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

Via Webex
September 4th, 2024 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Welch
	Update on CR1005: Negligently Operating a Vehicle Resulting in Injury		Tab 2	Judge Welch/Freyja Johnson
	Update on Proposed CR1007 – Unanimity Instruction on DUI & Special Verdict Form		Tab 3	Judge Welch/ Judge McCullagh
	Discussion: Ignorance or Mistake of Fact Instruction		Tab 4	Dustin Parmley/Freyja Johnson
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):

October 2nd, 2024
November 6th, 2024
December 4th, 2024
January 8th, 2025
February 5th, 2025
March 5th, 2025
April 2nd, 2025
May 7th, 2025
June 4th, 2025
July 2nd, 2025
August 6th, 2025
September 3rd, 2025
October 1st, 2025
November 5th, 2025
December 3rd, 2025

TAB 1

Meeting Minutes – August 7th, 2024

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

Hybrid Meeting: Utah Judicial Council Room & Via Webex
June 5, 2024 – 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	•	
[VACANT]	Linguist/Communications Professor	**N/A**	**N/A**
Hon. Linda Jones	Emeritus District Court Judge		•
Hon. Matthew Bates	District Court Judge	•	
Sharla Dunroe	Defense Attorney	•	
Janet Lawrence	Defense Attorney	•	
Jeffrey Mann	Prosecutor	•	
[VACANT]	Prosecutor	**N/A**	**N/A**
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: JUNE 2024 MEETING

Judge Welch welcomed the Committee to the meeting and reviewed the meeting schedule with the Committee. Judge Welch noted that on December 4th, 2024, the Committee would not meet due to Judge Welch attending an “artificial intelligence” conference. Judge McCullagh asked if it was an appellate court conference. Judge Welch said no. Judge Welch then noted that the Committee would not meet in July 2005 either, given the meeting’s close proximity to the Fourth of July holiday.

Judge Welch then reviewed the current vacancies among the Committee for a prosecutor and linguistic expert. Bryson King reviewed the process for appointing new Committee members and explained that an announcement would go out this month to request applications for the pending vacancies. Once the applications have been reviewed, the Judicial Council will announce the appointments to fill those vacancies.

The Committee then reviewed the minutes from the June 2024 meeting. McKay Lewis moved to approve the minutes, with Nic Mills seconding the motion. Without objection, the motion carries and the minutes are approved.

(2) AGENDA ITEM 2: CR1101: FAILURE TO RESPOND TO AN OFFICER’S SIGNAL TO STOP (CLASS A)

Judge Welch then turned the Committees attention to CR1101. At the last meeting, the Committee had left off on a discussion about the language in the Instruction Note. Judge Welch then asked the Committee to consider

State v. Nelson and whether that case answers the question about what mens rea element should be used in the Instruction. Dustin Parmley explained that *Nelson* doesn't address the question because the case was about the sufficiency of evidence presented at trial, and not really a jury instruction appeal. As such, the case's language would be dicta. Additionally, Dustin explained that the case goes against the discussion in *State v. Bird* about what it means to flee. McKay Lewis agreed with Dustin and pointed to the actus reus, fleeing, as potentially requiring a mens rea and the case law not making it clear what that mens rea should be. McKay then reviewed a draft of the Instruction Note he prepared. Judge Welch asked whether *State v. Nelson* should be included in the Instruction's references, and McKay agreed it should. Then, Judge Welch asked whether the question of the mens rea element is really unsettled, as indicated in the Instruction Note. Judge McCullagh offered the suggestion that the Instruction Note should say "the Committee cannot reach a consensus," instead of saying the law is unsettled. That change in the Note was made. Janet Lawrence explained to the Committee that after reviewing briefing from the caselaw, she sees support for a position that the act of fleeing needs a mens rea to show that the defendant did more than just not stop, and that a separate mens rea is required to show that the defendant was avoiding arrest because they thought they could or would be arrested. So, she suggested that intentionally, knowingly, and recklessly be used in the Instruction for the two separate mens rea requirements. The Committee continued its discussion about whether the Instruction should only include the element "intentionally" or the elements "intentionally, knowingly, or recklessly." The Committee made additionally formatting changes to the Instruction. After the discussion and modifications, McKay Lewis moved to approve the instruction and Dustin Parmley seconded the motion. Judge Bates then indicated he voted to approve the instruction with reservations, because the word intentionally does not seem to be necessary. After continued discussion on the format of the Instruction, Nic Mills moved to approve the Instruction language, with Dustin Parmley seconding the motion. Without objection, the motion carries and the Instruction language is approved.

Judge Welch then asked the Committee to address whether any changes to the Instruction Note should be made. Judge Bates suggested removing the word "specific" before the mens rea in the Note. Janet Lawrence suggested including language saying that the Committee cannot reach a consensus on whether the instruction needs a mens rea element at all, and if it does, whether that mens rea should be intentionally, or intentionally, knowingly, or recklessly. After the discussion, Dustin Parmley moved to approve the Note, with McKay Lewis seconding the motion. Without opposition, the motion carries and the Instruction and Note are now approved and will be published for public comment.

(3) AGENDA ITEM 3: CR1005 NEGLIGENTLY OPERATING A VEHICLE RESULTING IN INJURY

Judge Welch then turned the Committee's attention to CR1005 and the subcommittee formed to work on that instruction. Judge Welch asked whether the subcommittee had an update. Judge McCullagh and McKay Lewis indicated that the subcommittee had not met yet. Judge Welch indicated that the Committee would revisit the issue at its next meeting.

(4) AGENDA ITEM 4: PROPOSED CR1007 – UNANIMITY INSTRUCTION ON DUI & SPECIAL VERDICT FORM

Judge Welch then invited Judge McCullagh to discuss his work on CR1007 and the special verdict form. Judge McCullagh asked the Committee whether the Supreme Court or Court of Appeals are reviewing unanimity cases. Jeff Mann indicated that the Supreme Court is considering that issue in *State v. Paule*. Judge Welch also asked whether any caselaw exists or whether the appellate courts are considering the question of whether it is plain error for a trial court not to instruct on the issue of unanimity. Janet Lawrence explained that in *State v. Alires*, the court may have reviewed that issue. Judge Welch then invited Judge McCullagh to continue his review of the DUI unanimity instruction. Judge McCullagh reviewed the relevant statutes with the Committee and the language of the proposed unanimity instruction on the different ways to commit a DUI. After some discussion, Jeff Mann indicated that pending case law, *State v. Cissel*, might affect the Committee's work on this issue. Judge McCullagh suggested that the Committee postpone its work on this instruction until an opinion in that case is published.

(5) ADJOURN

Before adjourning, McKay Lewis asked about the status of CR1006, Driving With a Measurable Controlled Substance, and whether it had been published. That instruction had previously been approved by the Committee, but not published yet. After some discussion, the Committee agreed to publish CR1006 along with CR430, 432, and 1101. The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on August 7th, 2024, starting at 12:00 noon.

TAB 2

Proposed CR1005: Negligently Operating a Vehicle Resulting in Injury

Effective 5/3/2023

76-5-102.1 Negligently operating a vehicle resulting in injury.

(1)

(a) As used in this section:

(i) "Controlled substance" means the same as that term is defined in Section 58-37-2.

(ii) "Drug" means the same as that term is defined in Section 76-5-207.

(iii) "Negligent" or "negligence" means the same as that term is defined in Section 76-5-207.

(iv) "Vehicle" means the same as that term is defined in Section 41-6a-501.

(b) Terms defined in Section 76-1-101.5 apply to this section.

(2) An actor commits negligently operating a vehicle resulting in injury if the actor:

(a)

(i) operates a vehicle in a negligent manner causing bodily injury to another; and

(ii)

(A) has sufficient alcohol in the actor's body such that a subsequent chemical test shows that the actor has a blood or breath alcohol concentration of .05 grams or greater at the time of the test;

(B) is under the influence of alcohol, a drug, or the combined influence of alcohol and a drug to a degree that renders the actor incapable of safely operating a vehicle; or

(C) has a blood or breath alcohol concentration of .05 grams or greater at the time of operation; or

(b)

(i) operates a vehicle in a criminally negligent manner causing bodily injury to another; and

(ii) has in the actor's body any measurable amount of a controlled substance.

(3) Except as provided in Subsection (4), a violation of Subsection (2) is:

(a)

(i) a class A misdemeanor; or

(ii) a third degree felony if the bodily injury is serious bodily injury; and

(b) a separate offense for each victim suffering bodily injury as a result of the actor's violation of this section, regardless of whether the injuries arise from the same episode of driving.

(4) An actor is not guilty of negligently operating a vehicle resulting in injury under Subsection (2)(b) if:

(a) the controlled substance was obtained under a valid prescription or order, directly from a practitioner while acting in the course of the practitioner's professional practice, or as otherwise authorized by Title 58, Occupations and Professions;

(b) the controlled substance is 11-nor-9-carboxy-tetrahydrocannabinol; or

(c) the actor possessed, in the actor's body, a controlled substance listed in Section 58-37-4.2 if:

(i) the actor is the subject of medical research conducted by a holder of a valid license to possess controlled substances under Section 58-37-6; and

(ii) the substance was administered to the actor by the medical researcher.

(5)

(a) A judge imposing a sentence under this section may consider:

(i) the sentencing guidelines developed in accordance with Section 63M-7-404;

(ii) the defendant's history;

(iii) the facts of the case;

(iv) aggravating and mitigating factors; or

(v) any other relevant fact.

(b) The judge may not impose a lesser sentence than would be required for a conviction based on the defendant's history under Section 41-6a-505.

(c) The standards for chemical breath analysis under Section 41-6a-515 and the provisions for the admissibility of chemical test results under Section 41-6a-516 apply to determination and proof of blood alcohol content under this section.
(d) A calculation of blood or breath alcohol concentration under this section shall be made in accordance with Subsection 41-6a-502(3).
(e) Except as provided in Subsection (4), the fact that an actor charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense.
(f) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except if prohibited by the Utah Rules of Evidence, the United States Constitution, or the Utah Constitution.
(g) In accordance with Subsection 77-2a-3(8), a guilty or no contest plea to an offense described in this section may not be held in abeyance.

Amended by Chapter 111, 2023 General Session
Amended by Chapter 415, 2023 General Session

TAB 3

Proposed CR1007: Unanimity Instruction on DUI & Special Verdict Form

Unanimity around alternative ways to prove a violation of 41-6a-502 (DUI).

Count (#) charges (DEFENDANT'S NAME) with (CRIME). The prosecution argues that the defendant may have committed the offense by [WAY 1][WAY 2][WAY 3].

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

The defendant is charged with operating, or being in actual physical control of, a vehicle while:

1. Under the influence of alcohol and/or any other drug to a degree that he/she was incapable of safely operating the vehicle; or
2. Having sufficient alcohol in their body that a subsequent test showed that the defendant had a blood or breath alcohol concentration of .05 grams or greater at the time of the test.
3. [Having a blood or breath alcohol concentration of .05 grams or greater at the time of the operation or actual physical control.] [rare option]

These are separate considerations. To find the defendant guilty, you must unanimously agree on at least one of those above alternatives. Should you find the defendant guilty you must also fill out the special verdict form indicating which alternatives you had unanimity on. There must be at least one.

SPECIAL VERDICT FORM For which alternative method of DUI.
We the Jury, in finding (Defendant's name) GUILTY of Count __, find unanimously, and beyond a reasonable doubt, that the defendant:

____ was under the influence of alcohol and/or any other drug to a degree that he/she was incapable of safely operating the vehicle.

____had sufficient alcohol in their body at the time of operating or being in actual physical control of the vehicle, that a subsequent chemical test showed the defendant had a blood or breath alcohol concentration of .05 grams or greater at the time of the test.

____operated or was in actual physical control of a vehicle with a blood or breath alcohol concentration of .05 grams or greater.

____
Jury Foreperson

SPECIAL VERDICT FORM FOR THE MYRIAD ADD-ONS THAT INCREASE THE OFFENSE LEVEL (TOP) OR MINIMUM MANDATORY SENTENCING (BOTTOM)

We the jury having found the defendant guilty of Count # ___ [or violating Utah Code Ann 41-6a-502 (the DUI Statute)][we don't usually do it this way, but it's a lot cleaner than the whole statute title)], find unanimously and beyond a reasonable doubt the following:

Foreperson initial next to each that you do find. If you find none, initial the last box "None." Verdict form must also be signed by the foreperson on behalf of the jury.

[Factors that increase the level of offense]
____when committing the offense, the defendant had a passenger younger than 16 years old in the vehicle at the time of the offense.

____when committing the offense, the defendant was at least 21 years of age and had a passenger younger than 18 years of age in the vehicle.

____when committing the offense, the defendant also violated 41-6a-712 or 714 regarding Divided Highways [if those violations are charged in the information. If not, a longer special verdict form outlining all the elements of those offenses will need to be used.]

____Within ten years of [[the date defendant committed this offense] or [today's date]], the defendant had a prior conviction as defined in Instruction # _____.

____Within ten years of [[the date defendant committed this offense] or [today's date]], the defendant has two or more prior convictions as defined in Instruction # _____.

____The defendant has a prior felony conviction as defined in Instruction # ____.

[Factors that increase the minimum sentence a court must impose]

When committing the offense, the defendant had:

____a blood or breath alcohol level of .16 or higher;

____a blood or breath alcohol level of .05 or higher AND a measured amount of a controlled substance in his/her body that was not [recommended in accordance with Title 26B, Chapter 4, Part 2, Cannabinoid Research and Medical Cannabis] or [prescribed].

____two or more controlled substances in his/her body that were not [recommended in accordance with Title 26B, Chapter 4, Part 2, Cannabinoid Research and Medical Cannabis] or [prescribed].

(DEFENDANT'S NAME) is charged [in Count ____] with committing Criminal Refusal to submit to a Blood test [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. The defendant was under arrest;
2. A peace officer had requested the defendant to submit to a chemical test or tests;
3. The defendant refused that request;
4. The peace officer warned the defendant that refusal to submit to the test or tests may result in:
    a. criminal prosecution;
    b. revocation of the defendant's driver license;
    c. a five or ten year prohibition of driving with any measurable or detectable amount of alcohol in [his/her] body on the defendant's driving history; and
    d. a three-year prohibition of driving without an ignition interlock device.
5. A judge had issued a warrant allowing seizure of a sample of the defendant's blood; and
6. After being presented with evidence of that warrant, the defendant refused another request by an officer to submit to a test of the defendant's blood.

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.

Effective 5/3/2023

41-6a-502 Driving under the influence of alcohol, drugs, or a combination of both or with specified or unsafe blood alcohol concentration -- Penalities -- Reporting of convictions.

(1) An actor commits driving under the influence if the actor operates or is in actual physical control of a vehicle within this state if the actor:

(a) has sufficient alcohol in the actor's body that a subsequent chemical test shows that the actor has a blood or breath alcohol concentration of .05 grams or greater at the time of the test;

(b) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the actor incapable of safely operating a vehicle; or

(c) has a blood or breath alcohol concentration of .05 grams or greater at the time of operation or actual physical control.

(2)

(a) A violation of Subsection (1) is a class B misdemeanor.

(b) Notwithstanding Subsection (2)(a), a violation of Subsection (1) is a class A misdemeanor if the actor:

(i) has a passenger younger than 16 years old in the vehicle at the time of the offense;

(ii) is 21 years old or older and has a passenger younger than 18 years old in the vehicle at the time of the offense;

(iii) the actor also violated Section 41-6a-712 or 41-6a-714 at the time of the offense; or

(iv) has one prior conviction within 10 years of:

(A) the current conviction under Subsection (1); or

(B) the commission of the offense upon which the current conviction is based.

(c) Notwithstanding Subsection (2)(a), a violation of Subsection (1) is a third degree felony if:

(i) the actor has two or more prior convictions each of which is within 10 years of:

(A) the current conviction; or

(B) the commission of the offense upon which the current conviction is based; or

(ii) the current conviction is at any time after a conviction of:

(A) a violation of Section 76-5-207;

(B) a felony violation of this section, Section 76-5-102.1, 41-6a-520.1, or a statute previously in effect in this state that would constitute a violation of this section; or

(C) any conviction described in Subsection (2)(c)(ii)(A) or (B) which judgment of conviction is reduced under Section 76-3-402.

(3) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(4) A violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6a-510.

(5) A court shall, monthly, send to the Division of Professional Licensing, created in Section 58-1-103, a report containing the name, case number, and, if known, the date of birth of each person convicted during the preceding month of a violation of this section for whom there is evidence that the person was driving under the influence, in whole or in part, of a prescribed controlled substance.

(6) An offense described in this section is a strict liability offense.

(7) A guilty or no contest plea to an offense described in this section may not be held in abeyance.

(8) An actor is guilty of a separate offense under Subsection (1) for each passenger in the vehicle that is younger than 16 years old at the time of the offense.

Amended by Chapter 415, 2023 General Session

Effective 5/3/2023

41-6a-520.1 Refusing a chemical test.

(1) An actor commits refusing a chemical test if:
(a) a peace officer issues the warning required in Subsection 41-6a-520(2)(a);
(b) a court issues a warrant to draw and test the blood; and
(c) after Subsections (1)(a) and (b), the actor refuses to submit to a test of the actor's blood.
(2)
(a) A violation of Subsection (1) is a class B misdemeanor.
(b) Notwithstanding Subsection (2)(a), a violation of Subsection (1) is a class A misdemeanor if the actor:
(i) has a passenger younger than 16 years old in the vehicle at the time the officer had grounds to believe the actor was driving under the influence;
(ii) is 21 years old or older and has a passenger younger than 18 years old in the vehicle at the time the officer had grounds to believe the actor was driving under the influence;
(iii) also violated Section 41-6a-712 or 41-6a-714 at the time of the offense; or
(iv) has one prior conviction within 10 years of:
(A) the current conviction under Subsection (1); or
(B) the commission of the offense upon which the current conviction is based.
(c) Notwithstanding Subsection (2)(a), a violation of Subsection (1) is a third degree felony if:
(i) the actor has two or more prior convictions, each of which is within 10 years of:
(A) the current conviction; or
(B) the commission of the offense upon which the current conviction is based; or
(ii) the current conviction is at any time after a conviction of:
(A) a violation of Section 76-5-207;
(B) a felony violation of this section, Section 76-5-102.1, 41-6a-502, or a statute previously in effect in this state that would constitute a violation of this section; or
(C) any conviction described in Subsection (2)(c)(ii)(A) or (B) which judgment of conviction is reduced under Section 76-3-402.
(3) As part of any sentence for a conviction of violating this section, the court shall impose the same sentencing as outlined for driving under the influence violations in Section 41-6a-505, based on whether this is a first, second, or subsequent conviction, with the following modifications:
(a) any jail sentence shall be 24 consecutive hours more than is required under Section 41-6a-505;
(b) any fine imposed shall be $100 more than is required under Section 41-6a-505; and
(c) the court shall order one or more of the following:
(i) the installation of an ignition interlock system as a condition of probation for the individual, in accordance with Section 41-6a-518;
(ii) the imposition of an ankle attached continuous transdermal alcohol monitoring device as a condition of probation for the individual; or
(iii) the imposition of home confinement through the use of electronic monitoring, in accordance with Section 41-6a-506.
(4)
(a) The offense of refusing a chemical test under this section does not merge with any violation of Section 32B-4-409, 41-6a-502, 41-6a-517, or 41-6a-530.
(b) In accordance with Subsection 77-2a-3(8), a guilty or no contest plea to an offense of refusal to submit to a chemical test under this section may not be held in abeyance.

(5) An actor is guilty of a separate offense under Subsection (1) for each passenger in the vehicle that is younger than 16 years old at the time the officer had grounds to believe the actor was driving under the influence.

Enacted by Chapter 415, 2023 General Session

This opinion is subject to revision before final publication in the Pacific Reporter

2024 UT 33

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Petitioner,

v.

BREVAN BRINGHURST BAUGH,
Respondent.

No. 20220272
Heard December 13, 2023
Filed August 15, 2024

On Certiorari to the Utah Court of Appeals

First District, Cache County
The Honorable Angela Fonnesbeck
No. 181100862

Attorneys:

Sean D. Reyes, Att'y Gen., William M. Hains, Asst. Solic. Gen., Salt Lake City, for petitioner

Emily Adams, Freya Johnson, Melissa Jo Townsend, Bountiful, for respondent

CHIEF JUSTICE DURRANT authored the opinion of the Court, in which ASSOCIATE CHIEF JUSTICE PEARCE, JUSTICE PETERSEN, JUDGE BEAN, and JUDGE HOWELL joined.

Having recused themselves, JUSTICE HAGEN and JUSTICE POHLMAN do not participate herein; DISTRICT COURT JUDGE JOSEPH BEAN and DISTRICT COURT JUDGE ANTHONY HOWELL sat.

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 In 2018, Brevan Bringhurst Baugh was charged with two counts of aggravated sexual abuse of a child. At trial, the

prosecution introduced evidence of three instances of alleged abuse,[1] with the instances distinguished based on the location in which they occurred. But the two counts charged were distinguished based on date rather than location. And in the State's closing argument, it told the jurors they could use "any two" of the three alleged instances of abuse to fulfill the elements of the charged counts. The jury convicted Baugh on one count and acquitted him on the other.

¶2 Baugh appealed. He argued there was a risk that the jury did not unanimously agree on which instance of abuse supported the count on which he was convicted. Baugh also contended that his counsel rendered constitutionally ineffective assistance by failing to request jury instructions that would have properly instructed the jury on its constitutional duty to be unanimous as to each element of each convicted count. The court of appeals agreed with Baugh and vacated his sentence.

¶3 We granted the State's certiorari petition. We affirm.

BACKGROUND

¶4 Between 2012 and 2014, Brevan Bringhurst Baugh lived at his family home (Nibley Home) with his daughter Sasha[2] and her mother. In April 2014, Baugh and Sasha's mother commenced divorce proceedings, and Baugh moved into a one-bedroom apartment (Falls Apartment). Sasha and her siblings visited Baugh while he was living at Falls Apartment. Several years later, Sasha revealed to her therapist that Baugh had abused her, and her therapist reported the allegations to the police.

¶5 During the investigation into the abuse, a detective asked Sasha to call Baugh while the detective listened in. The detective's intent was to get Baugh to confess to the crimes. While on the call, Baugh resisted admitting to the allegations and suggested that Sasha was not remembering things correctly. He eventually apologized to Sasha but remained adamant that the apology was

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[1] We use "alleged abuse" here because, although Baugh was convicted of one count of aggravated sexual abuse of a child and acquitted of one count, we cannot know on which instance of touching the jury based its conviction. Therefore, when referring to the separate instances of touching, we use the term "alleged."

[2] A pseudonym.

only for inadvertently exposing Sasha to pornography and for her walking in on him while he was masturbating. When pressed, Baugh acknowledged that if Sasha remembered abuse occurring, he wouldn't deny it. But he insisted that he had no recollection of abusing Sasha, blaming his failure to remember on his marijuana use at the time of the alleged acts.

¶6 After this confrontation call, the detective brought Baugh in for questioning. Baugh restated that he and Sasha didn't "have the same recollection of the events." But he did admit to exposing Sasha to pornography and that she had once seen him masturbating. The detective also asked whether Baugh had been abusing Sasha "for years." Baugh responded, "For years[?] Okay no. No." The detective then asked when was the last time he had abused Sasha. Baugh responded that it was at Nibley Home.

¶7 On July 9, 2018, Baugh was charged with two counts of aggravated sexual abuse of a child, a first-degree felony, in violation of Utah Code subsection 76-5-404.1(4). The first count was based on alleged conduct that occurred on or about 2012. The second count was based on alleged conduct that occurred on or about 2014.

¶8 At trial, Sasha testified that Baugh made her touch his penis three times between 2012 and 2014. Sasha stated that during each of these alleged incidents, Baugh put Sasha's hand on his penis and moved it up and down until "white stuff came out." Sasha testified that the first two alleged incidents occurred while Baugh and Sasha were lying on Baugh's bed in Nibley Home. The final alleged incident occurred when Sasha was twelve and Baugh had moved out of Nibley Home and into Falls Apartment.

¶9 Baugh countered Sasha's testimony by testifying that none of the alleged acts occurred. He insisted that, until Sasha's confrontation call, he had no suspicion of the accusations. While Baugh did admit to accidentally exposing Sasha to pornography and further admitted that she had walked in on him while he was masturbating, he remained adamant that he never touched Sasha and he never had Sasha touch him. He also insisted that the comments he made during the phone call and subsequent interrogations were not confessions to having abused Sasha. Baugh testified that his answer to the final question the detective asked him during the interrogation was describing the last time he exposed Sasha to pornography. And when questioned about the other statements he made on the confrontation call, he stated that

he did not outright deny the allegations because he wanted to validate Sasha's feelings.

¶10 During closing argument, the prosecution stated that the two counts charged could be "fulfilled with . . . any two of those incidents that [Sasha] described, those can be the elements of both of these counts." Defense counsel did not object to this statement nor request more specific unanimity instructions.

¶11 The jury was then instructed. Regarding both counts of sexual abuse of a child, the jury was told that it must find:

> (1) the Defendant, Brevan Baugh, (2) occupied a position of special trust in relation to Sasha, and (3) intentionally, knowingly, [or] recklessly touched the anus, buttocks, genitalia or breast of Sasha or otherwise took indecent liberties with her or caused her to take indecent liberties with him, (4) with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and (5) at the time of the offenses Sasha was under the age of fourteen.

The jury was also given a general unanimity instruction: "Because this is a criminal case, every single juror must agree with the verdict before the Defendant can be found guilty or not."

¶12 Ultimately, the jury acquitted Baugh of Count One and convicted him of Count Two. Baugh appealed the conviction. He argued that his counsel provided ineffective assistance in failing to request more specific unanimity instructions.

¶13 Article I, section 10 of the Utah Constitution contains the Unanimous Verdict Clause, which reads, "In criminal cases the verdict shall be unanimous." To render a valid verdict under that clause, the jury must be unanimous on all elements of the charged crime.[3] Jury instructions must adequately convey this unanimity requirement to the jury.[4]

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[3] *State v. Hummel*, 2017 UT 19, ¶ 29, 393 P.3d 314.

[4] *See Meeks v. Peng*, 2024 UT 5, ¶¶ 35, 39, 545 P.3d 226 (explaining that jury instructions must "fairly instruct the jury on the law applicable to the case," and must "accurately convey the law" (cleaned up)).

¶14 In reviewing Baugh's appeal, the court of appeals applied these principles and reasoned that, much like in its recent decision in *State v. Alires*,[5] Baugh's counsel's performed deficiently by failing to request jury instructions that instructed the jury to be unanimous on which specific act supported which specific charge.[6] It further reasoned that these ambiguous instructions could have led some jurors to convict Baugh based on one alleged instance of abuse and others to convict on another alleged instance, in violation of the unanimity requirement.[7] Because of that risk, the court of appeals held that Baugh was prejudiced by defense counsel's deficient performance and vacated his conviction.[8] We granted the State's petition for certiorari.

STANDARD OF REVIEW

¶15 The State challenges the court of appeals' determination that Baugh's counsel provided constitutionally ineffective assistance by failing to request more specific unanimity instructions. "[W]e review the court of appeals' decision for correctness."[9]

ANALYSIS

¶16 An ineffective assistance of counsel claim has two elements. "First, the defendant must show that counsel's performance was deficient."[10] "Second, the defendant must show that the deficient performance prejudiced the defense."[11] "[F]ailure to establish either prong is fatal to an ineffective assistance of counsel claim."[12]

¶17 The State argues that neither prong of this test is satisfied. First, the State contends that Baugh's counsel's performance was reasonable because Unanimous Verdict Clause caselaw regarding

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[5] 2019 UT App 206, 455 P.3d 636.

[6] *State v. Baugh*, 2022 UT App 3, ¶¶ 15–19, 504 P.3d 171.

[7] *Id.* ¶ 21.

[8] *Id.* ¶¶ 26–27.

[9] *State v. McNeil*, 2016 UT 3, ¶ 14, 365 P.3d 699.

[10] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[11] *Id.*

[12] *State v. Centeno*, 2023 UT 22, ¶ 64, 537 P.3d 232 (cleaned up).

how a jury must be instructed on unanimity is ambiguous. Second, the State argues that the court of appeals erred in its prejudice analysis by failing to analyze whether there was a reasonable probability that a jury would have convicted Baugh absent counsel's deficient performance. The appellate court's error, the State contends, is significant because Baugh did not carry his burden of showing that any alleged deficient performance prejudiced him.

¶18 We disagree with the State on both points.

I. BAUGH'S COUNSEL PERFORMED DEFICIENTLY BY FAILING TO REQUEST A MORE DETAILED UNANIMITY INSTRUCTION

¶19 To constitute deficient performance, counsel's representation must fall "below an objective standard of reasonableness."[13] Reasonableness is determined by "prevailing professional norms."[14] Whether "counsel's actions can be considered strategic plays an important role in our analysis" of whether counsel's performance was deficient, but lack of strategic advantage is not conclusive in determining whether counsel's performance was unreasonable.[15] "A reviewing court must always base its deficiency determination on the ultimate question of whether counsel's act or omission fell below an objective standard of reasonableness."[16]

¶20 The State challenges the court of appeals' deficient performance analysis, claiming that the court of appeals misapprehended Unanimous Verdict Clause caselaw. In its analysis, the court of appeals relied on *Alires* to determine that Baugh's counsel's performance was deficient.[17] The court reasoned that, in *Alires*, it had correctly understood Unanimous Verdict Clause caselaw. In that case, the court dictated that "[w]here neither the charges nor the elements instructions link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each

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[13] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

[14] *Id.*

[15] *State v. Ray*, 2020 UT 12, ¶¶ 34, 36, 469 P.3d 871 (cleaned up).

[16] *Id.* ¶ 36.

[17] *State v. Baugh*, 2022 UT App 3, ¶¶ 15–19, 504 P.3d 171 (citing *State v. Alires*, 2019 UT App 206, 455 P.3d 636).

element of each crime."[18] And because neither the charges, the jury instructions, nor the State's presentation of evidence in Baugh's case linked specific conduct to each count, the court of appeals held that Baugh's counsel's failure to request more specific unanimity instructions constituted deficient performance.[19]

¶21 But the State argues that the caselaw regarding the kind of jury instructions necessary to ensure unanimity was not clear when *Alires* was decided. The court of appeals had, according to the State, incorrectly treated *State v. Saunders*[20]—a plurality opinion—as established precedent and had extended its narrow holding past what this court intended. Without *Saunders* as established precedent, the State argues that the court of appeals' reasoning falls apart because any remaining binding precedent was either not dispositive or inapplicable.

¶22 We now begin our analysis with our own review of the relevant caselaw on the Unanimous Verdict Clause in article I, section 10 of the Utah Constitution.

¶23 The Unanimous Verdict Clause requires that "the [jury's] verdict shall be unanimous" in all criminal cases.[21] It is not enough that the jury find the defendant "guilty of some crime."[22] For example, a verdict would not be unanimous "if some jurors found a defendant guilty of a robbery committed on December 25, 1990, in Salt Lake City, but other jurors found him guilty of a robbery committed January 15, 1991, in Denver, Colorado, even though all jurors" agreed that he was guilty of robbery.[23] The jury must be unanimous "as to a specific crime and as to each element of the crime" to comply with the Unanimous Verdict Clause.[24] Neither party disputes this premise.

¶24 Although our caselaw is clear that the jury must be unanimous as to each element of each count of a crime, it is less

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[18] *Id.* ¶¶ 14 n.3, 18 (quoting *Alires*, 2019 UT App 206, ¶ 23).

[19] *Id.* ¶¶ 16–19.

[20] 1999 UT 59, 992 P.2d 951.

[21] UTAH CONST. art. I, § 10.

[22] *Hummel*, 2017 UT 19, ¶ 27, 393 P.3d 314 (cleaned up).

[23] *Id.* ¶ 28 (cleaned up).

[24] *Saunders*, 1999 UT 59, ¶ 60 (plurality opinion).

clear how that unanimity requirement must be conveyed to the jury in multiple-act cases like Baugh's, where a defendant is charged with multiple counts of a crime with identical elements.[25]

¶25 In *Saunders*, the defendant was charged with one count of sexual abuse of a child.[26] The prosecution presented evidence of several acts, any one of which could satisfy the touching element of the charge.[27] The unanimity instruction given to the jury stated that there was "no requirement that the jurors be unanimous about precisely which act occurred or when or where the act or acts occurred."[28] On appeal, we held that it was plain error for the trial court to give these instructions, as they could have led the jurors to believe that it was acceptable to render a non-unanimous verdict.[29] But *Saunders* did not establish clear precedent on multiple-act cases because the relevant portion of the opinion was a plurality.[30]

¶26 Our next case on the issue, *State v. Evans*, provided no more clarity regarding the form jury instructions should take to ensure a unanimous verdict.[31] In that case, the defendant challenged jury instructions that presented two alternative theories for finding aggravating factors, without mentioning unanimity.[32]

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[25] We note that we establish in *State v. Chadwick*—which is published simultaneously with this case—how unanimity must be conveyed to the jury in multiple-act cases in which charges are not connected to specific conduct in the jury instructions. 2024 UT 34, __ P.3d __.

[26] *Saunders*, 1999 UT 59, ¶ 4. Saunders was charged with multiple offenses, but the solitary sexual abuse charge is the only one relevant to our analysis.

[27] *Id.* ¶ 5.

[28] *Id.* ¶ 65.

[29] *Id.* ¶¶ 65, 68 (plurality opinion); *id.* ¶ 70 (Howe, C.J., concurring in part and dissenting in part); *id.* ¶ 79 (Zimmerman, J., concurring in part and dissenting in part).

[30] *See id.* ¶¶ 67, 68 (Russon, J., concurring in the result); *id.* ¶ 70 (Howe, C.J., concurring in part and dissenting in part); *id.* ¶ 79 (Zimmerman, J., concurring in part and dissenting in part).

[31] 2001 UT 22, 20 P.3d 888.

[32] *Id.* ¶¶ 15–16.

In holding that it was not plain error for the court to give these jury instructions, we stated that the instructions created the risk of only slight confusion as to the unanimity required by the jury.[33] The State argues that *Evans* establishes that the lack of a specific unanimity instruction only ever creates a risk of "slight confusion" for a jury. But that reads too much into this court's opinion.

¶27 The *Evans* court stated that it was "unconvinced that the slight confusion that may have arisen from the wording of the instructions used [at trial] present[ed] a reasonable likelihood of a more favorable result for defendant."[34] Such language indicates a case- and fact-specific holding, rather than a general pronouncement, and we decline to extend this holding beyond that case.

¶28 In *State v. Alires*, which had not been decided at the time of Baugh's trial, the court of appeals surveyed the state of the law regarding jury unanimity instructions in multiple-act cases.[35] In *Alires*, the defendant was charged with six counts of aggravated sexual abuse of a child.[36] But, as in *Evans*, the jury instructions did not connect each count to a separate instance of touching.[37] The jury was given a general unanimity instruction informing it that all jurors must be unanimous regarding the guilt of the defendant.[38] During deliberations, the jury asked twice for clarification "on how the counts work," and asked in particular how to "weigh each count when they are all the same."[39] The court referred the jury back to its instructions.[40] The jury convicted Alires on two counts and acquitted him on the rest.[41]

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[33] *Id.* ¶ 17.

[34] *Id.*

[35] 2019 UT App 206.

[36] *Id.* ¶ 1.

[37] *Id.* ¶ 11.

[38] *Id.* ¶ 23 n.5.

[39] *Id.* ¶ 12.

[40] *Id.*

[41] *Id.*

¶29 The court of appeals reviewed the jury's verdict to determine whether counsel was ineffective for failing to request more specific unanimity instructions.[42] It reasoned that the state of the law "should have been readily apparent" based on our holding in *Saunders*: "[w]here neither the charges nor the elements instructions link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each element of each crime."[43] This blanket statement fails to recognize the reduced weight that *Saunders* must be given as a plurality opinion. Because the relevant portion of *Saunders* did not represent the opinion of the majority of the court, the court of appeals could rely only on that case's outcome as binding precedent, not its reasoning.[44]

¶30 Although the court of appeals may have overstated the weight of the holding in *Saunders*, that case was still the most relevant precedent at the time and thus an indicator to reasonable counsel of the range of appropriate actions. Relevant case law is one of several factors to consider in assessing the reasonableness of counsel's performance. And that counsel's performance was objectively unreasonable because not requesting specific unanimity instructions effectively lowered the State's burden of proof was another factor. Taken together, these two factors still support the court of appeals' conclusion that Alires's counsel performed deficiently despite the court's overstatement of *Saunders* as binding precedent.

¶31 Having reviewed the state of the law regarding the standard for instructing a jury on unanimity, we turn to Baugh's case. Despite the unsettled law in this area, it is clear in Baugh's case that the jury was not adequately instructed.

¶32 Baugh was charged with sexual abuse of a child. Under Utah Code subsection 76-5-404.1(2)(a), a person is guilty of sexual abuse of a child if "the actor: . . . [1] touches, whether over or under

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[42] *Id.* ¶ 16.

[43] *Id.* ¶¶ 23–24 (citing *Saunders*, 1999 UT 59, ¶ 65 (plurality opinion)).

[44] *See State v. Mohi*, 901 P.2d 991, 996 (Utah 1995) (explaining that plurality opinions "do not constitute binding precedent); *see also State v. Giron*, 943 P.2d 1114, 1121 (Utah 1997) (stating that a plurality opinion's analysis "is not binding").

the clothing, the buttocks or pubic area of a child; . . . the breast of a female child; or . . . otherwise takes indecent liberties with a child," and "[2] the actor's conduct is with intent to . . . cause substantial emotional or bodily pain to any individual; or . . . arouse or gratify the sexual desire of any individual." Caselaw is clear that the jury must be unanimous as to each element of each count of that crime.[45] In practice, this means that the jury must agree on which incident of touching satisfies each count. If the jury does not agree on which act relates to each count, then its verdict violates the Unanimous Verdict Clause.

¶33 The jury in Baugh's case was given a general unanimity instruction that read, "Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found guilty or not guilty." Trial counsel did not request a more specific unanimity instruction.

¶34 The circumstances of Baugh's case created an unacceptable risk of a non-unanimous verdict, and a reasonable attorney would have recognized that risk. Baugh was charged with two counts of aggravated sexual abuse of a child for alleged acts occurring in 2012 and 2014. During his trial, the State presented evidence to the jury of three instances of touching. But the jury was not told *when* these alleged instances occurred, only *where* the alleged instances occurred. The State presented evidence of two instances of touching that occurred at Nibley Home and one that occurred at Falls Apartment.

¶35 The State's presentation of evidence created tension between the evidence and the counts, which were distinguished only by date: one count for 2012 and one count for 2014. Because Baugh lived in both Nibley Home and Falls Apartment in 2014, that tension left room for ambiguity. And that ambiguity left room for non-unanimity. The jurors could agree that touching occurred in 2014 but disagree as to whether the specific instance of touching occurred at Nibley Home or Falls Apartment. And did the jury's verdict did not eliminate the problem. The jury acquitted Baugh on the 2012 count but convicted him on the 2014 count, leaving open the possibility that the jurors may have disagreed on which specific instance of touching the State had proven.

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[45] *See supra* ¶ 24.

¶36 The State also declined to connect specific instances of touching with a count.[46] We have noted that "courts in Utah and elsewhere have determined that a unanimity problem can be remedied by prosecutorial election."[47] That is, the harm that can flow from a lack of a specific unanimity instruction might, in some cases, be mitigated if the prosecutor elects, in closing argument, to spell out for the jury which alleged actions correspond to which charged counts. The absence of prosecutorial election here further indicates that reasonable counsel would have been concerned about unanimity because there was nothing to mitigate the harm of erroneous jury instructions.

¶37 The presence of a legal error "does not necessarily mean that defense counsel's failure to object to the error amounted to deficient performance."[48] And there is a "wide range of reasonable professional assistance."[49] But taking each of the above opportunities for jury confusion together, no reasonable attorney would have failed to request more specific unanimity instructions.

¶38 Baugh's counsel was presented with three instances of touching that were not specifically attached to the two counts charged. And in the State's closing argument, it told the jury that it could fulfill the counts with any two of the alleged instances of conduct. This statement suggested to the jury that it could

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[46] In criminal cases in which the State has not specified which acts it relied on to support each charged count, it may elect to do so during trial. *See Alires*, 2019 UT App 206, ¶¶ 22–23. We call this decision prosecutorial election. *See State v. Paule*, 2024 UT 2, ¶¶ 77–78, __ P.3d __. For example, in this case, the two counts of sexual abuse were not connected to specific acts when charged. They were distinguished only by approximate date. The State, in its closing argument, could have elected to attach one of the three alleged acts to a specific count instead of telling the jury that it could choose from any of the three alleged acts to satisfy the elements of either count. That election might have mitigated the harm flowing from Baugh's counsel's failure to ask for a specific unanimity instruction. But the State declined to make an election, and Baugh, as we describe below, was harmed by his counsel's failure to act.

[47] *Paule*, 2024 UT 2, ¶ 78.

[48] *State v. Bonds*, 2023 UT 1, ¶ 43, 524 P.3d 581.

[49] *Strickland*, 466 U.S. at 689.

impermissibly mix-and-match the instances of touching when reaching its verdict. The high risk for non-unanimity was clear.

¶39 Further, there were no circumstances in this case that mitigated the risk of a non-unanimous verdict. The evidence for each of the instances of touching was fairly equal in persuasive force.[50] So the evidence was not overwhelmingly stronger for any one instance such that any reasonable jury could have only convicted on that count.

¶40 And there was no strategic advantage to not requesting more specific unanimity instructions. Doing so would not have directed the jury to any especially damaging evidence, and failing to do so effectively lowered the State's burden of proof for the touching element.[51]

¶41 Because the risk of a non-unanimous verdict would have been clear to reasonable counsel, Baugh's counsel's failure to request more specific unanimity instructions was objectively unreasonable. Therefore, his counsel's performance was deficient.

II. BAUGH'S COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED BAUGH

¶42 To prevail on an ineffective assistance of counsel claim, the defendant must show that "counsel's errors actually had an adverse effect on the defense,"[52] and that there is a "reasonable probability that, but for [those] . . . errors, the result of the proceeding would have been different."[53] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[54] It is insufficient "for the defendant to show that the

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[50] *See Baugh*, 2022 UT App 3, ¶ 22.

[51] *See Alires*, 2019 UT App 206, ¶ 25 (explaining that failing to request more specific unanimity instructions in the face of a risk of a non-unanimous verdict "effectively lower[s] the State's burden of proof").

[52] *State v. Beverly*, 2018 UT 60, ¶ 30, 435 P.3d 160 (cleaned up).

[53] *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see also State v. Grunwald*, 2020 UT 40, ¶ 22, 478 P.3d 1 (explaining *Strickland*'s prejudice standard).

[54] *Strickland*, 466 U.S. at 694; *see also Grunwald*, 2020 UT 40, ¶ 22 (quoting *Strickland*, 466 U.S. at 694).

errors had some conceivable effect on the outcome of the proceeding."[55] And "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."[56]

¶43 The State argues that the court of appeals failed to consider whether the jury would have convicted absent defense counsel's error. In the State's view, the court of appeals completed only a portion of the *Strickland* prejudice analysis: whether the jury convicted Baugh because of counsel's deficient performance.

¶44 While we acknowledge the court of appeals may not have signposted its inquiry as clearly as possible, we are satisfied that the court conducted the requisite analysis. And we agree that counsel's deficient performance prejudiced Baugh.

¶45 The court of appeals began its analysis by correctly summarizing *Strickland*'s prejudice standard.[57] The court then considered the totality of the evidence before the jury. Sasha testified about three instances of abuse—two occurring at Nibley Home and one at Falls Apartment—but distinguished these instances only by the location.[58] And "[t]he jury instructions distinguished the counts, not by location but based on the date of the alleged abuse—2012 for count one and 2014 for count two."[59] But in 2012, Baugh lived at both Nibley Home and Falls Apartment.[60]

¶46 So the jury received evidence of the alleged instances of touching based only on location but was expected to connect these instances of touching to counts distinguished only by date. And although only those instances taking place at Nibley Home could have been connected to the first count, any of the three alleged instances could have been connected to the 2014 count because Baugh lived at both Nibley Home and Falls Apartment in 2014. Given that the jury acquitted Baugh on the 2012 count and

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[55] *Strickland*, 466 U.S. at 693.

[56] *State v. Newton*, 2020 UT 24, ¶ 31, 466 P.3d 135 (cleaned up).

[57] *State v. Baugh*, 2022 UT App 3, ¶ 20, 504 P.3d 171.

[58] *Id.*

[59] *Id.*

[60] *Id.* ¶ 21.

convicted him on the 2014 count, its verdict didn't resolve the risk that some jurors convicted based on an act that took place at Nibley Home, while others convicted based on an act that occurred at Falls Apartment.

¶47 Next, the court of appeals considered Baugh's "confessions" and his explanation of them at trial. During the investigation, Sasha called Baugh to confront him about the abuse.[61] The State argues that Baugh admitted to the abuse during the call saying, "if you say I did it, then—then I'm sure I did," and "I'm not going to deny it." Later, during interrogation, the detective asked Baugh if he had been abusing Sasha for years, to which he replied, "For years[?] Okay. No." The State paints that as another admission. And when asked when he last abused Sasha, Baugh said it was "at the Nibley [Home]." A third admission, according to the State.

¶48 But, as the court of appeals noted, Baugh's statements during the confrontation call and subsequent interrogations do not amount to an unequivocal confession.[62] During the confrontation call, interrogation, and at trial, Baugh maintained that he had not abused Sasha. And he offered testimony at trial that his "admissions" were simply an attempt to validate his daughter's feelings despite her "getting things mixed up."

¶49 Finally, the court of appeals considered the State's closing argument, where the prosecutor told the jurors that the "two counts can be fulfilled with . . . any two of those experiences" described at trial and that "any two of those incidents . . . can be the elements of both of these counts."[63]

¶50 Reviewing the evidence as a whole, the court of appeals concluded that its "confidence in the outcome ha[d] been undermined."[64] Because the jury was instructed on the counts based on the dates of the alleged instances but was only given evidence of the counts based on the location of those instances, the court reasoned, there was "a reasonable probability that the jurors

[61] *See id.* ¶ 22.

[62] *Id.* ¶¶ 22–24.

[63] *Id.* ¶ 25.

[64] *Id.* ¶ 26.

did not agree on which act of alleged abuse supported each count."[65]

¶51 And, relevant to the State's claim that the court of appeals did not consider whether the jury would have come to a different conclusion absent counsel's errors, the appellate court explained that it was not confident that the jury would have come to the same conclusion if it had received more specific unanimity instructions.[66] And it noted that the evidence presented was not overwhelmingly stronger for either of the two counts.[67] Further, despite some evidence that Baugh had confessed, his explanation of his statements created the possibility that a reasonable jury could have found his "confession" unconvincing.[68] Therefore, the court of appeals concluded, it could not "identify one charge on which [it could] say with confidence [the jury] would have convicted."[69] As such, the court found "a reasonable probability that but for defense counsel's" failure to request more specific unanimity instructions, "the proceeding's outcome would have differed."[70]

¶52 The court of appeals applied the correct standard in its analysis of the prejudicial effect of counsel's error, considered the totality of the evidence presented at trial, and correctly concluded that there was a reasonable probability of a different outcome had defense counsel requested more specific unanimity instructions.

CONCLUSION

¶53 In order to succeed on his claim of ineffective assistance of counsel, Baugh had to show that his counsel's performance was deficient and that the deficient performance prejudiced him. The court of appeals correctly concluded that Baugh made those showings. Because the risk of non-unanimity was significant, and, given the state of the law regarding jury unanimity as to elements, Baugh's counsel performed deficiently by failing to request more specific unanimity instructions. Further, there was a reasonable

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[65] *Id.* ¶ 21.

[66] *Id.* ¶ 24.

[67] *Id.* ¶ 22.

[68] *Id.*

[69] *Id.* ¶ 24.

[70] *Id.* ¶ 26.

probability that the jury would not have convicted Baugh had the error not occurred. Therefore, we hold that Baugh's counsel was ineffective and affirm the court of appeals' vacation of Baugh's conviction.

This opinion is subject to revision before final publication in the Pacific Reporter

2024 UT 34

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Appellee,

v.

DAVID CHADWICK,
Appellant.

No. 20190818
Heard March 4, 2024
Filed August 15, 2024

On Direct Appeal

Fourth District, Utah County
The Honorable James Taylor
No. 171400984

Attorneys[*]:

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Douglas J. Thompson, Orem, for appellants

CHIEF JUSTICE DURRANT authored the opinion of the Court, in which ASSOCIATE CHIEF JUSTICE PEARCE, JUSTICE PETERSEN, JUDGE HALL and JUDGE PARKER joined.

Having recused themselves, JUSTICE HAGEN and JUSTICE POHLMAN do not participate in this matter; DISTRICT COURT JUDGE CRAIG HALL and JUDGE RICHARD D. MCKELVIE sat.

DISTRICT COURT JUDGE RICHARD D. MCKELVIE sat for oral argument in this case but retired on June 1, 2024. DISTRICT COURT JUDGE PAUL PARKER participated as his replacement.

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[*] Additional attorneys: Paul Cassell, Heidi Nestel, Crystal Powell, Salt Lake City, for *amicus curiae* F.L. (limited purpose party), in support of appellee.

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 David Chadwick challenges the jury's verdict in his case because he believes it violated the Unanimous Verdict Clause of the Utah Constitution. That clause provides that "[i]n criminal cases the verdict shall be unanimous."[1]

¶2 Despite its brevity, the Unanimous Verdict Clause has historically proven difficult to navigate. We have not yet decided a case that has required us to articulate a specific standard identifying when the clause has been violated. We do so in this opinion and hold that the verdict in Chadwick's case violated the Unanimous Verdict Clause.

¶3 Because we vacate Chadwick's conviction on this unanimity ground, we need not decide his other claim regarding the victim's mental health records.

BACKGROUND

¶4 Two issues are before us in this appeal: (1) whether the jury's verdict was unanimous, and (2) whether the district court erred in refusing to re-examine the victim's mental health records during trial. These issues rest on different but overlapping facts. For clarity, we recount the facts relevant to each issue separately.

Unanimous Verdict Clause

¶5 In 2016, F.L. accused David Chadwick of repeatedly sexually abusing her when she was between the ages of nine and eleven. F.L. met Chadwick in 1999 when she was nine years old and lived near him in Eagle Mountain. A short time later, F.L., her mother, and her brother moved in with Chadwick, and the family lived with him as their landlord until she was fourteen years old. Based on F.L.'s allegations, Chadwick was charged with four counts of sexual abuse of a child. In the information, Count One was alleged to have occurred "on or about May 1, 1999," and Counts Two through Four were alleged to have occurred "on or about January 1, 2000."

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[1] UTAH CONST. art I, § 10.

¶6 At trial F.L. testified that, before her family moved in with Chadwick, he had lived alone. During that time, F.L. stated that she would "[p]retty regularly" play with her friends in Chadwick's basement. When she was in his basement, she would often sit on his lap while he was playing video games or while they were watching a movie. Chadwick acknowledged that F.L. played in his basement but testified that she rarely sat on his lap.

¶7 F.L. testified to two incidents. She stated that the first occurred before she moved in with Chadwick when her mother asked Chadwick to babysit F.L. During that time, Chadwick and F.L. were alone in his basement, and she was sitting on his lap when she felt something hard on her buttocks. She stated that she started to move off his lap, but Chadwick told her, "No, it's okay, you can stay." A short time later, Chadwick asked F.L. if she wanted to play a game. In this "game," which the parties refer to as the "catch-it game," Chadwick would move his penis under his pants and F.L. would try to "catch it." This went on for a few minutes until someone knocked on the door. Chadwick then jumped up and asked F.L. to hide. After answering the door, Chadwick told F.L. not to tell anyone about the game because "they wouldn't understand." In his testimony, Chadwick adamantly denied that the "catch-it game" ever occurred.

¶8 F.L. testified that the second incident occurred after she and her family had moved in with Chadwick. She stated that during that incident, she was sitting on Chadwick's lap in underwear, an oversized t-shirt, and with no pants on, watching a movie. She felt Chadwick take his erect penis out of his pants and rub it "against [her] underwear," on her buttocks and vagina and against her leg. Chadwick stopped when F.L.'s mother came into the room. F.L. thinks that, because of her large shirt, her mother did not see Chadwick's penis. F.L. got up and left soon after that incident.

¶9 In his testimony, Chadwick admitted to getting an erection when F.L. sat on his lap but claimed that it "was just a physical response to the contact" and that he "felt no sexual stimul[us] about it." He also testified that he would move F.L.'s hand if it touched his penis and that he would move her to the side if he got an erection. He admitted that he did sometimes ignore the erection and did not move her, but he claimed she would usually move her hand away from touching it shortly after.

¶10 In addition to these two incidents, F.L. also testified that Chadwick tickled her on various occasions. When Chadwick did so, he would pin F.L. down, straddle her, and tickle her. Sometimes in the process, his hand would "slip" underneath her shirt, and he would touch her breasts and ribcage. He would also "grind his hips" while he tickled her. These tickling episodes stopped when she was eleven, which F.L. attributes to her starting to get angry and telling him to stop. Chadwick admitted to tickling F.L. in his testimony but denied ever touching her breasts. He also denied ever having any sexual contact with F.L.

¶11 Finally, F.L. testified that she told various therapists about these incidents. She explained that she would tell them some parts of the incidents but that she "did not talk about it a lot of the time." She also testified that she told therapists that she could not remember details of the incidents because she did not want to talk about them. The State asked F.L. what the purpose was for going to therapy. F.L. responded that she went to therapy, in part, to process trauma. Defense counsel then asked whether this trauma had come from any other sources. F.L. identified several other sources, including a car accident and witnessing a cow get shot for butchering.

¶12 After both sides rested, each party presented its closing argument. During the State's closing argument, it elected to connect the four counts of sexual abuse to specific conduct: Count One to the "catch-it game"; Count Two to Chadwick rubbing his bare penis on F.L.; and Counts Three and Four to Chadwick tickling F.L.'s breasts.

¶13 During the defense's closing argument, counsel addressed the jury's constitutional duty to return a unanimous verdict. He explained that "[t]here has to be separate conduct on each charge that has to be decided unanimously" and that he "appreciate[d] the State for going through and saying what they're alleging happened for each of the[] counts." Defense counsel then provided an example of unanimity:

> Suppose you get into the jury room and half of you say we believe that the State has proved incident A but not incident B. The other half of you say well, we believe the State has proved incident B but not incident A. What you don't have is a unanimous verdict on one count for a conviction and then not

> guilty on the other. What you have in that situation is not a unanimous verdict on either count.

¶14 The judge instructed the jury that "[b]ecause this is a criminal case[] you must all agree to find a verdict." And that "[f]or each count, in order for you [to] find Mr. Chadwick guilty of the offense of sexual abuse of a child you must find beyond a reasonable doubt that by separate and distinct conduct" he engaged in the prohibited act. When listing the charged counts for the jury, the instructions no longer distinguished the counts by date. Instead, all counts were listed as having occurred between May 1999 and January 2000. The court then excused the jury for deliberation.

¶15 Attempting to apply these instructions, the jury asked two questions during its deliberation. First, the jury asked if it "could have a verdict form that specifically identified, in some way, a particular course of conduct to connect to each count." The court's proposed response told the jury that it need only determine how many incidents the State had proven and that the "order of the counts is of no particular consequence." Defense counsel objected to this response and requested that the court "identify for the jury the particular incident for each count." Counsel reasoned that "failure to do so was an invitation for [the jury] to reach a non-unanimous verdict on each incident." The court overruled defense counsel's objection and gave the jury the following answer:

> You should consider the evidence and argument of counsel to determine if the State has or has not proven beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence.

¶16 After further deliberations, the jury asked the court to confirm the State's election. It asked whether each count represented the respective incident the State had identified during its closing argument. The court repeated its answer to the first question, then responded as follows:

> Counsel may have suggested specific behaviors to correspond to specific counts during closing argument, but arguments and characterization of the evidence by counsel are neither pleadings nor facts. It is for you to determine from a consideration of all the

> facts if the State has proven beyond a reasonable doubt that the defined statute was violated, in some way, once, twice[,] three time[s], or four times[,] or if the State has failed to meet that burden of proof. You may choose to relate a specific conduct or incident to a particular count to assist your deliberation, but that is up to you. It is your sole province to determine the facts of this case.

Defense counsel did not object to the court's response, but the district court later stated, after addressing preservation on remand from the court of appeals, that defense counsel had already "made an adequate and timely objection" regarding his concern about the jury instructions.

¶17 The jury returned a guilty verdict on Count One and acquitted Chadwick on Counts Two, Three, and Four.

<u>Victim's Mental Health Records</u>

¶18 Before trial, Chadwick asked for access to F.L.'s mental health records, arguing that these records contained relevant prior statements F.L. had made about her interactions with Chadwick. The State initially opposed this request, noting that F.L.'s mental health records were privileged.[2] But the State eventually stipulated to the district court's review of these records *in camera* to identify portions containing either "a factual description of alleged abuse by Mr. Chadwick," or "any report of those events by the counselor to law enforcement, and any methods used to refresh or enhance the memory of the alleged victim regarding these events." After reviewing the therapy records, the court provided Chadwick with the relevant excerpts. The rest of the records, the court ruled, contained no information within the scope of the stipulated purpose.

¶19 At trial, the State asked F.L. whether she had ever gone to therapy to "address . . . any of the incidents that [she had] talked about" during her testimony. F.L. responded that she had. The State asked whether the purpose of seeking therapy was "to process trauma," to which F.L. again responded affirmatively.

¶20 Chadwick then requested that the judge re-review F.L.'s mental health records *in camera* for information regarding the

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[2] *See* UTAH R. EVID. 506(b).

source of F.L.'s trauma, claiming that the court was "under a continuing obligation to release portions [of the mental health records] that became relevant as the trial progresse[d]." Chadwick justified the request by arguing that the contents of the records were relevant now that the State had asked F.L. about why she went to therapy. The court denied the request, stating that it was not in a "position to have digested the full import of those records."

¶21 Chadwick timely appealed his conviction, and the court of appeals certified this case to us.

STANDARD OF REVIEW

¶22 Chadwick claims that his conviction violated the Unanimous Verdict Clause of the Utah Constitution. "We review de novo a district court's interpretation of constitutional provisions, granting it no deference."[3]

ANALYSIS

¶23 Chadwick raises two issues on appeal. First, he contends that the jury's verdict violated the Unanimous Verdict Clause because the jury instructions in his case did not properly instruct the jury regarding its duty to render a unanimous verdict. Second, he challenges the district court's denial of his motion to review the victim's mental health records, arguing that the court had an "ongoing duty" to review the records for facts that became relevant during the proceedings.

¶24 We agree with Chadwick that his conviction violated the Unanimous Verdict Clause. Because we reverse his conviction on that ground, we need not reach the second issue that he raises.[4]

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[3] *Dexter v. Bosko*, 2008 UT 29, ¶ 5, 184 P.3d 592 (cleaned up).

[4] We note that the relevant rule for establishing an exception to privilege for mental health records, Utah Rule of Evidence 506, has been amended during the pendency of this case. *Compare* UTAH R. EVID. 506 (April 30, 2024) *with id.* (May 1, 2024). Subsection (e) was added in this amendment. That subsection outlines the procedure courts and parties should follow when, as occurred here, one party believes that changed circumstances warrant expanding the scope of an initial disclosure of privileged communications. *See id.* (May 1, 2024). Subsection (e) may instruct the parties on how to address this issue if it arises again.

¶25 Before we can reach the merits of Chadwick's first claim, we must first address the State's argument that this claim is unpreserved. The State contends that, because he did not request a more specific unanimity instruction at trial, Chadwick did not preserve this claim. Chadwick instead requested at trial that the State link particular conduct to each count. This linking is known as prosecutorial election.[5] The State contends that Chadwick cannot now request the different remedy of specific unanimity instructions.

¶26 The State does not dispute that, in accordance with general preservation rules, Chadwick objected to the proposed jury instructions "in such a way that the court ha[d] an opportunity to rule on" his unanimity argument.[6] But, the State continues, preservation requires specificity both as to the issue and the remedy. So, according to the State, if a party requests a new remedy for the same issue on appeal, that remedy is not preserved.

¶27 The State cites *State v. Martin*[7] in support of its argument. But that case is unpersuasive because it is unrelated to preservation, and, even if it were relevant, it is distinguishable.

¶28 In *Martin*, we denied the defendant's request for relief on appeal because he had already received the relief he requested below.[8] At trial in that case, a witness gave improper testimony.[9] Martin objected to the testimony, asked that it be stricken, and requested curative instructions.[10] The court granted Martin's request.[11] On appeal, Martin claimed that the court erred by not granting him a mistrial instead.[12] We rejected that argument, holding that Martin waived his claim to the remedy of a mistrial when he requested and received relief in the form of the court

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[5] *State v. Paule*, 2024 UT 2, ¶¶ 77–78, __ P.3d __.

[6] *See State v. Houston*, 2015 UT 40, ¶ 19, 353 P.3d 55 (cleaned up).

[7] 2017 UT 63, 423 P.3d 1254.

[8] *Id.* ¶¶ 33–34.

[9] *Id.* ¶ 34

[10] *Id.*

[11] *Id.*

[12] *Id.*

striking the testimony and giving curative instructions.[13] Because he received the relief he argued to the court would remedy the improper testimony, he could not now claim that he was owed a mistrial.[14]

¶29 But here, Chadwick was denied the relief he requested at trial. He requested that the court confirm to the jury the State's election to connect specific acts of touching to specific counts. But the district court not only rejected that request, it also counteracted the State's election by informing the jury that the order of the counts was of "no particular importance." So, unlike in *Martin*, Chadwick received no remedy, and the error remained unresolved.

¶30 Further, Chadwick objected to the jury instructions "in such a way that the district court ha[d] an opportunity to rule on" the Unanimous Verdict Clause issue.[15] When he requested that the court confirm the State's election in the jury instructions, he argued that "failure to do so was an invitation for [the jury] to reach a non-unanimous verdict on each incident." Incorporating the State's election into the jury instructions would have made that election binding and resolved the unanimity issue.[16] It would have been futile to request a different instruction on the same issue or to object again to an instruction that referred to the previously given and objected-to instruction.[17] The court had the opportunity to rule on Chadwick's objection based on unanimity concerns and overruled that objection. His claim is therefore preserved, and we now reach it on the merits.

I. The Unanimous Verdict Clause

¶31 To merit reversal of a conviction on Unanimous Verdict Clause grounds, a defendant must show that a constitutional error

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[13] *Id.*

[14] *Id.*

[15] *See id.* ¶ 25 (cleaned up).

[16] *See infra* ¶ 40 (explaining that a unanimity problem arises in multiple-act cases when charges are not linked to specific conduct to support the charge).

[17] *See State v. Ashcraft*, 2015 UT 5, ¶ 33, 349 P.3d 664 (rejecting an argument asking the appellate court to require a more specific objection to preserve an issue).

has occurred and that error must be prejudicial.[18] We begin our analysis by discussing what constitutes error under the Unanimous Verdict Clause, then move to who bears the burden of establishing or refuting prejudice.

¶32 The Unanimous Verdict Clause requires that "[i]n criminal cases the verdict shall be unanimous."[19] A guilty verdict is not unanimous if the jury finds the defendant merely "guilty of some crime."[20] The jury must be unanimous regarding all elements of the crime the defendant is alleged to have committed.[21] When a defendant is charged with multiple offenses with identical or similar elements, unanimity as to the elements requires that the jury be unanimous regarding the specific act supporting the conviction.[22] That much is clear.

¶33 But we have not yet articulated how the jury must be instructed regarding this duty. We have identified circumstances under which the jury instructions were either plainly sufficient or insufficient, but we have not given a yardstick for measuring the constitutionality of a verdict in a Unanimous Verdict Clause challenge based on the form of jury instructions. Because the following two cases serve as useful guideposts in defining a standard, we analyze them here, but we emphasize that they are not dispositive.

¶34 First, in *State v. Saunders*, a plurality opinion, we held that jury instructions that misstated the unanimity requirement were plainly erroneous.[23] The instructions in *Saunders* read: "There is no requirement that the jurors be unanimous about precisely which act occurred or when or where the act or acts occurred. The only

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[18] *See State v. Rasmussen*, 68 P.2d 176, 183 (Utah 1937) (declining to reverse a conviction under the Unanimous Verdict Clause when no prejudicial error was found).

[19] UTAH CONST. art I, § 10.

[20] *State v. Hummel*, 2017 UT 19, ¶ 27, 393 P.3d 314 (cleaned up).

[21] *State v. Saunders*, 1999 UT 59, ¶ 60, 992 P.2d 951 (plurality opinion).

[22] *See State v. Baugh*, 2024 UT 33, ¶ 23, __ P.3d __.

[23] *Saunders* 1999 UT 59, ¶ 65 (plurality opinion).

requirement is that each juror believe, beyond a reasonable doubt, that at least one prohibited act occurred . . . ."[24]

¶35 As another example, in an opinion that addresses the Unanimous Verdict Clause also issued today, we hold that counsel rendered ineffective assistance by failing to request specific unanimity instructions in a multiple-act case where the counts were not linked to specific underlying conduct.[25] In that case, *State v. Baugh*, the defendant was charged with two counts of aggravated sexual abuse of a child.[26] To support those charges, the State presented several instances of touching that could satisfy the touching element of either count.[27] But it did not identify which specific instance of touching supported which count.[28] In that opinion, we reason that instructions informing the jury that it need only be unanimous regarding the verdict did not eliminate potential confusion created by multiple charges to which no specific conduct was attached.[29]

¶36 Part of the reason why we have not yet identified a standard relates to the posture of the cases we have heard regarding the Unanimous Verdict Clause. All relevant cases claiming a violation have been brought either as claims of plain error or of ineffective assistance of counsel.[30] In these cases, the issue before us was whether, for example, it was or should have been obvious to the court that the verdict rendered may have been non-unanimous,[31] or whether declining to request more specific unanimity instructions in the face of low confidence in the unanimity of the verdict was unreasonable.[32] So it has been

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[24] *Id.* ¶ 65.

[25] *Baugh*, 2024 UT 33, ¶ 53.

[26] *Id.* ¶ 1.

[27] *Id.*

[28] *Id.*

[29] *Id.* ¶¶ 31–40.

[30] *See, e.g.*, *Saunders*, 1999 UT 59, ¶ 56; *State v. Paule*, 2024 UT 2, ¶¶ 64–65, __ P.3d __.

[31] *See, e.g.*, *Saunders*, 1999 UT 59, ¶ 57.

[32] *See, e.g.*, *Paule*, 2024 UT 2, ¶ 64.

unnecessary to articulate a precise standard for Unanimous Verdict Clause violations.

¶37 Each party proposes a standard for our adoption. Chadwick proposes adopting a standard articulated by the court of appeals in *State v. Alires*.[33] In *Alires*, the court of appeals held that in multiple-act cases like Baugh's and Chadwick's, "[w]here neither the charges nor the elements instructions link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each element of each crime."[34]

¶38 The State advocates for a broader and more flexible totality-of-the-circumstances test. It points to other jurisdictions that use such a test, including federal courts, to argue that a flexible standard is best and is applicable in all circumstances. The State's proposed test would "require a specific-unanimity instruction only when the circumstances of the case create a 'genuine risk' of a non-unanimous verdict." When a specific unanimity instruction is necessary but not given, this test would require reviewing courts to consider the totality of the circumstances in each case to determine whether the jury's verdict violated the Unanimous Verdict Clause.

¶39 We believe that the best standard lies somewhere in the middle. We hold that constitutional error occurs when the defendant shows that the circumstances of the case undermine our confidence in the unanimity of the verdict. Because "a non-unanimous verdict has long been viewed as an invalid one,"[35] we require a certain degree of confidence in the verdict. Otherwise, it is constitutionally infirm.

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[33] 2019 UT App 206, ¶ 23, 455 P.3d 636. Chadwick actually proposes a stricter standard than the court of appeals' because he argues that prosecutorial election—which occurs when the State informs the jury that particular charges relate to particular acts—does not fix a unanimity problem. The court in *Alires* suggested that prosecutorial election could solve a unanimity issue. *Id.* ¶ 22. But election goes to the question of prejudice, not the question of error. *Baugh*, 2024 UT 33, ¶ 37.

[34] *Id.* ¶ 23.

[35] *Hummel*, 2017 UT 19, ¶ 25.

¶40 This raises the question of when the circumstances of a case undermine our confidence in the unanimity of the verdict. We will not attempt to answer that question in its entirety. But there are some circumstances that we can identify that inherently undermine our confidence in the unanimity of the verdict. Multiple-act cases in which the counts charged are identical and the counts are not linked to specific underlying conduct are one such set of circumstances. In these cases, general unanimity instructions, which merely instruct the jury that it must be unanimous as to the defendant's guilt, leave room for confusion.

¶41 In a multiple-act case where specific conduct is linked to each count, a general instruction that the jury must be unanimous as to the defendant's guilt does not typically cause us to doubt the unanimity of a verdict. To illustrate those circumstances that give us confidence—or undermine it—in the unanimity of a verdict, consider the following hypothetical. A defendant is charged with two counts of criminal trespass. The jury instructions identify two occasions on which the defendant allegedly entered the property at issue. The instructions connect the first count of trespass to entry onto the property on a Saturday. They connect Count Two to entry on a Sunday. The jury is instructed only that it must be unanimous as to the guilt of the defendant and the elements of the crime. The jury convicts on the first count and acquits on the second.

¶42 Under this hypothetical, because we presume that a jury follows the instructions given,[36] we are confident that the jury was unanimous regarding the underlying conduct supporting Count One. It was specifically instructed that entry onto the property on Saturday supported Count One. And the jury was instructed that it needed to be unanimous regarding the defendant's guilt. A reasonable jury would not take those instructions to mean that it did not have to agree that the defendant entered the property on Sunday to convict on Count One. Our confidence in the unanimity of the verdict is not undermined.

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[36] *See State v. Harmon*, 956 P.2d 262, 272 (Utah 1998) (plurality opinion) ("[O]ur judicial system greatly relies upon the jury's integrity to uphold the jury oath, including its promise to follow *all* of the judge's instructions."); *State v. Suhail*, 2023 UT App 15, ¶ 142, 525 P.3d 550 ("Jurors are presumed to have followed a trial court's instructions." (cleaned up)).

¶43 Now, alter the hypothetical slightly. Instead of attaching specific conduct to each count, the jury instructions merely list two counts of criminal trespass without identifying conduct to support each count. The State presents evidence of two occasions of entry: one on a Saturday and one on a Sunday. The jury is given the same instructions as the previous hypothetical and likewise convicts on Count One and acquits on Count Two.

¶44 Under these circumstances, our confidence in the unanimity of the verdict is far lower. The jury, having been instructed that it must agree on the defendant's guilt and the elements of the crime, could interpret its instructions to permit "mixing and matching" conduct to support its verdict. If six jurors believe that only entry on Saturday occurred, but the other six believe that only entry on Sunday occurred, a reasonable jury could believe that it had achieved unanimity as to the entry element. And if the jury found that the State had proven all other elements of the crime, it could reasonably believe it was unanimous as to the defendant's guilt.

¶45 Accordingly, our confidence in the unanimity of a verdict is low in multiple-act cases when the defendant is charged with multiple counts of the same crime and the jury instructions do not connect a particular act to each count. Under those circumstances, we require that the jury be specifically instructed that it must be unanimous regarding both the conduct supporting conviction on each count and the defendant's guilt. Examples of what a specific unanimity instruction includes can be found in Criminal Model Utah Jury Instructions 431 and 432.[37]

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[37] Instruction 431, pertaining to when a defendant is charged with multiple offenses with identical elements, reads:

> The prosecution has charged in Count (#) through Count (#) that (DEFENDANT'S NAME) committed (CRIME) multiple times. Although each of these counts has similar or identical elements, you must consider each count separately and reach unanimous agreement on whether (DEFENDANT'S NAME) is guilty or not guilty of each individual count. You may not find the defendant guilty of any count unless you unanimously agree the prosecution has proven the

(continued . . .)

¶46 But concluding that a lack of specific unanimity instructions was error is not the end of the analysis. We do not reverse a conviction unless a violation of the Unanimous Verdict Clause was prejudicial.[38]

> specific act 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).]

Instruction 432, treating circumstances in which the prosecution presents evidence of more occurrences than counts that are charged, reads:

> 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.

[38] *See State v. Rasmussen*, 68 P.2d 176, 183 (Utah 1937).

II. THE PREJUDICE ANALYSIS FOR A UNANIMOUS VERDICT CLAUSE ERROR

¶47 There are three categories of standards for proving prejudice. First, some constitutional errors in criminal cases constitute per se prejudice.[39] This standard is reserved for structural errors, which are defects that affect "the framework within which the trial proceeds."[40] Examples of structural errors include "the complete denial of counsel at a critical stage of a criminal proceeding, racial discrimination in jury selection, lack of an impartial trial judge, denial of the right to a public trial, and the failure to instruct the jury on the basic elements of an offense."[41]

¶48 Second, other constitutional errors carry a presumption of prejudice that may be rebutted if the State proves that the error was harmless beyond a reasonable doubt.[42] This standard applies to most federal constitutional errors.[43] We have not yet addressed whether this standard applies to constitutional errors in criminal cases under the Utah Constitution.[44] But we have applied this standard to specific violations of the Utah Constitution in criminal cases, such as improper jury contact—a violation of article I, section 12 of the Utah Constitution.[45] This category acts as a catch-all for errors that do not fall under the first or third categories.

¶49 The third class of constitutional errors requires that the defendant establish prejudice.[46] This standard is typically applied

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[39] *State v. Reece*, 2015 UT 45, ¶ 34, 349 P.3d 712.

[40] *Id.* (cleaned up).

[41] *Id.* (cleaned up).

[42] *See, e.g.*, *State v. Soto*, 2022 UT 26, ¶¶ 31–32, 38, 513 P.3d 684 (holding that improper jury contact, a violation of article I, section 12 of the Utah Constitution, carries a rebuttable presumption of prejudice).

[43] *See Chapman v. California*, 386 U.S. 18, 24 (1967).

[44] *State v. Lovell*, 2024 UT 25, ¶ 50 n.15, __ P.3d __.

[45] *Soto*, 2022 UT 26, ¶ 38.

[46] *See, e.g.*, *State v. Gallegos*, 2020 UT 19, ¶ 63, 463 P.3d 641 (explaining that, for ineffective assistance of counsel claims, which are claims of a violation of the Sixth Amendment of the United

(continued . . .)

to unpreserved claims of error[47] and ineffective assistance of counsel claims.[48] Unpreserved claims of error are claims that could or should have been brought at trial but were instead raised for the first time on appeal.[49] Ineffective assistance of counsel claims are also typically brought for the first time on appeal. Because these challenges claim that the defendant's trial counsel was ineffective, and a trial attorney is unlikely to raise a claim of ineffective assistance against themselves, ineffective assistance of counsel claims are not typically brought during trial.[50] In sum, the third class is generally reserved for a category of claims brought for the first time on appeal.

¶50 Chadwick and the State disagree on which category applies to Unanimous Verdict Clause errors. Chadwick believes that these errors fall within the second category. The State argues that they fall within the third. We agree with Chadwick.

¶51 Chadwick argues that our caselaw dictates that constitutional error carries a presumption of prejudice that the State may rebut by proving that the error was harmless beyond a reasonable doubt.[51] The State counters by pointing out that the "harmless beyond a reasonable doubt" standard for constitutional errors in criminal cases has been applied only with respect to federal constitutional errors rather than state constitutional errors and that any application under the Utah Constitution has not been across the board.[52] And the State asserts that "[w]ithout a

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States Constitution, "[t]he defendant generally has the obligation to affirmatively prove prejudice" (cleaned up)).

[47] *State v. Bond*, 2015 UT 88, ¶¶ 43, 46–47, 361 P.3d 104.

[48] *Gallegos*, 2020 UT 19, ¶ 63.

[49] *See O'Dea v. Olea*, 2009 UT 46, ¶ 18, 217 P.3d 704.

[50] *See Massaro v. United States*, 538 U.S. 500, 502–03 (2003) ("[A]n attorney . . . is unlikely to raise an ineffective-assistance claim against himself.").

[51] (Citing *Soto*, 2022 UT 26.)

[52] (Citing *id.* ¶¶ 19–31.)

presumption of prejudice, [Chadwick] must show harm in order to prevail on his claim."[53]

¶52 The State is correct that we have not held that constitutional errors under the Utah Constitution carry a presumption of prejudice across the board. But that does not prevent us from applying the standard to Unanimous Verdict Clause errors now.

¶53 Unanimous Verdict Clause errors fit best under the second category: the rebuttable presumption. Neither party suggests that a non-unanimous verdict is a structural error. We agree. So we can readily dispose of that category.

¶54 Likewise, we can dispose of the third category rather handily. Chadwick's Unanimous Verdict Clause error was preserved.[54] And a unanimity error is not the type of error that, by its nature, cannot be brought for the first time before a district court. Chadwick could, and did, raise an objection during trial.

¶55 The second category is the Goldilocks category for Unanimous Verdict Clause errors. That category acts as a catch-all for most constitutional errors that do not fit the other two categories. And as we explained above, unanimity errors do not fit the other two categories. Further, in one instance, *State v. Soto*, we applied the rebuttable presumption of prejudice to an error under the Utah Constitution.[55] And much of our reasoning from that case still resonates when applied to unanimity errors. In *Soto*, we held that the presumption of prejudice applies to a constitutional error of improper jury contact.[56] We reasoned that the right to a fair trial means that jury verdicts must "be above suspicion" of influence.[57]

¶56 Likewise, the right to a unanimous verdict implicates the right to a fair trial as well as an explicit constitutional guarantee.[58] Indeed, we have noted that "a non-unanimous verdict has long

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[53] (Quoting *State v. Maestas*, 2012 UT 46, ¶ 71, 299 P.3d 892.)

[54] *See supra* ¶ 30.

[55] 2022 UT 26, ¶ 32.

[56] *Id.* ¶ 31.

[57] *Id.* ¶ 33 (cleaned up).

[58] *See* UTAH CONST. art I, § 10.

been viewed as an invalid one."[59] And when a jury cannot agree on a verdict, the consequence is so serious that "the result is a mistrial."[60] So, as with confidence in an impartial jury, confidence in the unanimity of a guilty verdict is essential. And it is a serious constitutional concern when the circumstances of the case undermine our confidence in the unanimity of a verdict; attaching a rebuttable presumption is an appropriate safeguard.

¶57 We thus adopt the standard that a presumption of prejudice attaches to a constitutional error under the Unanimous Verdict Clause.[61] The State may rebut this presumption by showing that the error was harmless beyond a reasonable doubt. "In other words, the side which benefited by the error (the prosecution) must show beyond a reasonable doubt that the error did not contribute to the verdict (or sentence) obtained."[62]

A. The Jury's Verdict Violated the Unanimous Verdict Clause

¶58 We now apply the above principles to Chadwick's case. We begin by analyzing whether the circumstances of Chadwick's case undermine our confidence in the unanimity of the verdict. Because this case falls under the bright-line rule that we articulated previously,[63] the decision not to give a specific unanimity instruction was constitutional error.

¶59 Chadwick was charged with four counts of sexual abuse of a child. The charges did not connect any of the acts the State presented evidence of at trial to a particular count. Nor did the jury instructions connect a particular act to a count. And the jury did not receive specific unanimity instructions. It was instructed only that it must "find beyond a reasonable doubt that by separate and

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[59] *State v. Hummel*, 2017 UT 19, ¶ 25, 393 P.3d 314.

[60] *Id.*

[61] We are not swayed from this position by the State's argument that we have required the defendant to prove prejudice in *Hummel*, another Unanimous Verdict Clause case, and should do so again here. *Id.* ¶¶ 81–85. In that case, we held that there was no Unanimous Verdict Clause error. *Id.* ¶¶ 57, 65. So whatever standard we applied there is inapplicable here.

[62] *Soto*, 2022 UT 26, ¶ 90 (cleaned up).

[63] *See supra* ¶ 45.

distinct conduct" Chadwick committed the crimes in question. But this instruction is not a specific unanimity instruction, because it informed the jury only that it must unanimously agree that Chadwick touched F.L. between zero and four times. It did not instruct the jury that it must unanimously agree on which instance of touching supports each count on which it finds Chadwick guilty.

¶60 We now turn to the question of prejudice. The State argues that this error did not prejudice Chadwick because, under the circumstances of the case, the jury would have understood that its duty to be unanimous on the verdict extended to agreeing on the conduct that supported each count. To demonstrate its point that the jury would not have been confused regarding its unanimity duty, the State emphasizes that the jury was told that "each count had to be supported by separate and distinct conduct." And in closing argument, the State continues, defense counsel pointed to the elements instruction and explained clearly that a verdict is not unanimous if the jurors disagree on the conduct that supports the act. So, the State concludes, even if the instructions could have been clearer, the jury could not reasonably have been confused after defense counsel correctly and clearly defined unanimity for them.

¶61 We disagree. The instruction that each count must be supported by "separate and distinct conduct" indicated to the jury that it could not use the same conduct to support two counts. But it did not preclude the jury from using two separate instances of touching to support the same count. And because the jury found Chadwick guilty of only one count, the risk of error is heightened. The jury could have found Chadwick guilty because some jurors believed that Chadwick was only guilty of one of the underlying acts, like the "catch-it game," while others believed he was only guilty of another act, like inappropriately tickling F.L.

¶62 Adding to our concern, the explanation of unanimity that defense counsel gave during closing argument does not support a conclusion that the verdict was unanimous beyond a reasonable doubt. The jury was instructed that it could "accept or reject" statements made during closing arguments. The jury was also told that the only law it had to follow would be included in the jury instructions. So while we agree with the State that defense counsel's statements may have helped, they do not solve the problem that the previously described aspects of the case created.

¶63 And the jury's questions support the idea that the jury did not treat the defense's definition of unanimity as binding. The jury twice asked which conduct supported which count. One interpretation of the jury's questions is that if the jury found Chadwick guilty on only one count, it believed that it mattered whether it found Chadwick guilty on Count Three rather than Count One. Another interpretation is that the jury was uncertain whether it needed to agree on or identify which conduct supported each count.

¶64 The court's response to the jury's questions likely made matters worse. The jury was told twice in response to its questions that it need only determine the *number* of counts of which it found Chadwick guilty. Emphasizing that the number of violations—rather than the specific conduct—was most important left room for the jury to disregard the defense's definition of unanimity and proceed under the understanding that it need only agree on the number of times that Chadwick was guilty of a crime.

¶65 Finally, the State argues that the evidence against Chadwick was so overwhelming that it is "clear beyond a reasonable doubt that a jury would not have reached a more favorable verdict had it been given a specific-unanimity instruction." The State reasons that F.L.'s testimony was detailed, "clear[,] and largely consistent." And, the State adds, on cross-examination of F.L., Chadwick "pointed to only two potential inconsistencies" in her testimony: that F.L. told the detective that his penis never touched her leg and that she told a therapist that she could not remember details of the abuse. The State argues that F.L. "easily explained" those discrepancies during her re-direct examination, and as a result, her testimony went largely uncontroverted.

¶66 But the evidence was clearly not as overwhelming as the State claims, given that the jury acquitted Chadwick of three of the four counts charged against him. The jury was convinced to some degree by Chadwick's insistent denial of having sexually touched F.L. And F.L.'s testimony on each alleged conduct was not more overwhelming for one than the other. She was as detailed in her description of the "catch-it game" as she was in her description of Chadwick rubbing his penis on her leg. Because the evidence for each claim was both overlapping and equally matched, the odds are reduced that the jury would have been overwhelmingly convinced that Chadwick was guilty of one count but not the

others. And in the inverse, the odds are increased that the jury may have tried to reach a compromise by arriving at a non-unanimous, consensus decision.

¶67 Because the State has not proven beyond a reasonable doubt that the outcome of the trial would not have been different without the error, the presumption of harm stands. We hold that not giving the jury specific unanimity instructions prejudiced Chadwick. We therefore vacate Chadwick's conviction.

CONCLUSION

¶68 The district court erred in failing to instruct the jury that it must unanimously agree on the conduct that supported each count of Chadwick's charged crimes. As a result, the jury's verdict violated the Unanimous Verdict Clause and prejudiced Chadwick, and we vacate Chadwick's conviction.

TAB 4

Ignorance or Mistake of Fact Instruction

Ignorance or Mistake of Fact

[Defendant] is not guilty of [list offense(s)] if [he/she] did not have the mental state required to commit the crime[s] because of [his/her] ignorance or mistake about a fact.

If you have reasonable doubt about whether [Defendant] had the mental state required for [offenses] due to [his/her] ignorance or mistake of fact, you must find [him/her] not guilty of [offenses].

[The defendant may be convicted of [lesser included offense] if [he/she] would be guilty of [lesser included offense] if the facts were as [he/she] believed them to be.]

The defendant is not required to prove that this defense applies. Rather, the State must prove beyond a reasonable doubt that this defense does not apply. The State has the burden of proof at all times. If the State has not carried this burden, then you must find the defendant not guilty.

Ignorance or Mistake of Law

[Defendant] is not guilty of [list offense(s)] if

1. [Defendant] reasonably believed [his/her] conduct was not criminal, and

2. [Defendant's] ignorance or mistake about the law resulted from [his/her] reasonable reliance on

    [an official statement of law contained in a written order or grant of permission from an administrative agency charged with the responsibility of interpreting the law in question.]

    [a written interpretation of law contained in an opinion of a court of record.]

    [a written interpretation of the law made by a public servant charged with the responsibility for interpreting the law in question.]

The defendant may be convicted of [lesser included offense] if [he/she] would be guilty of [lesser included offense] if the law was as [he/she] believed it to be.

The defendant is not required to prove this defense applies. Rather, the State must prove beyond a reasonable doubt that this defense does not apply. The State has the burden of proof at all times. If the State has not carried this burden, then you must find the defendant not guilty.

Ignorance or Mistake of Law – Not a Defense

Ignorance or mistake about the meaning or existence of a criminal law is not a defense to the crime[s] charged in this case.

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 2. Principles of Criminal Responsibility (Refs & Annos)
Part 3. Defenses to Criminal Responsibility

U.C.A. 1953 § 76-2-304

§ 76-2-304. Ignorance or mistake of fact or law

Currentness

(1) Unless otherwise provided, ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime.

(2) Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless:

(a) Due to his ignorance or mistake, the actor reasonably believed his conduct did not constitute an offense, and

(b) His ignorance or mistake resulted from the actor's reasonable reliance upon:

(i) An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

(ii) A written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question.

(3) Although an actor's ignorance or mistake of fact or law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the fact or law were as he believed.

Credits
Laws 1973, c. 196, § 76-2-304; Laws 1974, c. 32, § 5.

Notes of Decisions (9)

U.C.A. 1953 § 76-2-304, UT ST § 76-2-304
Current with laws of the 2024 General Session eff. through April 30, 2024. Some statutes sections may be more current, see credits for details.

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3407. Defenses: Mistake of Law

It is not a defense to the crime[s] of ___________ <*insert crime[s]*> that the defendant did not know (he/she) was breaking the law or that (he/she) believed (his/her) act was lawful.

New January 2006

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction. It is no defense to a crime that the defendant did not realize he or she was breaking the law when he or she acted. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [177 Cal.Rptr. 819].) This is true even when the defendant claims he or she was acting in good faith on the mistaken advice of counsel. (*People v. Snyder* (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42] [defendant's mistaken belief, based on attorney's advice, that prior conviction was a misdemeanor no defense to felon in possession of a firearm]; *People v. McCalla* (1923) 63 Cal.App. 783, 795 [220 P. 436], disapproved on other grounds by *People v. Elliot* (1960) 54 Cal.2d 498 [6 Cal.Rptr. 753, 354 P.2d 225]; *People v. Honig* (1996) 48 Cal.App.4th 289, 347–348 [55 Cal.Rptr.2d 555]; *People v. Smith* (1966) 63 Cal.2d 779, 792–793 [48 Cal.Rptr. 382, 409 P.2d 222] [no defense to felony murder that defendant did not know that entering a store intending to pass a forged check constituted burglary in California].)

The court should, however, exercise caution with specific intent crimes. A mistaken belief about legal status or rights may be a defense to a specific intent crime if the mistake is held in good faith. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [177 Cal.Rptr. 819] [defendants' belief that they had a legal right to use clients' gold reserves to buy future contracts could be a defense if held in good faith]; (*People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317] [defendant's good faith belief that he was legally authorized to use property could be defense to embezzlement]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–670 [279 Cal.Rptr. 17] [defendant's belief, if held in good faith, that out-of-state custody order was not enforceable in California could have been basis for defense to violating a child custody order]; see also 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 37.) Although concerned with knowledge of the law, a mistake about legal status or rights is a mistake of fact, not a mistake of law. (See CALCRIM No. 3406, *Mistake of Fact*.)

AUTHORITY

- Instructional Requirements. *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [177 Cal.Rptr. 819]; *People v. Stewart* (1976) 16 Cal.3d 133, 140 [127 Cal.Rptr. 117, 544 P.2d 1317]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–670 [279 Cal.Rptr. 17].

RELATED ISSUES

Good Faith Reliance on Statute or Regulation

Good faith reliance on a facially valid statute or administrative regulation (which turns out to be void) may be considered an excusable mistake of law. Additionally, a good faith mistake-of-law defense may be established by special statute. (See 1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 46.)

SECONDARY SOURCES

1 Witkin & Epstein, California Criminal Law (4th Ed. 2012) Defenses, §§ 45–46.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.07 (Matthew Bender).

3406. Mistake of Fact

The defendant is not guilty of ___________ *<insert crime[s]>* if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit ___________ *<insert crime[s]>*.

If you find that the defendant believed that ___________ *<insert alleged mistaken facts>* [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for ___________ *<insert crime[s]>*.

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for ___________ *<insert crime[s]>*, you must find (him/her) not guilty of (that crime/those crimes).

New January 2006; Revised April 2008, December 2008, August 2014, September 2018, September 2022

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it, there is substantial evidence supporting the defense, and the instruction is legally correct. (*People v. Anderson* (2011) 51 Cal.4th 989, 996–997 [125 Cal.Rptr.3d 408, 252 P.3d 968]; *People v. Speck* (2022) 74 Cal.App.5th 784, 791 [289 Cal.Rptr.3d 816] [No sua sponte duty to instruct on mistake of fact defense].)

The mistake of fact instruction must negate an element of the crime. (*People v. Speck, supra,* 74 Cal.App.5th at p. 791.)

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable.

If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6 [61 Cal.Rptr.2d 39]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426 [51 Cal.Rptr.3d 263].)

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing cannabis to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 287(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements. Pen. Code, § 26(3).
- Burden of Proof. *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr. 745, 542 P.2d 1337].
- This Defense Applies to Attempted Lewd and Lascivious Conduct With Minor Under 14. *People v. Hanna* (2013) 218 Cal.App.4th 455, 461 [160 Cal.Rptr.3d 210].

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of

necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Ibid.*; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez,* the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra,* 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

SECONDARY SOURCES

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 47.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06 (Matthew Bender).