms indicate action with a specific purpose. *See* WEBSTER'S NEW COLLEGE DICTIONARY 540 (2007) (defining "flee" as "to run away or escape"); *Id.* at 463 (defining "elude" as "to avoid or escape from by quickness, cunning, etc."). Because the act of fleeing or eluding requires a conscious decision to escape or avoid, one could not recklessly flee from a peace officer. Although a person might act recklessly by *departing* from a police stop without the police officer's permission, the person would not be *fleeing* unless it were his intention to escape or avoid the police officer. To attempt to flee or elude, therefore, requires that the actor leave in an effort to escape or avoid a peace officer. Thus, the trial court should have instructed the jury that an "attempt to flee or elude" requires an intentional mental state.

¶ 24 In sum, the court of appeals correctly held that the trial court erred in denying Mr. Bird a mens rea jury instruction because the instruction given to the jury did not specify the essential mens rea elements of the failure-to-respond charge.

III. GUIDANCE FOR REMAND

[11] ¶ 25 The State also argues that the court of appeals erred by not providing guidance on remand. We disagree. Although appellate courts have the discretion to provide

guidance on remand, they are not required to do so. *Compare* *State v. Low,* 2008 UT 58, ¶ 61, 192 P.3d 867 (exercising our discretion to provide guidance), *with* *State v. Verde,* 2012 UT 60, ¶ 62, 296 P.3d 673 (deferring to the trial court's "superior position" in matters of evidence and withholding guidance). Thus, it was not error for the court of appeals to ask the trial court to determine, in the first instance, the proper mens rea instruction.

[12] ¶ 26 We, however, choose to provide such guidance. If the State recharges Mr. Bird, we direct the trial court to instruct the jury that Mr. Bird must have knowingly "received a visual or audible signal from a police officer" and must have intended "to flee or elude a peace officer." And the trial court should also include an instruction defining the knowing and intentional mental states.

CONCLUSION

¶ 27 We affirm the court of appeals' reversal of Mr. Bird's conviction because the trial court erred in failing to instruct the jury on the mens rea requirements of section 41–6a–210 of the Utah Code. On remand, the trial court should instruct the jury as to the mens rea required for each of the elements of the failure-to-respond charge.

Justice LEE, dissenting:

¶ 28 I respectfully dissent from the majority's determination of reversible error in the district court's failure to give an instruction clarifying the *mens rea* implications of the elements of the offense set forth in Utah Code section 41–6a–210(1)(a). Perhaps such an instruction would have aided the jury somewhat, by clarifying the import of the elements of (a) "receiv[ing] a visual or audible signal from a peace officer," and (b) "attempt[ing] to flee or elude a peace officer by vehicle or other means." UTAH CODE § 41–6a–210(1)(a). But the question presented is not whether the judges of this court ***1148** would have accepted a request to give such an instruction. It is whether the district judge's failure to give the instruction was error, and whether any such error would have made any difference to the outcome.

¶ 29 I would affirm on two grounds. First, I would uphold the jury instruction as given on its own terms, as the ordinary meaning of the terms of the instruction adequately conveyed a fair understanding of the *mens rea* issues identified by the majority. Second, I would hold that any purported error in the instruction as given was harmless, having no " 'reasonable likelihood' " of affecting the outcome of the proceedings. *State v. Powell,* 2007 UT 9, ¶ 21, 154 P.3d 788.

¶ 30 It is an over-generalization to say that "[a] trial court should provide the jury with a mens rea instruction when a criminal statute includes terms that have mens rea implications." *Supra* ¶ 15. Our cases seem to me to stand for a more modest principle. Instead of broadly mandating separate *mens rea* clarifications of all "terms that have mens rea implications," we have simply required that the jury be fairly and accurately instructed on all elements (whether *mens rea* or *actus reus*) of any offense.[1] And we have hastened to add that "the trial court does not err in refusing to give a requested instruction if the point is properly covered in other instructions presented to the jury."[2]

¶ 31 The instruction given in this case easily satisfied these standards. First, the instruction conveyed the requirement of *knowledge* of the peace officer's signal. It did so by requiring the jury to find that the defendant "*received* a visible or audible signal from a peace officer." As the majority acknowledges, the *knowledge* requirement is inherent in the common, ordinary understanding of the verb *receive. See supra* ¶ 20 (citing WEBSTER'S NEW COLLEGE DICTIONARY 1195 (2007), defining "receive" as "apprehend mentally; get knowledge of or information about").

¶ 32 Second, the instruction also conveyed the requirement of *intent* to flee or evade. That requirement was again inherent in the common, ordinary meaning of the terms of the district court's instruction. Here the operative terms are "attempt," which "is 'to try, solicit,' or 'to make an effort to do, get, have, etc.,' " *supra* ¶ 21 (citing WEBSTER'S NEW COLLEGE DICTIONARY 91 (2007)); and "flee" or "evade," which mean, respectively, "run away or escape," and "avoid or escape from by quickness, cunning, etc.," *supra* ¶ 23 (citing WEBSTER'S NEW COLLEGE DICTIONARY 540, 463).

¶ 33 The elements of "receiv[ing]" a signal and of "attempt[ing] to flee or elude a peace officer" thus gave the jury a fair and accurate understanding of the *mens rea* elements of the offense of failure to respond under Utah Code section 41–6a–210. The majority's analysis only confirms this conclusion. It does so by reciting the above definitions of the operative terms of the statute—*receive, attempt, flee,* and *evade*—and by conceding that these

terms accordingly conveyed the essential notion of the *knowledge* and *intent* elements of the offense in question. *Supra* ¶ 20 (conceding that "a juror would likely have perceived that the 'receives a visual or audible signal from a peace officer' element of the offense requires knowledge of the peace officer's signal"); *id.* ¶ 23 (acknowledging that "the 'attempt to flee or elude' element implicates an intentional mens rea"). That should be the end of our analysis. The jury was fairly instructed, and we should affirm the conviction on that basis.[3]

***1149** ¶ 34 The majority's justifications for overturning the jury verdict are unpersuasive. As to the *knowledge* implications of the instruction given to the jury, I accept that we do not know for certain whether a "juror would recognize the *significance* of" the statutory "knowledge requirement as an essential mens rea element." *Supra* ¶ 20 (emphasis added). But the majority has not identified any sense in which the ordinary meaning of "receive" would fall short of giving the jury a full sense of the *knowledge* element of the offense in question. Instead it has vaguely suggested that the jury *might not get it,* and concluded that "[t]hus it was error" not to provide further explanation in a more detailed instruction. *Supra* ¶ 20. This turns the operative burden of persuasion on its head.

¶ 35 To succeed in establishing a basis for reversal, *the defendant* bears the burden of demonstrating that the instruction in question falls short of the goal of fairly and accurately stating the law (and of indicating that the error is likely to have made a difference in the outcome, a separate problem discussed below, *infra* ¶ 13). *Powell,* 2007 UT 9, ¶ 21, 154 P.3d 788. The court inverts that standard by reversing on the basis of a vague insistence that the jury might not have "recognize[d] the significance" of the instruction's reference to "receiv[ing] a visual or audible signal from a peace officer." *Supra* ¶ 20. I dissent from a decision that seems to me to ignore our cases regarding the operative burden of persuasion.

¶ 36 The majority's analysis of the *intent* implications of the instruction in question is similarly problematic. If the ordinary meaning of "attempt to flee or elude ... requires that the actor leave in an effort to escape or avoid a peace officer," *supra* ¶ 23, then defendant Bird has failed to carry his burden of proof that the instruction as given fell short of giving a fair and accurate description of the law to the jury. That is a sufficient basis for affirming the jury verdict in this case.

¶ 37 The court does not clearly identify any precise shortcoming of the *intent* implications of the instruction in question. But in discussing the statutory term *attempt,* the court appears to draw a distinction between (a) "[t]he common dictionary definition of attempt," as "to try, solicit, or to make an effort to do, get, have, etc."; and (b) the legal sense of the *inchoate crime of attempt,* which requires "a substantial step toward commission of the crime." *Supra* ¶ 21 (internal quotations omitted). And in discussing this distinction, the court suggests that "the *statutory meaning of attempt* connotes a conscious decision with more specific action than does the common dictionary definition of the term." *Supra* ¶ 21 (emphasis added).

¶ 38 If the majority is suggesting that the "substantial step" element of the inchoate crime of *attempt* should have been included in the instruction as given, then I dissent from that conclusion. For one thing, I see no basis for treating the failure to stop offense as inchoate. It is not defined in terms of a "substantial step" toward a choate offense. It appears instead to be a crime in itself. So there is no reason to read the "substantial step" sense of an inchoate *attempt* into this state. In any event, that notion of *attempt* was neither preserved in the district court nor argued on appeal. So if the failure to instruct on "substantial step" is the shortcoming that the court sees in the instruction in question, it is a defect of the court's own imagining. And if that is not the problem, then the court has failed to identify any distinction between the common, ordinary sense of the terms of the district court's instruction and the *mens rea* requirements delineated in the majority opinion.

¶ 39 Finally, even assuming some minor, unarticulated distinction between the ordinary meaning of "receiv[ing] a visual or audible signal" and the *knowledge* required by the majority, or between "attempt[ing] to flee or elude a peace officer" and the *intent* requirement set forth by the court, we should still affirm Bird's conviction on harmless error grounds. Under settled law, Bird bears the burden of establishing that any error in the instruction in question was reasonably likely to affect the outcome in this case. *See* *State v. Vargas,* 2001 UT 5, ¶ 39, 20 P.3d 271 ***1150** (stating that it is the defendant's burden to establish that the error is harmful). In my view he has utterly failed to carry that burden. Given the common, ordinary sense of the operative terms of the instruction given to the jury in this case, I would also hold that any arguable shortcoming in failing to elaborate on the *mens rea* elements of the offense was harmless.

All Citations

345 P.3d 1141, 778 Utah Adv. Rep. 5, 2015 UT 7

Footnotes

1 *See* *State v. Maestas,* 2012 UT 46, ¶ 148, 299 P.3d 892 (explaining that we review jury instructions "in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case"); *State v. Roberts,* 711 P.2d 235, 239 (Utah 1985) (stating "the general rule" that "an accurate instruction upon the basic elements of an offense is essential").

2 *State v. James,* 819 P.2d 781, 799 (Utah 1991).

3 *See* *Philpot v. State,* 268 Ga. 168, 486 S.E.2d 158, 160–61 (1997) (dismissing defendant's argument that the trial court improperly failed to define terms "knowingly" and "great risk" because "the terms ... are ordinary terms found in common usage and understood by people of common and ordinary experience ... and need not be specifically defined in the charge to a jury"); *People v. McCleod,* 55 Cal.App.4th 1205, 1216, 64 Cal.Rptr.2d 545 (1997) (upholding the inclusion of the common term "residence" in a jury instruction without additional elaboration, stating that a court "need only give explanatory instructions when terms used in an instruction have a technical meaning peculiar to the law" (internal quotation marks omitted)).

Failure to Respond to an Officer's Signal to Stop
Utah Code section 41-6a-210(1)(a) and (b)

(DEFENDANT'S NAME) is charged [in Count ____] with committing Failure to Respond to an Officer's Signal to Stop [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. That (DEFENDANT'S NAME)
2. Knowingly received a visual or audible signal from a law enforcement officer to bring the motor vehicle to a stop;
3. And after receiving the visual or audible signal,
4. (DEFENDANT'S NAME) intentionally
    a. Operated the motor vehicle in willful and wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person;
    OR
    b. Attempted to flee or elude a law enforcement officer by vehicle or other means.

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

References:
State v. Bird, 2015 UT 7, 345 P.3d 1141

NOTE: We will also want to prepare an instruction for section 41-6a-210(2), which makes the crime a second degree felony if the operator causes death or serious bodily injury to another person, under circumstances not amounting to murder or aggravated murder.

TAB 3

Driving with a Measurable Controlled Substance Instruction

Draft Instruction for Driving with any Measurable Controlled Substance in the Body

Proposed Instruction:

(DEFENDANT'S NAME) is charged [in Count ____] with committing Driving with any Measurable Controlled Substance in the Body [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. Did operate or was in actual physical control of a vehicle; and
3. Had any measurable amount of a controlled substance or any metabolite of a controlled substance in [his] [her] body.

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

References:

- Utah Code Ann. § 41-6a-517(2)(a)
- Utah Code Ann. § 76-2-101(2)
- *State v. Outzen*, 2017 UT 30, 408 P.3d 334

Notes:

This instruction is intended to be used in prosecuting **Class B Misdemeanor** Driving with any Measurable Controlled Substance in the Body. For Driving Under the Influence—as found in Utah Code Ann. § 41-6a-502— instructions, use CR1003, CR1004, or CR1005, respectively.

Similar to the offense of Driving Under the Influence, Driving with any Measurable Controlled Substance in the Body is a strict liability offense. *See* Utah Code Ann. § 76-2-101(2) (no mental state generally required for traffic offenses). But in contrast to Driving Under the Influence, Driving with any Measurable Controlled Substance in the Body does not require proof of impairment. *See State v. Outzen*, 2017 UT 30, ¶¶ 7–12, 408 P.3d 334.

TAB 4

Negligently Operating a Vehicle Resulting in Bodily Injury Instruction

Draft Instruction for Negligently Operating a Vehicle Resulting in Injury

Proposed Instruction:

(DEFENDANT'S NAME) is charged [in Count ____] with committing Negligently Operating a Vehicle Resulting in Injury [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);
    a. Operated a vehicle in a negligent manner; and
    b. Caused [serious] bodily injury to another; and
2. (DEFENDANT'S NAME):
    a. [Had sufficient alcohol in [his] [her] body that a subsequent chemical test showed that [he] [she] had a blood or breath alcohol concentration of .05 grams or greater at the time of the test;]
    b. [Was under the influence of [alcohol] [a drug] [the combined influence of alcohol and a drug] to a degree that rendered [him] [her] incapable of safely operating a vehicle;] or
    c. [Had a blood or breath alcohol concentration of .05 grams or greater at the time of operation;] or
3. (DEFENDANT'S NAME);
    a. Operated a vehicle in a criminally negligent manner; and
    b. Caused [serious] bodily injury to another; and

4. (DEFENDANT'S NAME):
    a. Had in [his] [her] body any measurable amount of a controlled substance.

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

References:

- Utah Code Ann. § 76-5-102.1(2)

Relevant Definitions:

- Negligence: *see* CR305.
- Criminal Negligence: *see* CR306A, CR306B, and CR307.
- Bodily Injury "means physical pain, illness, or any impairment of physical condition." *See* Utah Code Ann. § 76-1-101.5(4).
- Serious Bodily Injury "means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." *See* Utah Code Ann. § 76-1-101.5(17).

Notes:

This instruction is intended to be used in prosecuting the crime of Negligently Operating a Vehicle Resulting in Injury. Whether that offense constitutes a Class A Misdemeanor or a Third-Degree Felony depends on whether the Defendant caused bodily injury or serious bodily injury to another. *See* Utah Code Ann. § 76-5-102.1(3). Practitioners should use the bracketed [serious] language accordingly.

For the definition of "negligent," see CR305. For the definition of "criminally negligent," see CR306A, CR306B, and CR307.