

# **Utah Supreme Court Rules of Criminal Procedure Committee**

## **Meeting Agenda**

Doug Thomspon, Chair

Location: WebEx Meeting:

https://utcourts.webex.com/meet/brysonk

Date: September 20, 2022

Time: 12:00 p.m. – 2:00 p.m. MST

Action: Welcome and approve July 19, 2022 minutes	Tab 1	Doug Thompson
<b>Discussion:</b> Rule 18 – Attorney-conducted voir dire	Tab 2	David Ferguson
<b>Discussion:</b> Rule 14 – Appeals from 14(b)	Tab 3	Doug Thompson
<b>Discussion:</b> Rule 21 – Inconsistent verdicts update	Tab 4	William Carlson

https://www.utcourts.gov/rules/urcrp.php

## **Meeting Schedule:**

November 15, 20022

## **Rule Status:**

Rules 6, 7, 7A, 7.5, 9, and 16 - Present to SC at Oct. 12th Conference

## Tab 1

## Criminal Rules of Procedure Committee Meeting Minutes for July 19, 2022

Present	Not Present
Doug Thompson	Janet Reese
Judge Porter	Craig Johnson
Judge Hruby-Mills	
Judge Kelly Schaefer	
Keri Sargent (for Meredith Mannebach)	
Lori Seppi	
Ryan Peters	
Ryan Stack	
William Carlson	
David Ferguson	
Amber Stargell	

#### Introduction

Doug Thompson updated the Committee on current rules before approved by the Supreme Court and welcomes Lori Seppi as the newest member of our committee.

Ryan Peters moves to adopt the minutes from the Committee's May 17, 2022 meeting. Ryan Stack seconds. With no objection, the motion passes.

#### Rule 21 Review

Doug reviews the *Terry* decision that has prompted a review of Rule 21 on inconsistent verdicts. William Carlson volunteers to take on the subcommittee for Rule 21.

#### Rule 17.5 Amendment

Doug addresses a proposal to amend Rule 17.5 on remote transmission of criminal proceedings. Judge Schaeffer-Bullock addresses considerations for justice court operations in the Rule. Doug asks for a volunteer to chair the Rule 17.5 subcommittee. Judge Porter suggests that we first consider what our goal is for the Rule and consider who to bring on board for the subcommittee next. Keri Sargent explains that the Green Phase Working Group has been discussing remote transmission of proceedings via WebEx. Judge Porter asks whether that group will stop making recommendations to the bench on the issue. Bryson King explains that Ron Gordon, State Court Administrator, directed the Committee to take on the project and that the Green Phase Working Group will piggyback off of the Committee's work and let us move forward with making recommendations to the bench. Doug requests recommendations non-committee

members who can participate in the subcommittee. Committee members make recommendations. We will try to form a subcommittee of 10-12 members. No chair is appointed for the subcommittee, yet.

### **Pre Trial-Committee Discussion** – Subcommittee for Rules 6, 7, 7A, 7.5, 9

David addresses the purpose of the committee is to harmonize the rules with the statute. David states that these some these changes address timing, new language, temporary pre-trial status orders, and a description on how detention hearings are to be carried out.

## i. Rule 6

David addresses Rule 6 changes. David states that some the committee's language changes included:

- (1) a summons may be submitted via email;
- (2) temporary pretrial status orders;
- (3) bail forfeiture rule.

Doug clarifies that the committee's goal is an attempt to implement the statutory changes into the rule.

David Ferguson proposes to recommend Rule 6 to the Court and send out for public comment. William Carlson seconds the motion. No opposition. The motion carries and the Rule will be sent to the Supreme Court to approve for public comment.

#### ii. Rule 7

Rule 7(a)(6). Consulate Notification. William addresses the background of the Rule 7(a)(6) changes. William states the changes are based on international treaties the U.S. has entered. William states that under Rule 7(a)(6) a prosecutor is to provide notification to a consulate officer at the first appearance. Judge Schaeffer-Bullock asks the group if the amendment adds to the obligations of the court. William Carlson explains that the only new obligation from the court, under this new amendment, is to inform the defendant they have the right to request that a consulate officer is notified and that the rule does not require the court to follow up with the prosecution to ensure that notification was sent. Doug asks does the rule cause a burden for judges by adding more to the initial disclosures. Judge Porter states she does not believe this rule would be unduly burdensome to judges. Judge Hruby-Mills agrees with Judge Porter.

<u>Rule7(c)</u>. Pretrial status order (victim notification requirements). David states that the committee added statutory language to the rule. Doug suggests adding language that states "constitutional or statutory" victim notification requirements. David has concerns about the wording of "constitutional" victim notification. William agrees to adding the statutory requirements language to the rule.

<u>D(3)(a)</u>. David addresses added language: "the court must consider whether the amount exceeds the defendant's ability to pay."

Doug askes the group whether anyone has any suggestions or objections? Judge Schaeffer-Bullock addresses some contradictions in the rule in subsection (b)(1).

William Carlson moves to adopt Rule 7 with the addition of "constitution and statutory" language in Rule 7(c). The motion is seconded. David votes nay for the constitution and statutory language. No one else votes nay. The motion carries and the rule will be sent to the Supreme Court to approve for public comment.

## iii. Rule 7(A) – Requirements for Misdemeanor B and C.

Rule 7(A)(a)(6). William Carlson states we can remove the consulate language because under the treaty the prosecutor is only required to notify the consulate for felonies.

<u>Victim Notification Requirements</u>. Doug suggests amendments should include "constitution and statutory" language to the notification requirement.

William Carlson moves to admit Rule 7(A) with the addition of the "constitution and statutory" language. The motion is seconded. No objection. The motion carries and the rule will be sent to the Supreme Court for public comment.

(Doug addresses the Webex disconnect and there are no longer enough voting members on the platform. Doug suggests that the committee address rules 7.5 and 9 and vote via email.)

## iv. Rule 7.5 – Pretrial Detention Hearings.

David and William address additional language to deal specifically with Justice Court for defendants who do not comply with the conditions of release. William and David explain the language would not apply to DVs in justice court. William and David further explain the rule is meant to be for the exceptional circumstances when the defendant will not appear for court hearings. There is no official draft language for today's meeting. The group discussed the following concerns:

- 1. David Justice courts not able to see a defendant until a couple of days after arrest. Defendant could sit for lengthy periods of time.
- 2. Judge Schaeffer-Bullock judges could use this rule for minor traffic offenses/non qualifying case or overuse of the rule. Possibility of judicial abuse. Additionally, Defendants would not see judge for several days after arrest.
- 3. William Carlson askes how do we narrow the language?

Doug suggests to cut Rule 7.5 (a)(2) and submit 7.5 and 9 for review and adoption via email. Doug suggests the group to vote on the remaining matters via email.

Meeting adjourned.

## Tab 2

## Fact sheet on Attorney-Conducted Voir Dire:

## Utah is in the minority

As of 2007, Utah was one of only 10 states in which judges predominantly conducted voir dire.<sup>1</sup>

Table 21: Who Conducts Voir Dire in State Courts?			
Predominantly or Exclusively Judge-Conducted Voir Dire	AZ, DC, DE, MA, MD, ME, NH, NJ, SC, UT		
Judge and Attorney Conduct Voir Dire Equally	CA, CO, HI, ID, IL, KY, MI, MN, MS, NM, NV, NY, OH, OK, PA, VA, WI, WV		
Predominantly or Exclusively Attorney-Conducted Voir Dire	AK, AL, AR, CT, FL, GA, IA, IN, KS, LA, MO, MT, NC, ND, NE, OR, RI, SD, TN, TX, VT, WA, WY		

That number has since decreased at least by one after Massachusetts adopted attorney-conducted voir dire in 2015 (see article and rule below).

## **Length of Attorney-Conducted Voir Dire**

The Center for Jury Studies conducted a study on how much time attorney-conducted voir dire adds to a trial. As a reference point, they calculated that the average 12-person civil jury trial with equal time between judge and attorney-conducted questioning and three peremptoriness takes 114 minutes, or approximately 2 hours to complete.<sup>2</sup>

Using their data as a guide, the average felony voir dire conducted exclusively by a judge takes 70 minutes. The average misdemeanor takes 40 minutes.<sup>3</sup>

When voir dire is conducted predominantly by attorneys the average times increase by 70 minutes.<sup>4</sup> That would make the average voir dire in Utah  $2^{1/3}$  hours for a felony and  $1^{1/2}$  hours for misdemeanors.

<sup>&</sup>lt;sup>1</sup> Center for Jury Studies, *State of the States Survey of Jury Improvement Efforts*, 27, available at https://www.ncsc-jurystudies.org/state-of-the-states/state-of-states-survey?SQ\_VARIATION\_5888=0.

<sup>2</sup> See *Id.* at 30 showing a table of how different variables increase or decrease the average time for voir

dire when compared to the reference.

<sup>3</sup> *Id*.

<sup>&</sup>lt;sup>4</sup> *Id.* Using the table, when judges conduct voir dire exclusively, it saves 47 minutes compared to the reference, and when attorneys predominantly conduct voir dire, it adds 25 minutes. By comparison, when attorneys exclusively conduct voir dire, it adds 105 minutes instead of 25.

## The Benefit of Attorney Conducted Voir Dire

Repeated studies show that attorney-conducted voir dire elicits much more truthfulness about juror biases than judge-conducted voir dire.<sup>5</sup>

Jurors are twice as honest when attorneys ask them questions than when judges ask the identical questions.<sup>6</sup>

Juror dishonesty with judges is tied to two primary explanations: jurors are significantly more likely to face the pressure of "evaluation anxiety" when asked questions by judges rather than attorneys. Jurors are also more likely to experience an "expectancy effect" of believing that the judge is implicitly encouraging jurors to lie about being impartial because the judge wants the juror to say that they are.<sup>7</sup>

Attorney-conducted Voir Dire is encouraged in Utah<sup>8</sup> but rarely permitted by courts outside of a few jurisdictions.

In *State v. Williams*, the Utah Court of Appeals has given guidance on how Utah courts should oversee attorney-conducted voir dire, with details about what should, and shouldn't, be allowed based on how other jurisdictions handle attorney-conducted voir dire.<sup>9</sup>

The proposed rule change adopts guidance by *Williams* while also looking to other jurisdictions as supplemental guidance to construct a comprehensive rule.

There is a proposal to the Rules of Civil Procedure advisory committee seeking nearly identical changes to the civil voir dire that has been endorsed by the Utah Association of Justice.

<sup>&</sup>lt;sup>5</sup> John Campbell et. al., An Empirical Examination of Civil Voir Dire: Implications for Meeting Constitutional Guarantees and Suggested Best Practices, U DENVER LEGAL STUDIES RESEARCH PAPER NO. 20-11 (April 24, 2020), available at SSRN:

https://ssrn.com/abstract=3584582 or <a href="http://dx.doi.org/10.2139/ssrn.3584582">https://ssrn.com/abstract=3584582</a> or <a href="http://dx.doi.org/10.2139/ssrn.3584582">http://dx.doi.org/10.2139/ssrn.3584582</a>; Susan E. Jones, Judge-Versus Attorney-Conducted Voir Dire An Empirical Investigation

of Juror Candor, 11 LAW AND HUMAN BEHAVIOR, 131 (1987); Richard Seltzer, et. al. Juror Honesty During the Voir Dire, JOURNAL OF CRIMINAL JUSTICE 451, 453 (1991); Roger W. Shuy, How a Judge's Voir Dire can Teach a Jury What to Say, 6 DISCOURSE & SOCIETY, 207 (1995).

<sup>&</sup>lt;sup>6</sup> Susan E. Jones, Judge-Versus Attorney-Conducted Voir Dire An Empirical Investigation of Juror Candor, 11 LAW AND HUMAN BEHAVIOR, 131 (1987).

<sup>&</sup>lt;sup>8</sup> State v. Williams, 2018 UT App 96, ¶ 37, n. 14 ("In Utah's trial courts, the days of perfunctory — and often insufficient — judge-only-conducted juror examination are gone. Indeed, our rules now expressly provide for attorney-conducted juror examination, see Utah R. Crim. P. 18(b), and many judges and attorneys wisely embrace the conscientious use of a well-drafted questionnaire.").

<sup>&</sup>lt;sup>9</sup> State v. Williams, 2018 UT App 96.

#### Rule 18. Selection of the jury.

- (a) **Method of selection.** The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.
  - (a)(1) Strike and replace method. The court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.
  - (a)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.
  - (a)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.
- (b) Examination of prospective jurors. The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant. Prior to examining the jurors, the court may

make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(b) Examination of prospective jurors. Upon a party's request the court must allow attorney-conducted jury selection before the panel of prospective jurors or through a series of panels if the court divides the jurors into smaller groups for questioning. If defense does not make the request, the court may conduct the examination itself. If the court conducts the examination and counsel or the defendant requests additional questions submitted to the jury, the court must submit the questions if they are submitted for a proper purpose.

#### (c) Procedures for attorney-conducted jury selection.

(c)(1) The court may impose reasonable restrictions on attorney-conducted jury selection including a reasonable time limit allotted to each side. In determining a reasonable time limit the court should consider the complexity of the issues in the case, the length of the overall trial, the seriousness of the offense, and any stipulation of the parties. The Court may not make the time restriction so narrow that it precludes either party from asking relevant and proper questions to prospective jurors.

(c)(2) A party may give a preliminary statement of the case before asking questions. The statement should orient the panel to questions that will be asked without commenting on the facts presented. The statement may not be used as a tool to persuade members of the panel to adopt a position, develop a predisposition to the evidence, or bolster an anticipated witness's credibility. The party may make additional statements during the time allotted for questioning as needed to orient the panel to new topics.

(c)(3) With prior leave of the Court, the party may ask questions about the law, such as an anticipated defense, if needed to inquire into any bias on following the law.

(c)(3) Questions should be targeted to reveal prospective jurors' biases or prejudices. The court may not prohibit a question simply because the bias or prejudice of concern is not related to a for-cause strike or because the question relates to a sensitive topic. Either by objection from opposing counsel, or by the court acting *sua sponte*, the court may prohibit a question that:

(c)(3)(A) may confuse the person asked;

(c)(3)(B) is rhetorical or waits for no answer;

(c)(3)(C) may harass, embarrass, inflame, or ask highly personal information about a juror;

(c)(3)(D) makes repetitive inquiries of a juror;

(c)(3)(E) was already asked in a questionnaire except to have the juror explain an answer;

Commented [DF1]: State v. Purdy, 491 N.W.2d 402 (N.D. 1992):

Rule 24(a), N.D.R.Crim.P., provides that "[t]he court shall permit the defendant or the defendant's attorney and the prosecuting attorney to participate in the examination of prospective jurors." However, the right to voir dire is not without limitations. It is properly within a trial court's discretion to impose reasonable restrictions on the exercise of voir dire, such as placing reasonable time limits on the voir dire examination and preventing the propounding

of vexatious or repetitious questions. See. e.a., Hatchett v. State 503 N F 2d 398 402 (Ind 1987): People v. Jean 75 N.Y.2d 744, 551 N.Y.S.2d 889, 890, 551 N.E.2d 90, 91 (1989); Maddux v. State, 825 S.W.2d 511, 514 (Tex.Ct.App.1992). Nevertheless, because the purpose of voir dire is to obtain a fair and impartial jury [see State v. Gross, 351 N.W.2d 428, 433 (N.D.1984); Explanatory Note to Rule 24, N.D.R.Crim.P.], placing arbitrary and unreasonable time limits on voir dire can result in reversible error. See, e.g., State v. Petersen, 368 N.W.2d 320, 322 (Minn.Ct.App.1985); State v. Evans, 352 N.W.2d 824, 826 (Minn.Ct.App.1984). We agree with those jurisdictions which hold that to establish prejudicial reversible error from time restrictions on voir dire, the defendant must show that he was precluded by the time restriction from asking relevant and proper questions to prospective jurors.

#### Commented [DF2]: Mass. Rule 6(4)(e)

"i. If the parties have obtained approval to ask voir dire questions about the law, the trial judge shall take appropriate measures to ensure that the jury is accurately and effectively instructed on the law. Such measures may include, but are not limited to: a brief precharge; requiring the questioner to use the words

**Commented [DF3]:** Michael J. Ahlen, Voir Dire: What Can I Ask and What Can I Say?, 72 N.D.L.Rev. 631.

"Some judges allow attorneys to discuss the law of the case in voir dire, particularly in criminal cases in which the entire defense rests upon burden of proof or presumption of innocence. Nationally, there is a trend toward restrictif \_\_\_\_\_[2]

**Commented [DF4]:** State v. Ball, 685 P.2d 1055, 1059 (Utah 1984).

"[T]he peremptory challenge performs a valuable function in our jury system. . . ". The peremptory challenge is meant to give parties opportunity to strike jurors "on a broad spectrum of evidence suggestive of juror partiality." Id ... [3]

Commented [DF5]: State v. Williams, 2018 UT App 96, ¶ 27

**Commented [DF6]:** Michael J. Ahlen, Voir Dire: What Can I Ask and What Can I Say?, 72 N.D.L.Rev. 631

Commented [DF7]: Wyo R. Crim P. 24

(c)(3)(F) has no apparent link to uncovering a potential bias;

(c)(3)(G) seeks to influence how a juror may decide the case by doing any of the

#### following:

(c)(3)(G)(i) raises a hypothetical that closely approximates the facts of the case;

(c)(3)(G)(ii) invites the juror to predict how he or she may ultimately decide the case;

(c)(3)(G)(iii) asks the juror to judge the weight to be given to an operative fact; or

(c)(3)(G)(iv) seeks to have a juror commit to, pledge, or otherwise maintain a particular position in advance of the actual presentation of the evidence unless that position is to follow the judge's instructions or to be fair and impartial during the trial.

(c)(4) A question about how a particular piece of evidence may affect a juror's predisposition to one side is not equivalent to asking the juror to indicate how much weight that evidence would have in deciding the outcome of the case.

(c)(5) If a party asks a question that requests highly personal information from a juror, may embarrass a juror, or may cause a bias or prejudice to form in the minds of other jurors, the court may instruct that the juror be questioned outside the presence of the panel. The court may require that the juror answer the question if the question is highly relevant to the issue of bias.

The court should not impose time restrictions on questions to individuals outside the presence of the jury. The defendant's presence is not required if the answer may relate to information that the juror does not wish the defendant to hear.

(c)(6) The prosecution goes first in attorney-conducted voir dire.

(c)(7) The court may sanction a party for violating this subsection by prohibiting the question, admonishing the party, giving a curative instruction, declaring a mistrial, or any other sanction as appropriate or required under the circumstances.

#### (d) Procedures for use of a supplemental jury questionnaire

(d)(1) Upon timely request, the court may permit a party to submit a questionnaire to aid in the discovery of bias or prejudices. The court may set reasonable limits on the length of the questionnaire or number of questions in considering the complexity of the issues in the case, the length of the overall trial, the seriousness of the offense, and any stipulation of the parties.

(d)(2) Before issuing the questionnaire the court may strike any question that follows one of the prohibited questions described in subsection (c). The court should not modify, or require that a party modify, a question unless doing so is necessary to avoid asking a prohibited question.

Commented [DF8]: State v. Saunders, 1999 UT 59, ¶ 43

"As a general rule, trial judges have some discretion in limiting voir dire inquiry. See, e.g., Worthen, 765 P.2d at 845. That discretion is most broad when it is exercised with respect to questions that have no apparent link to any potential bias. However, the trial judge's discretion narrows to the extent that questions do have some possible link to possible bias, and when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears."

Commented [DF9]: State v. Janis, 880 NW 2d 76, 82-83 (SD 2016) -this case is cited with approval in State v. Williams.

"Prospective jurors may not be questioned about hypothetical facts to be proved at trial, but may be questioned about their mental attitudes regarding certain types of evidence."

Commented [DF10]: Haarhuis v. Cheek, 805 SE 2d 720, 726 (NC App 2017) - this case is reference with approval in State v. Williams

Commented [DF11]: Hyundai Motor Co. v. Vasquez,189 S.W.3d 743, 753 (2006) - this case is referenced with approval in State v. Williams

Commented [DF12]: State v. Broyhill, 803 S.E.2d 832, 841 (N.C. App 2017) - this case is cited with approval in State v. Williams.

See also John T. Bibb, Voir Dire: What Constitutes an Impermissible Attempt to Commit A Prospective Juror to A Particular Result, 48 Baylor L. Rev. 857, 874 (1996)

"Texas lawyers will exceed the scope of permissible voir dire examination by asking questions that tend to elicit a pledge from a prospective juror as to how much weight the juror will give to such evidence in the determination of the final verdict. Texas courts generally prohibit any voir dire questions which ask prospective jurors to indicate their views on certain facts, and thereby commit themselves to certain views or conclusions.84 The rule denying committal inquiries on the weight of evidence supports the underlying policy of voir dire: to obtain a fair trial from an unbiased jury by preventing jurors from determining critical issues based on a previous commitment as to the weight of particular

#### Commented [DF13]:

#### Commented [DF14]:

Commented [DF15]: Barrett v. Peterson, 868 P.2d 96 (Utah Ct. App. 1993) (assigning error when a court changed the wording of proposed questions when the changes to wording changed the bias that the litigant intended to uncover).

The court may not strike a question simply because that question serves only the function of a peremptory challenge.

- (d)(3) The Court must allow the parties a reasonable opportunity to review the answers to the questionnaires in advance of making questions to the panel.
- (ee) Challenges to panel or individuals. A challenge may be made to the panel or to an individual juror.
- (ee)(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.
- (ee)(1)(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.
- (ee)(1)(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or made upon the record. It shall specifically set forth the facts constituting the grounds of the challenge.
- (ee)(1)(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.
- (ee)(1)(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.
- (ee)(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.
- (df) Peremptory challenges. A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.
- (eg) Challenges for cause. A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or

more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

- (eg)(1) Want of any of the qualifications prescribed by law.
- (eg)(2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror.
- (eg)(3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.
- (eg)(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.
- (eg)(5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.
- (eg)(6) Having served on the grand jury which found the indictment.
- (eg)(7) Having served on a trial jury which has tried another person for the particular offense charged.
- (eg)(8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.
- (eg)(9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.
- (eg)(10) If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and the juror's oath in subsection (h).
- (eg)(11) Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.
- (eg)(12) Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.
- (eg)(13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.

- (eg)(14) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.
- (h) Rehabilitation prohibited. When a juror admits to a bias, further enquiry may be made to allow the juror to elaborate or clarify the answer without an attempt to commit the juror to impartiality.
- (fi) Alternate jurors. The court may impanel alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. If one or two alternate jurors are called, the prosecution and defense shall each have one additional peremptory challenge. If three or four alternate jurors are called, each side shall have two additional peremptory challenges. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.
- (gi) **Juror oath.** When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Commented [DF16]: Current advisory committee notes:

"Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the "right" answer from or to "rehabilitate" a juror."

However, see State v. Fletcher, 2015 UT App 167, ¶ 23

"When an inference of bias is raised, the inference is generally not rebutted simply by a subsequent general statement by the juror that he or she can be fair and impartial," but instead, "[t]he level of investigation necessary once voir dire reveals potential juror bias will vary from case to case and is necessarily dependent on the juror's responses to the questions asked." State v. Woolley, 810 P.2d 440, 445 (Utah Ct. App. 1991), overruled on other grounds as recognized by Robertson, 2005 UT App 419, 122 P.3d 895.

Also see discussion in State v. Jonas, 904 N.W.2d 566 (Iowa 2017).

"As noted in People v. Merrow, answers to the trial judge's generalized and leading questions "may suggest overt acquiescence in the trial court's efforts to elicit a commitment to neutrality" but are unreliable."

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Mass. Rule 6(4)(e)

"i. If the parties have obtained approval to ask voir dire questions about the law, the trial judge shall take appropriate measures to ensure that the jury is accurately and effectively instructed on the law. Such measures may include, but are not limited to: a brief precharge; requiring the questioner to use the words specifically approved by the judge; stating the law in a written supplemental questionnaire; or contemporaneous instructions

by the trial judge at the time the question is asked.

ii. If a juror asks counsel a question to clarify an aspect of the law, counsel shall request that the trial judge answer the question; the trial judge may interrupt if counsel attempts to respond to a juror question by instructing on such a point of law."

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Michael J. Ahlen, Voir Dire: What Can I Ask and What Can I Say?, 72 N.D.L.Rev. 631.

"Some judges allow attorneys to discuss the law of the case in voir dire, particularly in criminal cases in which the entire defense rests upon burden of proof or presumption of innocence. Nationally, there is a trend toward restricting attorneys' discussion of law. . . A growing number of North Dakota courts have avoided or minimized the problem of attorneys seeking to discuss the law of a case by instructing the jury as to key provisions of law before voir dire."

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State v. Ball, 685 P.2d 1055, 1059 (Utah 1984).

"[T]he peremptory challenge performs a valuable function in our jury system. . . ". The peremptory challenge is meant to give parties opportunity to strike jurors "on a broad spectrum of evidence suggestive of juror partiality." Id. But "[i]ts efficacy is necessarily vitiated when a party is not permitted to gather enough information from prospective jurors in order to exercise his right intelligently." Id. at 1059–60. The Utah Supreme Court has instructed trial courts to permit attorneys to ask questions crafted to the purpose of exercising peremptory strikes when they are "reasonably calculated to discover any latent biases," particularly those biases that do not rise to for-cause strikes. Id. at 1059."

## State v. Williams

Court of Appeals of Utah May 24, 2018, Filed No. 20160625-CA

#### Reporter

2018 UT App 96 \*; 427 P.3d 434 \*\*; 2018 Utah App. LEXIS 104 \*\*\*; 2018 WL 2381992 STATE OF UTAH, Appellee, v. BRIAN K. WILLIAMS, Appellant.

**Prior History:** [\*\*\*1] First District Court, Logan Department. The Honorable Kevin K. Allen. No. 141100362.

### **Core Terms**

juror, questions, prospective juror, touched, trial court, indoctrinate, daughters, sexual abuse, convictions, sexual, answers, painting, bolster, abusing, cleaned, impermissible, hypothetical, asserts, preliminary hearing, physical evidence, first house, inappropriately, credibility, happened, friends, cases, sex

## **Case Summary**

#### Overview

HOLDINGS: [1]-Because irregularities occurred in the State of Utah's juror examination in defendant's trial for child sex abuse, reversal of defendant's convictions and remand of the case for a new trial was appropriate in that the error should have been obvious to the trial court and, had the error not occurred, there was a reasonable likelihood that defendant would have had a more favorable outcome as the case turned on the credibility of the alleged victims. The prosecution campaigned to bolster the alleged victims in the jury selection by posing hypothetical questions closely approximating the facts of the case, made statements and posed rhetorical questions rather than inquired into the prospective jurors' thoughts and attitudes, and posed questions without awaiting a response.

#### **Outcome**

Convictions reversed, and case remanded for new trial.

## LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

## <u>HN1</u>[ Substantial Evidence, Sufficiency of Evidence

In reviewing a jury verdict, an appellate court will view the evidence in a light most favorable to the verdict.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

## <u>HN2</u>[♣] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

To demonstrate ineffective assistance of counsel, a defendant must: (i) identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance when considered at the time of the act or omission and under all the attendant circumstances, and (ii) demonstrate that counsel's error prejudiced the defendant, i.e., that but for the error, there is a reasonable probability that the verdict would have been more favorable to the defendant.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Burdens of Proof

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

## HN3[♣] Plain Error, Burdens of Proof

To demonstrate plain error, a defendant must show the following: (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, an appellate court's confidence in the verdict is undermined.

Criminal Law &

Procedure > Appeals > Reviewability > Preservation for Review

## HN4[ ] Reviewability, Preservation for Review

When an appellate court reverses on one ground and remands for a new trial, the court need not consider the other issues raised.

Evidence > ... > Testimony > Credibility of Witnesses > Rehabilitation

## HN5[基] Credibility of Witnesses, Rehabilitation

Utah jurisprudence has long held that witnesses may not be bolstered by improper means.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Questions to Venire Panel

## HN6[♣] Voir Dire, Individual Voir Dire

The true purpose of juror examination is well settled in Utah jurisprudence: to determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it. But the privacy interests of prospective jurors must be balanced against the historic values and the need for openness of the process.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Questions to Venire Panel

## <u>HN7</u>[♣] Voir Dire, Individual Voir Dire

To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge in camera but with counsel present and on the record.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

## HN8[♣] Plain Error, Definition of Plain Error

The prejudice standard under ineffective assistance of counsel and plain error is the same.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Questions to Venire Panel

## <u>HN9</u>[基] Voir Dire, Individual Voir Dire

A party is not permitted to argue a case under the auspices of jury selection.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Questions to Venire Panel

## <u>HN10</u>[基] Voir Dire, Individual Voir Dire

The true purpose of juror examination is to determine, by inquiry, whether biases and prejudices, latent as well

as acknowledged, will interfere with a fair trial if a particular juror serves in it. Using juror examination as a tool to indoctrinate the jury on a party's argument or bolster anticipated witness testimony is improper.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Burdens of Proof

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

## <u>HN11</u>[基] Plain Error, Burdens of Proof

Utah requires that an appellant arguing plain error demonstrate that the error should have been obvious to the trial court.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Questions to Venire Panel

## <u>HN12</u>[基] Voir Dire, Individual Voir Dire

In Utah's trial courts, the days of perfunctory—and often insufficient—judge-only-conducted juror examination are gone. Indeed, the rules now expressly provide for attorney-conducted juror examination, <u>Utah R. Crim. P. 18(b)</u>, and many judges and attorneys wisely embrace the conscientious use of a well-drafted questionnaire. But a free-for-all attorney-conducted juror examination in the presence of the entire venire carries with it a substantial risk of irreparably tainting the entire panel and effectively guaranteeing a resulting mistrial.

Counsel: Elizabeth Hunt, Attorney for Appellant.

Sean D. Reyes and Aaron G. Murphy, Attorneys for Appellee.

**Judges:** JUDGE DAVID N. MORTENSEN authored this Opinion, in which JUDGES KATE A. TOOMEY and DIANA HAGEN concurred.

Opinion by: DAVID N. MORTENSEN

## **Opinion**

[\*\*435] MORTENSEN, Judge:

**[\*P1]** Although he testified that the events underlying this case never happened, a jury convicted Defendant Brian K. Williams of sexually abusing his three daughters. After Defendant was convicted, the district court sentenced him to multiple prison terms, several of which are potentially for the remainder of his life. Because we conclude that irregularities occurred in the State's juror examination, we reverse his convictions and remand for a new trial.

#### **BACKGROUND**

[\*P2] Defendant's three daughters, Oldest, Middle, and Youngest, accused Defendant of sexually abusing them repeatedly over a five-year period. During this time, the alleged abuse included, but was not limited to, touching his daughters' breasts and pubic areas; showering with them; and on one occasion, forcing his daughters to undress and smear body paint on each other as Defendant watched.

**[\*P3]** The State charged Defendant **[\*\*\*2]** with six counts of aggravated sexual abuse of a child and six counts of forcible sexual abuse. During juror examination, the trial court asked potential jurors about their personal and professional lives before allowing counsel for the State and Defendant to conduct additional juror examination.<sup>2</sup>

[\*P4] [\*\*436] During trial, the jury heard testimony from Defendant's daughters, who detailed the abuse.<sup>3</sup> The jury also heard testimony regarding the daughters'

<sup>&</sup>lt;sup>1</sup> Juror examination is often referred to as "voir dire." Because both terms describe the same "tool for counsel and the court to carefully and skillfully determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it," see <u>State v. Ball. 685 P.2d 1055, 1058 (Utah 1984)</u>, we use the terms interchangeably.

<sup>&</sup>lt;sup>2</sup> The specific content of the State's juror examination is set forth in more detail below. *Infra* ¶¶ 15-23.

³ As we explain, *infra* ¶¶ 5-8, some of the daughters' trial testimony conflicted with their testimony at the preliminary hearing. Other pieces of information were contradicted at trial. *HN1*[♣] "In reviewing a jury verdict, we view the evidence . . . in a light most favorable to the verdict." *State v. Maestas, 2012 UT 46*, ¶ 36, 299 *P.3d 892* (cleaned up). However, we also present conflicting evidence where it is necessary to understand the issues raised on appeal. *See State v. Holgate, 2000 UT 74*, ¶ 2, 10 *P.3d 346*.

difficulties in school, their depression, Oldest's habit of cutting herself, and Oldest and Middle's joint overdose on antidepressants and subsequent hospitalizations. The State's expert testified that these behaviors were consistent with symptoms exhibited by sexual abuse victims.

[\*P5] Oldest's trial testimony conflicted with her testimony at Defendant's preliminary hearing in some respects. She initially testified that Defendant showered with her once or twice a month before the family moved, but at trial she said it happened only once, total, in the family's first house. At the preliminary hearing, she testified that she could not recall Defendant touching her in the shower, but at trial she said he "cupped" her breasts and buttocks and [\*\*\*3] washed her body. Oldest testified at the preliminary hearing that Defendant touched her breasts and vaginal area five to ten times at the first house; but at trial she could not recall him touching any of her body parts at the first house. Shortly after her assertion at trial that Defendant had not touched her in the first house, she testified regarding an incident in the first house during which Defendant had touched her inappropriately while wrestling.

[\*P6] Middle originally testified at length at the preliminary hearing about Defendant's abuse of her sisters, but later admitted at trial that she had never seen him inappropriately touching Oldest or Youngest. When Middle initially reported Defendant's abuse, she denied that he had ever inserted his finger into her vagina. But at trial, she testified that he did so on multiple occasions, explaining that she originally denied this behavior because she wanted to minimize the trouble Defendant would be in.

**[\*P7]** Youngest's testimony that Defendant left "white gooey stuff" on her legs after a back rub was a detail reported for the first time at trial. Youngest explained that she only recalled that fact as she was testifying. At trial, on cross-examination, **[\*\*\*4]** Youngest frequently answered that she could not recall the information she was asked to provide.

[\*P8] All three daughters' stories regarding the bodypainting incident differed from one another. Oldest testified that she and Middle had been painting a picture when the sisters started painting each other. Defendant then instructed them to remove their clothing, and he stripped down to his underwear, before they all painted one another. When she was asked about this incident at the preliminary hearing, she denied that it occurred; only at trial did she allege that it took place. Middle testified that Defendant had told them he ordered the paints online. When he produced them, they all removed their clothes and started painting each other. Youngest also testified that Defendant bought the paints online and explained that he made them remove their clothing. Middle and Youngest testified that after they painted each other, all four showered together. Oldest made no such claim.

**[\*P9]** Defendant testified in his own defense and denied sexually abusing any of his daughters. The jury convicted Defendant as charged. He now appeals.

### ISSUES AND STANDARDS OF REVIEW

[\*P10] Defendant argues that we should reverse his [\*\*\*5] convictions for any one of five reasons. First, he asserts that the jury instructions given at trial were inadequate. Second, he asserts that during the State's argument, the prosecutor engaged misconduct by (1) impermissibly bringing to the jury's attention facts not in evidence, (2) arguing that Defendant lied, (3) disparaging the integrity of defense counsel, and (4) appealing to the jury's fears by seeking a verdict to protect society. Third, he asserts that the State violated <u>rule 608 of the Utah Rules of Evidence</u> by improperly bolstering the credibility of its witnesses. Fourth, he asserts [\*\*437] that the State offered inadmissible evidence of his invocation of his right to counsel. And fifth, he asserts that during his testimony, he was improperly asked to opine on the veracity of other witnesses.

[\*P11] Defendant did not raise any of these arguments before the trial court. Instead, he brings his claims under the doctrines of ineffective assistance of counsel and plain error. HN2[\*] To demonstrate ineffective assistance of counsel, Defendant must:

(i) identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance when considered at the time of the act or omission and under [\*\*\*6] all the attendant circumstances, and (ii) demonstrate that counsel's error prejudiced the defendant, i.e., that but for the error, there is a reasonable probability that the verdict would have been more favorable to the defendant.

<u>State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993)</u>. <u>HN3</u>[

To demonstrate plain error, Defendant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court;

and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

#### Id. at 1208-09.

#### **ANALYSIS**

[\*P12] Although Defendant raises many potential grounds for reversing his convictions, we are persuaded by his arguments regarding the irregularities and impropriety that occurred during juror examination.<sup>4</sup>

HN4[\*] Because we reverse on that ground and remand for a new trial, we need not consider the other issues raised. See State v. Holm, 2017 UT App 148, ¶ 8 n.2, 402 P.3d 193.

[\*P13] While the issue of determining when a juror examination has crossed the line into impermissible indoctrination is one of first impression, <code>HN6[+]</code> the true purpose of juror examination is well settled in our jurisprudence: to "determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, [\*\*\*7] will interfere with a fair trial if a particular juror serves in it." <code>Salt Lake City v. Tuero, 745 P.2d 1281, 1283 (Utah Ct. App. 1987)</code> (cleaned up). But the privacy interests of prospective jurors "must be balanced against the historic values . . . and the need for openness of the process." <code>Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 512, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).</code>

HN7 To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.

<sup>4</sup> Defendant argues that the State used the voir dire process to improperly bolster the credibility of his daughters' testimony. <u>HN5</u>[♣] Utah jurisprudence has long held that witnesses may not be bolstered by improper means. See <u>State v. Adams</u>, 955 <u>P.2d 781</u>, 786 (*Utah Ct. App. 1998*). *Id.*<sup>5</sup> In determining whether the trial court properly balanced the privacy interests of the jurors with Defendant's constitutional right **[\*\*438]** to present the case before an impartial jury, we review the court's decision for plain error.<sup>6</sup>

**[\*P14]** Defendant argues that "the prosecution began its campaign to bolster the alleged victims at the outset of the jury selection." After reviewing the transcript of juror examination, we agree. We conclude that an error occurred and that the [\*\*\*8] error should have been obvious to the trial court. Because Defendant's challenge is best understood by experiencing the flow of the State's juror examination in its odd entirety, we quote at length from it. Any emphasis is our own.

[\*P15] The prosecutor began by sharing, "My experience has been that jurors want to do a good job.

<sup>5</sup> Other jurisdictions have held similarly. See **People v.** Knight, 2013 IL App (4th) 111127-U, ¶ 45 (holding that at a minimum, the court's responsibility includes "not permitting (1) courtroom proceedings to embarrass them and (2) trial court participants to engage in offensive conduct"); State v. Roby, 2017 ME 207, ¶ 12, 171 A.3d 1157 ("In order to select a qualified and impartial jury, the trial court has considerable discretion over the conduct and scope of juror voir dire, because it is the trial court that has the responsibility of balancing the competing considerations of fairness to the defendant, judicial economy, and avoidance embarrassment to potential jurors." (cleaned up)); People v. Mulroy, 108 Misc. 2d 907, 439 N.Y.S.2d 61, 65 (N.Y. Sup. Ct. 1979) ("[In conducting voir dire] . . . this court conceives that it has the highest obligation, first, to the prospective juror that, if sworn, he may serve with a free mind, unfettered by personal discomfiture, embarrassment or subconscious restraint and, second, to all who stand before the bar of justice, to assure that such juror will be ultimately able to make his determination fairly and impartially, without fear, favor or sympathy.").

Defendant's claim that his trial counsel was ineffective for failing to object to the juror examination process. This is because the same error that should have been plain to the trial court should have alerted trial counsel to act. There was no strategic reason not to object, and in choosing not to, trial counsel's performance fell below an objective standard of reasonableness. Likewise, where we conclude that Defendant was harmed by the trial court's failure to intervene, we would conclude that trial counsel's performance prejudiced Defendant. Cf. State v. Bruun, 2017 UT App 182, ¶ 79, 405 P.3d 905 (explaining that HN8 The prejudice standard under ineffective assistance of counsel and plain error is the same").

They want to do a good job. They just want to make sure they understand all the evidence, and they want to do a good job." She then assured the prospective jurors, "So as I talk to you right now, just understand there are not right or wrong answers. I'm just trying to find out how you view life, how you view your job as a juror, things of that nature, and maybe what your thoughts are on child sex abuse . . . . So please feel free to raise your hand."

[\*P16] After encouraging members of the venire to "just be honest," she initiated a discussion about child sex abuse:

[Prosecutor]: How do you know children are sometimes sexually abused?

[Prospective Juror]: Well, I can think of three friends that have either had someone in their family sexually abused or themselves.

[Prosecutor]: Were these close friends?

[Prospective Juror]: Well, they're friends. I—

[Prosecutor]: Friends, [\*\*\*9] okay. That you're aware-

[Prospective Juror]: They're not my closest friends.

[Prosecutor]: Yeah, but you—they shared with you the fact that they've had children in their family abused and so on and so forth. So how is it that society sort of proves or becomes aware of child sex abuse?

Prospective jurors provided answers, such as, "Well, the person that has done that to the child has said that they did," and "Or it is medically proven."

[\*P17] Apparently not hearing the answer she wanted, the prosecutor continued, "So let's say someone decides to be really brave and say, 'Okay, okay, okay, I've been touching a kid.' That may happen. I've never seen it, but—I'm only kidding. But how else?" An inaudible response was given, and then the prosecutor stated, without getting an answer from any member of the jury pool, "So a child may be acting weird or they may say something, and then an adult gets wind of that and then they report that. Is that generally what happens? In the end, what is it that causes it? Isn't it that the child says . . . something is bothering me."7

[\*P18] Next, the prosecutor asked, "So you as jurors in

a case like this, are you going to require anything more in terms of physical evidence [\*\*\*10] corroboration necessarily?" After receiving an inaudible response, she began talking about "CSI or Law and Order or Boston Legal" regarding "physical evidence" and asserted, "I'm just going to tell you that I think you know this, but it's actually an important concept to realize that we are not required to do CSI investigations or work. We just have to prove beyond a reasonable doubt." She asked, "Would any of [\*\*439] you require that type of evidence in order to convict someone of this type of crime?" When she saw "some brow furrowing" she followed up with one of the prospective jurors:

[Prosecutor]: What are you thinking up there, Ms.

[Ms. K.]: I'm thinking maybe so.

[Prosecutor]: Okay, maybe so. Okay, tell me about that. That's fine.

[Ms. K.]: I mean I don't know that it would need to be D—I don't know. I'm not sure what evidence[.]

Eventually the prosecutor elicited from Ms. K. that she would likely expect to see more evidence than solely "a child's report in and of itself."

[\*P19] With this understanding, the prosecutor switched course and began discussing "general rule[s]" about child sexual abuse. She asked, "[I]s a child abused in secret or somewhere where it is not secret?" Without [\*\*\*11] pausing for an answer, she stated,

So that's kind of a no brainer, right? Everybody understand[s] . . . who is usually there? The perpetrator and the child, right? Okay.

So who are the only two people in the world who really know what really happened? Just those two. If a child is touched, and it isn't reported immediately, is that something that we're necessarily going to have physical evidence of? Does that mean it didn't happen? No. Okay.

[\*P20] Next came a conversation about delayed reporting and why that might occur. Some prospective jurors provided answers—fear, guilt, and grooming.8

<sup>&</sup>lt;sup>7</sup> The official transcript ends this sentence with a period, rather than a question mark. Given the declaratory tone of most of this portion of the juror examination, we do not think that is a mistake.

<sup>&</sup>lt;sup>8</sup> The definition of grooming ranges from "testing the waters" and "breaking down boundaries so as to not get caught," see Benedict v. State, No. 05-15-00958-CR, 2016 Tex. App. LEXIS 7266, 2016 WL 3742127, at \*3 (Tex. App. July 7, 2016), to "less intrusive and less highly sexualized forms of sexual touching, done for the purpose of desensitizing the victim to future sexual contact," see People v. Steele, 283 Mich. App. 472, 769 N.W.2d 256, 269-70 (Mich. Ct. App.

When the answer "grooming" was given, the prosecutor replied, "Grooming, okay. Okay. Very good. Very good."

[\*P21] Changing tack, the prosecutor engaged in the following exchange:

[Prosecutor]: Now I sometimes do this, and it's really awful, but . . . I sometimes say—who do I want to pick on? I wonder if you would turn to Ms.

[M.] there and—is it [M.]?

[Ms. M.]: Uh-huh.

[Prosecutor]: Okay. If you would just *tell her about the very last sexual experience you had*, and if you could be very detailed, okay? Please make sure you don't (inaudible) the body parts and where everybody put everything and all of that. Would [\*\*\*12] you mind just turning and just sharing that with her?

Meaning to use this as a demonstration of how the court system often asks victims in child sexual abuse cases to testify as to "some pretty embarrassing things," she ended the inquiry without actually requiring the venire to engage in such an intimate conversation. She said, "I'm not going to ask you do that. Why do I ask that? Why do I ask that?" And when someone gave the answer she was looking for, she replied, "There we go. There we go."

[\*P22] The discussion shifted to the topic of changed stories and why someone might give different accounts of the same story. The prosecutor frequently replied to prospective jurors' answers by saying things like, "Yeah, exactly," or, "That's exactly right." Then she discussed with the venire whether we can "tell who touches children by looking at them." Receiving no answers from individual members of the jury pool, the prosecutor presented a string of questions, the answers to which were implied:

Can we tell by how much money they make? Can we tell by how old they are? Can we tell by how they look?

What about their personality? What about if they're very charming? Does that tell us? *Do charming people* [\*\*\*13] touch children? Do you think?<sup>9</sup>

<u>2009</u>). Given varying definitions of what grooming might mean, it can certainly be considered a loaded term and it is unclear from the record what the prospective juror was referring to.

[\*P23] [\*\*440] Finally, the prosecutor ended with what we consider standard juror examination questions regarding prospective jurors' willingness to "sit in judgment of another person," whether they would feel "uneasy about having to hear about sexual abuse," whether anyone "just doesn't want to be here," and whether there was "anything that [they could] think of that makes [them] feel like" they should not sit on the jury.

[\*P24] Defendant now argues that the prosecutor's juror examination was "more of a Socratic lecture on why the jurors should believe the [victims], despite and even because of the inconsistencies in their claims." He complains that "rather than asking questions designed to skillfully cull [honest] attitudes from the jurors, the prosecutor asked the panel of prospective jurors a number of rhetorical questions designed to indoctrinate the jurors on the State's theor[ies]" of the case.

**[\*P25]** The State responds that the juror examination simply involved "friendly responses to juror answers," and suggests that because "none of these questions or comments related to any particular witness or testimony," juror examination was "merely designed to ferret out biases **[\*\*\*14]** among the jurors that might predispose them to disbelieve children." For several reasons, we cannot agree that the prosecutor's juror examination was as innocuous as the State asserts.

[\*P26] First, the prosecutor posed "hypothetical questions closely approximating the facts of the case . . . and delivered a lecture." See <u>State v. Martin, 877 N.W.2d 859, 860 (lowa 2016)</u> (reviewing this and more concerning behavior in a prosecutor's juror examination but refusing to grant a new trial "[i]n part because [the defendant] did not object in the district court to all the statements he challenge[d] on appeal"). Such questions, and the relevant fact scenarios, included:

- "If a child is touched, and it isn't reported immediately, is that something that we're necessarily going to have physical evidence of? Does that mean it didn't happen? No. Okay." Defendant's daughters delayed reporting, and there was no physical evidence of their abuse.
- "Do charming people touch children?" The prosecutor later described Defendant as "charming."
- "So let's say someone decides to be really brave

the juror examination process prejudiced Defendant. See infra ¶ 38-40.

<sup>&</sup>lt;sup>9</sup> This portion of the juror examination is important in light of the State's closing argument, when the prosecutor mirrored these words: "[Defendant] is very charming. He's likeable." This passage particularly informs our consideration of whether

and say, 'Okay, okay, okay, I've been touching a kid.' That may happen. I've never seen it, but—I'm only kidding." Defendant never wavered on his position that he had never [\*\*\*15] touched his daughters inappropriately, and by presenting denial as an inference of guilt during juror examination, the prosecutor improperly indoctrinated the jury to react favorably to the same argument at trial.

**[\*P27]** Additionally, the prosecutor devoted much of her juror examination to making statements and posing rhetorical questions rather than inquiring into the prospective jurors' thoughts and attitudes, including:

- Making proclamations about the general pattern of sexual abuse, such as, "[I]s a child abused in secret or somewhere where it is not secret? So that's kind of a no brainer, right?"
- Telling the venire its options for whom to believe at trial. "So who are the only two people in the world who really know what really happened? Just those two."
- Indicating when prospective jurors gave answers she liked and praising them, showing (despite her opening remarks to the contrary) that there were indeed right and wrong answers. "Okay. Very good. Very good." "There we go. There we go." "Yeah, exactly." "That's exactly right."

**[\*P28]** Finally, in many instances, the prosecutor posed questions without awaiting a response. "Isn't it that the child says . . . something is bothering me." "Everybody [\*\*\*16] understand[s] . . . who is usually there? The perpetrator and the child, right? Okay." On this point, we consider persuasive a Virginia case discussing juror examination questions posed by a trial judge.

Proof of a prospective juror's impartiality should come from him and not be based on [\*\*441] his mere assent to persuasive suggestions. When asked by the court, a suggestive question produces an even more unreliable response. A juror's desire to say the right thing or to please the authoritative figure of the judge, if encouraged, creates doubt about the candor of the juror's responses.

Bradbury v. Commonwealth, 40 Va. App. 176, 578 S.E.2d 93, 95 (Va. Ct. App. 2003) (cleaned up). And like the judge's questions in Bradbury, the prosecutor's questions in the present case

were leading, long, and complex. They suggested the answer that the [prosecutor] preferred to hear, compressed several issues into one phrase, and generally incorporated several legal concepts. These questions constituted persuasive suggestions more than an impartial inquiry and, as such, were an ineffective means [of conducting voir dire].

See <u>id. at 96</u> (citation omitted). While jurors ordinarily might place more weight on a judge's comments than those of the State, the State's representative commands similar respect, [\*\*\*17] and with that respect the same inherent danger exists that, when improperly prompted, a juror will attempt to say the "right" thing or otherwise please the prosecutor with certain responses. This danger is heightened in a group setting where jurors may be inclined to make socially acceptable responses.

[\*P29] The process employed by the prosecutor in this case was not designed to find out what jurors' thoughts or attitudes were, but instead served as an attempt to influence the jury panel—in effect intentionally tainting it with a bias favorable to the State's case. And while the prosecutor never couched her questions or comments by reference to a specific victim, it is clear, given the context, that the prosecutor was essentially arguing the State's case and inappropriately bolstering the anticipated testimony of the alleged victims.

**[\*P30]** This is not the purpose of juror examination. See *supra* ¶ 13. HN9 A party is not permitted to

<sup>10</sup> This is to say nothing of the concept of "commitment" or "stake out" questions. See Haarhuis v. Cheek, 805 S.E.2d 720, 725 (N.C. Ct. App. 2017) ("A stake out question asks a juror to pledge himself or herself to a future course of action by asking what verdict the prospective juror would render, or how they would be inclined to vote, under a given state of facts." (cleaned up)); Standefer v. State, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001) ("Commitment questions are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact."). Some states have prohibited these sorts of questions during juror examination altogether. See, e.g., Stewart v. State, 399 Md. 146, 923 A.2d 44, 54 (Md. 2007); State v. Parks, 324 N.C. 420, 378 S.E.2d 785, 787 (N.C. 1989); Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 756 (Tex. 2006); Standefer, 59 S.W.3d at 183. And while we have encountered no Utah case addressing these sorts of questions, we note that the prosecutor's juror examination included questions that may offend the standards of those other states. See supra ¶ 18 ("[A]re you going to require anything more in terms of physical evidence or other corroboration necessarily?"; "Would any of you require that type of evidence in order to convict someone of this type of crime?").

argue a case under the auspices of jury selection. A majority of the cases we discovered that have ruled on this issue do not allow questions or statements that serve to "pre-educate and indoctrinate jurors as to the [party's] theory of the case." [\*\*\*18] People v. Boston, 383 III. App. 3d 352, 893 N.E.2d 677, 681, 323 III. Dec. 405 (III. App. Ct. 2008); see also, e.g., People v. Landry, 2 Cal. 5th 52, 211 Cal. Rptr. 3d 160, 385 P.3d 327, 354 (Cal. 2016) (holding that it is not the purpose of juror examination to educate, compel, prejudice, indoctrinate, or instruct the jury); Preston v. State, 306 A.2d 712, 715 (Del. 1973) ("Too often we see the [v]oir dire process being misused to argue the case, to indoctrinate the jury, and to seek other undue advantage."); People v. Bell, 152 III. App. 3d 1007, 505 N.E.2d 365, 373, 106 III. Dec. 59 (III. App. Ct. 1987) (reversing where a juror examination "went beyond a probe for bias and sought to educate the jury and convert the panel to [the prosecutor's] beliefs" and other grounds); Coy v. State, 720 N.E.2d 370, 372 (Ind. 1999) (holding a party's "attempt to indoctrinate the jury during [juror examination] may require reversal if his or her questions amount to misconduct"); State v. Iromuanya, 282 Neb. 798, 806 N.W.2d 404, 425 (Neb. 2011) (holding that "parties may not use [juror examination] to impanel a jury with a predetermined disposition or to indoctrinate jurors to react favorably to a [\*\*442] party's position"); Khoury v. Seastrand, 377 P.3d 81, 86 (Nev. 2016) (noting that "while counsel may inquire to determine prejudice, he cannot indoctrinate or persuade the jurors" (cleaned up)); State v. Broyhill, 803 S.E.2d 832, 841 (N.C. Ct. App. 2017) (holding that counsel may not attempt to cause jurors to "pledge themselves to a particular position in advance of the actual presentation of the evidence"(cleaned up)); State v. Frederiksen, 40 Wn. App. 749, 700 P.2d 369, 374 (Wash. Ct. App. 1985) (noting that juror examination questions must be reasonably calculated to "discover an actual and likely source of prejudice" [\*\*\*19] (cleaned up)).

[\*P31] Furthermore, a majority of the cases that we have discovered relevant to this issue have held that questions or statements about specific defenses, scenarios, or evidence—even presented as hypotheticals—should be excluded from juror examination.

11 See, e.g., Boston, 893 N.E.2d at 681;

see also Steelman v. State, 602 N.E.2d 152, 158 (Ind. Ct. App. 1992) (holding that juror examination "should not be used to begin trying the case before evidence has been presented"); State v. Holmes, 5 So. 3d 42, 56 (La. 2008) (holding that "Louisiana law clearly establishes that a party interviewing a prospective juror may not ask a question or pose a hypothetical scenario which would demand a commitment or pre-judgment from the juror"); Iromuanya, 806 N.W.2d at 425 (holding that "counsel may not use [juror examination] to preview prospective jurors' opinions of the evidence that will be presented"); State v. Johnson, 209 N.C. App. 682, 706 S.E.2d 790, 793 (N.C. Ct. App. 2011) (noting that "a defendant is not entitled to put on a mini-trial of his during evidence [juror examination] by hypothetical questions [or] situations to determine whether a juror would cast a vote for his theory"); Broyhill, 803 S.E.2d at 841 (holding that "stakeout" questions were improper where counsel posed "hypothetical evidence or scenarios to attempt to 'stakeout' prospective jurors" (cleaned up)); State v. Janis, 2016 SD 43, ¶ 23, 880 N.W.2d 76 (holding that "questions regarding what the jurors considered [\*\*\*20] to be signs of intoxication" were impermissible). Simply stated, these types of "stakeout" questions are improper.

[\*P32] The issue of determining when a juror examination has crossed the line into impermissible indoctrination is one of first impression. While Utah case law does address situations in which the juror examination is too restrictive, we have not found any Utah case discussing when juror examination is too permissive. See State v. Saunders, 1999 UT 59, ¶¶ 38, 43, 992 P.2d 951 (reversing and remanding where defense counsel was prohibited from investigating possible bias regarding "specialized knowledge concerning child sexual abuse" during examination); State v. Holm, 2017 UT App 148, ¶ 18, 402 P.3d 193 (reversing and remanding where the trial court did not permit questions regarding "jurors' experiences and the experiences of persons close to them in serious car collisions"); Alcazar v. University of Utah Hosps. & Clinics, 2008 UT App 222, ¶ 1, 188 P.3d 490 (reversing and remanding where the trial court refused to allow questions regarding jurors' attitudes toward tort reform and medical malpractice).

[\*P33] Nevertheless, as pointed out above, the proper purpose of juror examination is well established in Utah law. The prosecutor's approach departed from this well-established purpose and the prosecutor's departure should have been obvious to the judge. Looking [\*\*\*21]

<sup>&</sup>lt;sup>11</sup>While there are exceptions for "matters of intense controversy," those exceptions do not apply in the present case against Defendant. See <u>People v. Boston, 383 III. App. 3d 352, 893 N.E.2d 677, 681, 323 III. Dec. 405 (III. App. Ct. 2008)</u>.

to other jurisdictions supports the conclusion that error occurred here. People v. Knight. 2013 IL App (4th) 111127-U, is instructive in this case. There, the court reviewed a defendant's convictions for sexual assault and aggravated sexual abuse. Id. ¶ 2. During juror examination, the prosecutor asked prospective jurors, "Would somebody volunteer to tell all of us about your last sexual experience?" Id. ¶ 6. Presumably because no one volunteered, the prosecutor followed up with, "How about last year, experience from last year? Doesn't have to be the most recent." Id. Again, the prosecutor had no takers. So he asked a specific prospective juror, "Why didn't you raise your hand and tell everybody about [\*\*443] that[?]" Id. This led to a discussion about "feelings of nervousness embarrassment and that sort of thing involved and attached to that question," as well as how difficult it would be for a fifteen-year-old girl to share details about sexual abuse by her stepfather. Id.

**[\*P34]** The Illinois Appellate Court reviewed for plain error the defendant's claim that "the prosecutor improperly indoctrinated the jurors during [juror examination]." *Id.* ¶ 33. Noting that "[t]he threshold question, o[f] course, is whether any error occurred at all," [\*\*\*22] the court concluded, "Here, an error occurred." *Id.* ¶¶ 35-36. It explained:

[Juror examination] is not to be used as a means of indoctrinating a jury, or impaneling a jury with a particular predisposition. In this case, the prosecutor erroneously incorporated specific facts from his case into his [juror examination] inquiry, essentially attempting to bolster his star witness's credibility before the trial began[.]

*Id.* ¶ 36 (cleaned up). Ultimately, though, the Illinois court concluded that the defendant had not been prejudiced by this error and affirmed his convictions. *Id.* ¶¶  $37, 50.^{12}$ 

[\*P35] The similarity between portions of the State's juror examination in the present case and that at issue in *Knight* allows us to easily and similarly conclude, "Here, an error occurred." See id. ¶ 36. Both cases involved a father figure allegedly sexually abusing his

daughters. Both prosecutors asked inappropriately intimate questions about the jurors' sex lives. Both prosecutors used their examination questions to segue to a discussion regarding the difficulties of sharing intimate details in a public setting. And in doing so, both prosecutors improperly attempted to bolster the victim's credibility. We [\*\*\*23] accordingly conclude, like the Illinois Appellate Court, that the "prosecutor should never have asked these questions, and once they were asked, the trial court should have emphatically stopped this line of inquiry." See id. ¶ 44. Because the trial court presiding over Defendant's case did not intervene, it erred

[\*P36] We note that in the present case, the improper juror examination went far beyond the error identified in Knight. Additional problematic questions posed by the prosecutor in this case make it a clear call. Here, the prosecutor impermissibly used juror examination to preview and argue her case, explaining how child sex abuse cases are reported, investigated, and proven at trial and coaching the potential jury members on how they should evaluate the evidence. In People v. Boston. 383 III. App. 3d 352, 893 N.E.2d 677, 323 III. Dec. 405 (III. App. Ct. 2008), the Appellate Court of Illinois reversed and remanded the trial court's decision to allow counsel to ask similar questions, such as

is there anyone that believes if a person or a woman gets an order of protection against someone and then invites that person over that she has the [order of protection] against, does anyone believe that the invitation itself equals consent to a later sexual act? . . . [I]s there anyone [\*\*\*24] that believes a person consents to a sexual act if they [do not] scream or fight or kick or yell or scratch or hit? Anyone require a victim to do any of those things while [she is] being assaulted?

<u>Id. at 681</u>. The court held that these questions impermissibly "highlighted factual details about the case and asked prospective jurors to prejudge those facts." <u>Id.</u>

[\*P37] Again, we conclude that a similar error occurred in this case, which should have been obvious to the trial court.<sup>13</sup> When the prosecutor veered from acceptable

<sup>&</sup>lt;sup>12</sup> However, a member of the panel dissented, arguing "the error rises to the level of plain error." *People v. Knight, 2013 IL App (4th) 111127-U,* ¶ *53* (Turner, J., dissenting). Because the case "hinged on credibility," and the prosecutor's improper juror examination was "designed to bias the jurors in assessing credibility," the dissent concluded that the error was prejudicial. *Id.* ¶ *54*.

<sup>13</sup> Illinois's plain-error doctrine requires "a clear or obvious error," *id.* ¶ 34 (majority opinion), similar to <u>HN11</u>[♠] our requirement that an appellant arguing plain error demonstrate that "the error should have been obvious to the trial court," <u>State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993)</u>. Thus,

juror [\*\*444] examination territory, the trial court allowed it. Furthermore, the trial court allowed the prosecutor to improperly bolster the anticipated testimony of the daughters and invited the jury to prejudge the case. <a href="https://hww.nu.ni.nlm.nu.nl

**[\*P38]** As stated, the multiplicity of the prosecutor's divergence from the established purpose **[\*\*\*25]** of juror examination was error and should have been obvious to the trial court. We are thus tasked with considering whether "absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined." *State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993)*. We conclude that had error not occurred, there is a reasonable likelihood that Defendant would have had a more favorable outcome. Our reasoning is two-fold.

[\*P39] First, the prosecutor's attempts to bolster the victims' credibility were not isolated incidents, but permeated the State's entire juror examination. When she did ask questions, they were almost always premised on facts—presented as hypotheticals—that mirrored the actual facts of this case. See supra ¶¶ 27-28. Instead of asking open-ended questions, her questions resembled those one would expect to hear on cross-examination. See supra ¶¶ 27-28. In short, where the juror examination process was replete with suggestive questions and improper allusions to the actual facts of this case, and lacking in questions meant

while the *Knight* court did not explicitly decide that the error was clear or obvious, its conclusion that there was an error implies that clear or obvious error occurred.

14 HN12 In Utah's trial courts, the days of perfunctory—and often insufficient—judge-only-conducted juror examination are gone. Indeed, our rules now expressly provide for attorney-conducted juror examination, see <u>Utah R. Crim. P. 18(b)</u>, and many judges and attorneys wisely embrace the conscientious use of a well-drafted questionnaire. But a free-for-all attorney-conducted juror examination in the presence of the entire venire carries with it a substantial risk of irreparably tainting the entire panel and effectively guaranteeing the resulting mistrial.

to root out biases, Defendant's trial was tainted before it began.

[\*P40] Second, the case turned on the credibility of the victims, and [\*\*\*26] the improper juror examination predisposed the jury to believe the victims' testimony, despite evidence of inconsistency. We acknowledge that the State presented a large amount of evidence indicating Defendant's guilt. But that evidence was not without its problems, and ultimately the case turned entirely on the victims' testimony. The incongruities in the daughters' testimony, see supra ¶¶ 5-8, thus compound the concerns that began during juror examination and undermine our confidence in Defendant's convictions. See <u>Dunn</u>, 850 P.2d at 1209. We therefore reverse.

#### CONCLUSION

**[\*P41]** We reverse Defendant's convictions. Given the trial court's failure to intervene in the State's improper juror examination, the court plainly erred. Coupled with the inconsistencies in the evidence, our confidence in the jury's verdicts is undermined. We therefore remand for a new trial.

**End of Document** 

## Excerpt from the 2015 Massachusetts rule creating a right to attorney-conducted voir dire

When practicable, excuses of jurors shall be presented under oath to the presiding justice in the session to which such jurors are summoned, or, where jurors are held in a central pool, to the justice in charge thereof.

If it is necessary to present such excuses before the return day of the venire, they shall be submitted to the justice assigned to sit in said session, if available, or, where jurors are held in a central pool, to the justice in charge thereof, or to the chief justice; and, if unavailable, by jurors in Suffolk to the justice presiding in the first session without jury; and by jurors in other counties to a justice holding court or resident in such county or an adjoining county. If any juror is excused in any place other than in open court, the justice excusing him shall forthwith notify the clerk of his action and the ground thereof. The word jurors in this rule shall include grand jurors.

## Rule 6. Jury Selection

### (Applicable to all cases)

1. Subject to applicable statutes, rules, and controlling authority, the trial judge in each case has discretion to determine a procedure for examining and selecting jurors designed to maintain juror privacy and dignity, identify explicit and implicit bias, and foster efficiency in the session and among sessions using the same jury pool. This rule provides a standard procedure for each civil and criminal case unless otherwise ordered by the trial judge, while permitting attorneys and self-represented parties a fair opportunity to participate in voir dire so as to identify bias.

### 2. Conference With the Trial Judge

a. In civil cases, unless otherwise ordered, the court shall schedule a final trial conference in accordance with Standing Order 1-88, as may be amended from time to time. In criminal cases, unless otherwise ordered, a final pretrial conference shall be scheduled in accordance with Standing Order 2-86. These conferences with the trial judge shortly before trial serve as the primary opportunity to discuss empanelment, including without limitation: the statement of the case to be read to the venire; the extent of any pre-charge on significant legal principles; the method and content of the judge's intended voir dire of jurors; the method and content of any attorney or party participation in voir dire; judicial approval or disapproval of proposed questions or subject matters; any time limits on attorney or party voir dire; the number of jurors to be seated; any agreement to allow deliberation by fewer jurors if seated jurors are dismissed post-empanelment; the content and method of employing any supplemental juror questionnaire; the number of peremptories; and the order and timing of the parties' assertions of challenges for cause and peremptory challenges.

b. If the court has not scheduled a final trial conference in a civil case or a final pre-trial conference in a criminal case, any party planning to submit a request, proposal, or motion regarding jury selection should request such a conference or submit a motion requesting voir dire procedures in time for a pretrial ruling by the trial judge. All parties shall avoid proposing jury selection procedures (including attorney/party voir dire) for the first time on the day of trial.

## 3. Voir Dire by Attorneys and Parties

- a. On or before the final trial conference in a civil case or final pre-trial conference in a criminal case, or 5 business days before trial if no such conference is scheduled, the parties shall submit in writing any requests for attorney/party voir dire; motions in limine concerning the method of jury selection; proposed subject matters or questions for inquiry by the parties or trial judge; any proposed supplemental questionnaire; any proposed preliminary legal instructions to the venire or juror panels; the location within the courtroom where jurors and parties will stand or sit during voir dire; and any other matter setting forth the party's position regarding empanelment.
- b. The trial judge shall allow attorney or party voir dire if properly requested at or before the time set forth in paragraph 3(a), above. The trial judge may deem any subsequent request for attorney or party voir dire untimely, but may in the judge's discretion allow the request in the absence of prejudice to any other party or significant impact on trial efficiency or on other sessions using the same jury pool.
- c. When attorney or party voir dire is allowed, the trial judge shall, at a minimum, allow the attorneys or parties to ask reasonable follow-up questions seeking elaboration or explanation concerning juror responses to the judge's questions, or concerning any written questionnaire. After considering the goals set forth in paragraph 1 above, the trial judge should generally approve a reasonable number of questions that (i) seek factual information about the prospective juror's background and experience pertinent to the issues expected to arise in the case; (ii) may reveal preconceptions or biases relating to the identity of the parties or the nature of the claims or issues expected to arise in the case; (iii) inquire into the prospective jurors' willingness and ability to accept and apply pertinent legal principles as instructed; and (iv) are meant to elicit information on subjects that controlling authority has identified as preferred subjects of inquiry, even if not absolutely required.
- d. At the final trial conference in a civil case, or final pre-trial conference in a criminal case (or in a written submission in lieu of such conference), any attorney or party wishing to inquire into any of the following disfavored subjects must explain how the inquiry is relevant to the issues, may affect the juror's impartiality, or may assist the proper exercise of peremptory challenges:
  - i. The juror's political views, voting patterns or party preferences;
  - ii. The juror's religious beliefs or affiliation.

#### e. Counsel and Parties May Not Ask:

- i. Questions framed in terms of how the juror would decide this case (prejudgment), including hypotheticals that are close/specific to the facts of this case (any hypotheticals that may trigger this rule must be presented to the judge before trial).
- ii. Questions that seek to commit juror(s) to a result, including, without limitation, questions about what evidence would cause the juror(s) to find for the attorney's client or the party.
- iii. Questions having no substantial purpose other than to argue an attorney's or party's case or indoctrinate any juror(s).

- iv. Questions about the outcome in prior cases where the person has served as a juror, including the prior vote(s) of the juror or the verdict of the entire jury.
- v. Questions in the presence of other jurors that specifically reference what is written on a particular juror's confidential juror questionnaire.
- f. The trial judge may impose reasonable restrictions on the subject matter, time, or method of attorney or party voir dire and shall so inform the attorneys or parties before empanelment begins.
- g. In approving or disapproving voir dire questions and procedures, the trial judge, on request, should consider whether questions or methods proposed by the attorneys or parties may assist in identifying explicit or implicit bias.
- h. If employing panel voir dire, the trial judge shall determine the procedure and may elect to follow the method set forth in Addendum A or adopt variations thereof. The trial judge may also elect to use some of the methods set forth in Addendum A even if not employing panel voir dire. Nothing in Appendix A restricts the trial judge from selecting an alternative method of voir dire, including but not limited to:
  - i. Filling empty seats as they arise due to challenges for cause or the exercise of peremptories. The trial judge may do this by clearing additional prospective jurors or filling in from additional already cleared jurors;
  - ii. The "Walker method": Through panel voir dire or otherwise, the trial judge may clear as indifferent a number of prospective jurors that equals or exceeds the total number of jurors needed, plus alternates, plus the total number of peremptory challenges held by the parties. See <a href="Commonwealth v. Walker">Commonwealth v. Walker</a>, 379 Mass. 297, 299 n.1 (1979). But see <a href="Commonwealth v. Johnson">Commonwealth v. Johnson</a>, 417 Mass. 498, 507–508 (1994).

#### 4. Empanelment

- a. The trial judge shall ask all voir dire questions specifically required by statute, court rule, or controlling authority, but retains discretion as to when and how to do so. The trial judge may allow individual voir dire, panel voir dire, or any combination.
- b. Questioning shall occur through individual voir dire if (i) required by statute, rule, or controlling authority; (ii) inquiry concerns private or potentially embarrassing information; or (iii) questioning would specifically reference what is written on a particular juror's confidential juror questionnaire.
- c. The trial judge should consider some individual voir dire in all cases to (i) determine whether any juror has an impediment concerning hearing, language or visual ability, mental health, or comprehension and to determine whether a reasonable accommodation would enable the juror to serve; (ii) address any private or embarrassing information not disclosed in public portions of the voir dire; or (iii) identify any other impediment to jury service that the trial judge and parties might not observe without personal contact with the juror.
- d. Attorneys and parties shall limit their questioning of any juror(s) to such subject matters and methods as previously approved by the trial judge and shall avoid questions set forth in paragraph 3(e) above, even as follow-up, without court approval.

#### e. Questions about the Law

- i. If the parties have obtained approval to ask voir dire questions about the law, the trial judge shall take appropriate measures to ensure that the jury is accurately and effectively instructed on the law. Such measures may include, but are not limited to: a brief precharge; requiring the questioner to use the words specifically approved by the judge; stating the law in a written supplemental questionnaire; or contemporaneous instructions by the trial judge at the time the question is asked.
- ii. If a juror asks counsel a question to clarify an aspect of the law, counsel shall request that the trial judge answer the question; the trial judge may interrupt if counsel attempts to respond to a juror question by instructing on such a point of law.
- f. Any party may object to a question posed by another party by stating "objection," without elaboration or argument. The trial judge may rule on the objection in, or outside of, the juror's presence. The trial judge may, on the judge's own motion, strike or rephrase a party's question and may interrupt or supplement a party's questioning to provide the juror(s) with an explanation of the law or the jury trial process, or to ask any additional questions that the trial judge believes will assist the trial judge in determining the juror's impartiality.
- g. Counsel and the parties must ensure an accurate record of attorney or party voir dire. In an electronically recorded courtroom, counsel must stand near a microphone at all times. During panel voir dire in any courtroom, counsel must also call out the juror seat number (or juror number) of any individual juror who is questioned individually or who responds audibly. Failure to do so may constitute a waiver of any claim of error arising from any inaudible or unattributable portions of the record.

#### h. Challenges for Cause

- i. The court will consider all its observations, including the juror's responses, to determine whether or not the juror will be fair, focus on the facts of the case and follow the law despite a particular viewpoint or experience.
- ii. Whether at side bar or during panel inquiry, a juror's "yes" or "no" answer to a question about a viewpoint or experience may not, by itself, support a challenge for cause. If intending to challenge a juror for cause as a result of attorney or party voir dire, the questioner ordinarily should lay an adequate foundation showing that, in light of the information or viewpoint expressed, the juror may not be fair and impartial and decide the case solely on the facts and law presented at trial. The court may inquire further or may decide without further questioning, if the judge believes that the existing record is sufficient to resolve the challenge for cause.

### i. Peremptory Challenges

i. After the trial judge finds that each juror stands indifferent, the parties shall exercise their peremptory challenges. The trial judge may require exercise of peremptory challenges after completion of side bar inquiry of an individual juror, after filling the jury box with jurors found to stand indifferent, or at some other time after the trial judge's finding of indifference.

## HEADS UP: THE INTRODUCTION OF ATTORNEY-CONDUCTED VOIR DIRE IN MASSACHUSETTS

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#### Text

[\*1] Last year, the Massachusetts Legislature enacted <u>General Laws chapter 254, § 2</u>, permitting <u>attorneys</u> (and self-represented parties) in Superior Court criminal and civil cases to examine prospective jurors. The Supreme Judicial Court subsequently created the Committee on Juror <u>Voir Dire</u> composed of judges, court officials, academics, and practitioners to help implement the new statute.

The Committee's efforts led to two important initiatives: <u>Superior Court Standing Order 1-15</u>, an interim order setting forth the procedures for <u>attorney-conducted voir dire</u> in the Superior Courts, and, in conjunction with the Superior Court, the creation of the <u>Panel Voir Dire Pilot Project</u>, which will provide the opportunity to <u>conduct</u> group or "panel" <u>voir dire</u> in selected Superior Courts.

The Standing Order now guides the process for all <u>attorney-conducted voir dire</u> in the Superior Courts. For now, it will be up to the discretion of each individual Superior Court Justice whether to permit <u>attorney-conducted voir dire</u>, except in the case of Superior Court Justices who have volunteered to participate in the Pilot Project, where the right to <u>attorney-conducted voir dire</u> will be automatic.

#### The Standing Order

An <u>attorney</u> who wants to examine prospective jurors must first file a motion requesting leave to do so. In civil cases, the motion must follow the procedures of Superior Court Rule 9A. In criminal cases, the motion must be served on all parties at least one week before filing and the opposition shall be filed with the court not later than two business days before the scheduled date of the final pre-trial conference. The motion shall identify generally the topics of the questions which the moving party proposes to ask prospective jurors, though reasonable follow-up questions will be permitted. The trial judge decides what questions are appropriate, but must give due regard to: (a) selecting jurors who will decide the case fairly and based solely on the evidence and the law; (b) <u>conducting</u> the selection process with reasonable expedition: and (c) respecting the dignity and privacy of each potential juror.

[\*2] Generally, a court should approve questions that: (a) seek factual information about a prospective juror's background and experience pertinent to the issues expected to arise in the case; (b) elicit pertinent preconceptions or biases; and (c) inquire about the prospective jurors' willingness and ability to accept and apply pertinent legal principles.

A court should generally disapprove questions that: (a) duplicate questions appearing on the juror questionnaire; (b) seek information about a potential juror's political views or voting pattern; (c) ask about the outcome of or deliberation in any trial in which the prospective juror has previously served; or (d) purport to instruct jurors on the law, require speculation about facts or law, are argumentative or would tend to embarrass or offend jurors, or unduly invade their privacy.

As in prior practice, before any jurors are questioned, the trial judge shall provide the venire with a brief description of the case, including the facts alleged and the claims or charges being brought, as well as brief preliminary instructions on legally significant principles such as the standard of proof and the basic elements of the civil claims or criminal charges. The judge then shall proceed to ask all questions required by statute, and any other questions necessary to find jurors indifferent. As with prior practice, the judge may ask these questions of the venire as a group but should <u>conduct</u> at least part of the questioning of each prospective juror individually outside the presence or hearing of other jurors.

After the judge has found an individual juror indifferent and able to serve, the judge shall permit the <u>attorneys</u> to ask the previously approved line of questions. The questioning shall begin with the party having the burden of proof. The judge may require the questioning of each prospective juror to be <u>conducted</u> individually and outside the presence (or at least the hearing) of the other potential jurors.

Perhaps the most significant provision of the interim order is that it allows counsel to question jurors as a panel during <u>voir dire</u>. In such group questioning, the judge shall not permit questions that would elicit sensitive, personal information about an individual juror or that would specifically reference information provided in the jurors' statutory confidential jury questionnaire (such information is required to be kept confidential under Chapter 234A, § 23 and so may only be elicited outside of the presence or hearing of the other members of the jury pool). If this procedure is followed, jurors shall be identified on the record by juror number only.

The trial judge may set a reasonable time limit for questioning of prospective jurors by <u>attorneys</u>, according to guidelines set forth in the interim order. Once the <u>attorneys</u> are through questioning, the parties may assert challenges for cause, even though the judge previously found the challenged jurors indifferent.

### The Panel Voir Dire Pilot Project

To facilitate the introduction of so-called "panel <u>voir dire</u>," a subcommittee of the Committee on Jury <u>Voir Dire</u> and the Superior Court created a Pilot Project in which certain Superior Court Justices have [\*3] volunteered to <u>conduct</u> panel <u>voir dire</u> according to the principles established in the Standing Order. (The list of participating Courts can be found on the <u>Trial Court website</u>.) The Pilot Project will gather data on <u>attorney-conducted voir dire</u> to evaluate the efficacy of this selection process. Upon the completion of the Pilot Project, the Committee will issue a report on its findings, including suggested changes to the Interim Standing Order.

In Pilot Project courts, parties must still make a request for <u>attorney-conducted voir dire</u> in compliance with Standing Order 1-15. In cases where the parties are represented by counsel, jury selection in the Pilot Project shall include panel <u>voir dire</u> except for good cause shown. At the final pretrial conference, the judge shall confer with counsel as to the mechanics of the panel <u>voir dire</u> process, including the use of a supplemental jury questionnaire and the establishment of time limits on questioning.

At trial, once the preliminary steps in jury selection are completed, the court should seat up to 16 jurors based on the judge's preliminary findings of indifference. As the jury box is filled, and before any <u>attorney</u> questioning is allowed, the clerk shall read into the record which juror, identified by juror number, is seated in which numbered seat. It is incumbent upon the trial <u>attorneys</u> to correct any misstatements regarding any potential juror's number and seating. Also, as in prior practice, it is important for <u>attorneys</u> to keep track of this designation as they must address potential jurors by their identification number rather than by name.

Parties with the burden of proof shall **conduct** the questioning first. In cases in which multiple parties are on the same side, the parties on each side shall agree to an order in which to proceed. The questions may be posed by

counsel to the entire jury panel or to an individual juror. An <u>attorney</u> is free to object to any question posed to the jury panel by an opposing <u>attorney</u>, and the court may openly rule on the objection.

During this process, the nature of a proposed question or the particular circumstances of an individual juror may warrant bringing a juror to side bar. The judge may rule on any challenge or cause at that time or at the conclusion of the panel questioning. Furthermore, if the juror is brought to side bar, the judge may direct the parties to do their own questioning on the same subject matter at that time to avoid the need to return to side bar for related questioning. No follow-up questioning of a panel is allowed once an <u>attorney</u> has had his or her turn with questioning an individual juror except in the judge's discretion and for good cause shown.

After all parties have questioned a panel, challenges for cause shall be heard and ruled upon at side bar. The parties then exercise any preemptory challenges they have as to the remaining panel members. Again, the party with the burden proceeds first, using all preemptory challenges the party seeks to use with that panel. If the first round of questioning of jurors does not result in a full panel, the same procedure shall apply for all subsequent panels required to seat a full jury.

[\*4] The Superior Court will solicit feedback from participants in the Pilot Project, including judges, court personnel, <u>attorneys</u>, and jurors. It is expected that this feedback will be used to evaluate <u>attorney-conducted voir dire</u> and modify Standing Order 1-15 as appropriate.

#### Conclusion

The introduction of <u>attorney voir dire</u> in Massachusetts is a significant development in trial practice and a new opportunity for trial counsel, though the practical effects of <u>attorney voir dire</u> remain to be seen. Whatever those effects might be, it is important for trial <u>attorneys</u> to learn and properly apply the interim procedures and then provide appropriate feedback to help shape the final form of these rules.

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## Tab 3

## **Utah Courts**

## **URCRP Rule 14** (Rules of Criminal Procedure)

## Rule 14. Subpoenas

Rule printed on July 14, 2022 at 12:06 pm. Go to https://www.utcourts.gov/rules for current rules.

Effective: 1/1/2020

- (a) Subpoenas requiring the attendance of a witness or interpreter and production or inspection of records, papers, or other objects.
- (a)(1) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending must issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.
- (a)(2) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects, other than those records pertaining to a victim covered by Subsection (b). The court may quash or modify the subpoena if compliance would be unreasonable.
- (a)(3) A subpoena may be served by any person over the age of 18 years who is not a party. Service must be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying the witness or interpreter of the contents. A peace officer must serve any subpoena delivered for service in the peace officer's county.
- (a)(4) Written return of service of a subpoena must be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.
- (a)(5) A subpoena may compel the attendance of a witness from anywhere in the state.
- (a)(6) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring the witness before the court.
- (a)(7) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.
- (a)(8) If a party has reason to believe a material witness is about to leave the state, will be too ill or infirm to attend a trial or hearing, or will not appear and testify pursuant to a subpoena, the party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. The party must file an affidavit providing

facts to support the party's request. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court will make whatever order is necessary to effect such attendance. A deposition may be used as substantive evidence at the trial or hearing to the extent it would otherwise be admissible under the Rules of Evidence if the witness is too ill or infirm to attend, the party offering the deposition has been unable to obtain the attendance of the witness by subpoena, or the witness refuses to testify despite a court order to do so.

## (b) Subpoenas for the production of records of victim.

- (b)(1) No subpoena or court order compelling the production of medical, mental health, school, or other privileged records pertaining to a victim shall be issued by or at the request of any party unless the court finds after a hearing, upon notice as provided below, that the records are material and the party is entitled to production of the records sought under applicable rules of privilege, and state and federal law.
- (b)(2) The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.
- (b)(3) The request for the subpoena or court order shall be filed with the court as soon as practicable, but no later than 28 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the opposing party. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the request for the subpoena to the victim or victim's representative within 14 days of receiving it.
- (b)(4) If the court makes the required findings under subsection (b)(1), it must issue a subpoena or order requiring the production of the records to the court. The court will then conduct an in camera review of the records and disclose to the defense and prosecution only those portions that the requesting party has demonstrated a right to inspect.
- (b)(5) Any party issuing a subpoena for non-privileged records, papers or other objects pertaining to a victim must serve a copy of the subpoena upon the victim or victim's representative. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the subpoena to the victim within 14 days of receiving it. The subpoena may not require compliance in less than 14 days after service on the prosecutor or victim's representative.
- (b)(6) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.
- (b)(7) For purposes of this rule, "victim" and "victim's representative" are used as defined in Utah Code § 77-38-2.
- (b)(8) Nothing in this rule alters or supersedes other rules, privileges, statutes or caselaw pertaining to the release or admissibility of an individual's medical, psychological, school or other records.

(c) <b>Applicability of Rule 45, Utah Rules of Civil Procedure.</b> The provisions of Rule 45, Utah Rules of Civil Procedure, will govern the content, issuance, objections to, and service of subpoenas to the extent those provisions are consistent with the Utah Rules of Criminal Procedure.

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