Utah Pattern Jury Instructions
MUJI

Opening Instructions.

CR101 Introduction

(Ladies and Gentlemen) (Members of the Jury), you have been selected and sworn as the jury in this case. The defendant is accused of committing one or more crimes. You will decide if the defendant is guilty or not guilty. I will give you some instructions now and some later. You are required to consider and follow all my instructions. Keep an open mind throughout the trial. At the end of the trial you will discuss the evidence and reach a verdict. You took an oath to "well and truly try the issues pending between the parties" and to "render a true and just verdict." The oath is your promise to do your duty as a member of the jury. Be alert. Pay attention. Follow my instructions.

References

Utah R. Crim. P. 18(h).
Utah R. Crim. P. 19(a).
Utah Code Ann. § 77-17-10(1).

CR102 Information, Plea and Burden of Proof.

The prosecution has filed a document—called an "Information"—that contains the charges against the defendant. The Information is not evidence of anything. It is only a method of accusing a defendant of a crime. The Information will now be read.

(Read Information)

The defendant has entered a plea of not guilty and denies committing the crime(s). Every crime has component parts called "elements." The prosecution must prove each element beyond a reasonable doubt. Until then, you must presume that the defendant is not guilty. The defendant does not have to prove anything. (He) (She) does not have to testify, call witnesses, or present evidence.

References

Utah R. Crim. P. 4(b).
Utah Code Ann. § 76-1-501(1).
State v. Spillers, 2007 UT 13, ¶19, 152 P.3d 315.
State v. Lopez, 1999 UT 24, ¶13, 980 P.2d 191.
State v. Torres, 619 P.2d 694, 695 (Utah 1980).

CR103 Proof Beyond a Reasonable Doubt.

The prosecution has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the prosecution's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that (he) (she) is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.

References

In re Winship, 397 U.S. 358, 362 (1970).
State v. Reyes, 2005 UT 33, ¶37, 116 P.3d 305.
State v. Cruz, 2005 UT 45, ¶¶19-22, 122 P.3d 543.
State v. Austin, 2007 UT 55, 165 P.3d 1191.

Committee Notes

As an alternative to using the *Reyes* instruction, in *State v. Cruz*, 2005 UT 45, 122 P.3d 543 (argued the same day as *Reyes*) the Utah Supreme Court concluded that an alternative formulation of the reasonable doubt instruction, taken as a whole, adequately conveyed to the jury the concept of reasonable doubt, provided a clear and accurate definition of the concept, and correctly stated the prosecution's burden. Accordingly, the courts and counsel may appropriately use either the *Reyes* instruction or the collective reasonable doubt instructions used in *Cruz*.

CR104 Presumption of Innocence.

Remember, the fact that the defendant is charged with a crime is not evidence of guilt. The law presumes that the defendant is not guilty of the crime(s) charged. This presumption persists unless the prosecution's evidence convinces you beyond a reasonable doubt that the defendant is guilty.

References

Utah Code Ann. § 76-1-501(1).
Estelle v. Williams, 425 U.S. 501, 503 (1976).
Coffin v. United States, 156 U.S. 432, 453 (1895).
State v. Mitchell, 824 P.2d 469, 473 (Utah Ct. App. 1991).

CR105 Role of Judge, Jury and Lawyers.

All of us, judge, jury and lawyers, are officers of the court and have different roles during the trial:

As the judge I will supervise the trial, decide legal issues, and instruct you on the law.

As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.

The lawyers will present evidence and try to persuade you to decide the case in one way or the other.

Neither the lawyers nor I decide the case. That is your role. Do not be influenced by what you think our opinions might be. Make your decision based on the law given in my instructions and on the evidence presented in court.

References

Utah Code Ann. § 77-17-10(1).
Utah Code Ann. § 78A-2-201.
State v. Sisneros, 631 P.2d 856, 859 (Utah 1981).
State v. Gleason, 40 P.2d 222, 226 (Utah 1935).
75 Am. Jur.2d Trial §§ 714, 719, 817.

CR106 Evidence.

As jurors you will decide whether the defendant is guilty or not guilty. You must base your decision only on the evidence. Evidence usually consists of the testimony and exhibits presented at trial. Testimony is what witnesses say under oath. Exhibits are things like documents, photographs, or other physical objects. The fact that the defendant has been accused of a crime and brought to trial is not evidence. What the lawyers say is not evidence. For example, their opening statements and closing arguments are not evidence.

References

Utah R. Evid. 401.
Utah R. Evid. 603.
State v. Hall, 186 P.2d 970, 972 (Utah 1947).
29 Am. Jur.2d Evidence § 1.

CR107 Objections.

Rules govern what evidence may be presented to you. On the basis of these rules, the lawyers may object to proposed evidence. If they do, I will rule in one of two ways. If I sustain the objection, the proposed evidence will not be allowed. If I overrule the objection, the evidence will be allowed.

Do not evaluate the evidence on the basis of whether objections are made.

References

Utah R. Evid. 103.
75 Am. Jur.2d Trial § 395.

CR108 Order of the Trial.

I will now explain how the trial will unfold. The prosecution will give its opening statement. An opening statement gives an overview of the case from one point of view, and summarizes what that lawyer thinks the evidence will show. Defense counsel may choose to make an opening statement right after the prosecutor, or wait until after all of the prosecution's evidence has been presented, or not make one at all. You will then hear the prosecution's evidence. Evidence is usually presented by calling and questioning witnesses. What they say is called testimony. A witness is questioned first by the lawyer who called that witness and then by the opposing lawyer.

[**For judges who permit juror questions, add:** After the lawyers finish with their questions you will have the opportunity to submit questions. In a moment I will explain how to do this.]

Consider all testimony, whether from direct or cross-examination, regardless of who calls the witness. After the prosecution has presented all its evidence, the defendant may present evidence, though the defendant has no duty to do so. If the defendant does present evidence the prosecution may then present additional evidence. After both sides have presented all their evidence, I will give you final instructions on the law you must follow in reaching a verdict. You will then hear closing arguments from the lawyers. The prosecutor will speak first, followed by the defense counsel. Then the prosecutor speaks last, because the government has the burden of proof. Finally, you will deliberate in the jury room. You may take your notes with you. You will discuss the case and reach a verdict.

References

Utah R. Crim. P. 17(g), (i).

CR201 Closing Roadmap.

1. Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The prosecutor will go first, then the defense. Because the prosecution has the burden of proof, the prosecutor may give a rebuttal.

Finally, you will go to the jury room to discuss and decide the case.

References

Utah R. Crim. P. 17(g).

CR202 Juror Duties.

You have two main duties as jurors.

The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine.

The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction.

Perform your duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way. [You must also not let yourselves be influenced by public opinion.]

References

Utah R. Crim. P. 18(h).
Utah Code Ann. § 77-1-6.
Holland v. United States, 348 U.S. 121, 141 (1954).
United States v. Rith, 164 F.3d 1323, 1338 (10th Cir. 1999).
State v. Sisneros, 631 P.2d 856, 859 (Utah 1981).
State v. Gleason, 40 P.2d 222, 226 (Utah 1935).
75 Am. Jur.2d Trial §§ 719, 817.

CR203 Closing Arguments.

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

References

Utah Code Ann. § 77-17-10(1).
State v. Hall, 186 P.2d 970, 972 (Utah 1947).

CR204 Legal Rulings.

During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.

However,

if I sustained an objection,

if I did not accept evidence offered by one side or the other, or

if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

References

Utah Code Ann. § 77-17-10(1).

CR205 Judicial Neutrality.

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

References

State v. Beck, 2006 UT App 177, ¶11, 136 P.3d 1288.
State v. Mellen, 583 P.2d 46, 48 (Utah 1978).
State v. Gleason, 40 P.2d 222, 227 (Utah 1935).
Utah Code of Judicial Conduct, Canon 3.
75 Am. Jur.2d Trial § 272.

CR206 Evidence-Closing.

You must base your decision only on the evidence that you saw and heard here in court.

Evidence includes:

what the witnesses said while they were testifying under oath; and

any exhibits admitted into evidence.

Nothing else is evidence. The lawyers statements and arguments are not evidence. Their objections are not evidence. My legal rulings and comments, if any, are not evidence.

In reaching a verdict, consider all the evidence as I have defined it here, and nothing else. You may also draw all reasonable inferences from that evidence.

References

Utah R. Evid. 201.
Utah R. Evid. 401.
Utah R. Evid. 603.
Utah R. Crim. P. 18(l).
State v. Sisneros, 631 P.2d 856, 859 (Utah 1981).
State v. Hall, 186 P.2d 970, 972 (Utah 1947).
29 Am. Jur.2d Evidence § 1.

Committee Notes

If the lawyers have stipulated to certain facts, or if the court took "judicial notice" of certain facts, then one or both of the following bullet points should be added to the above list of what is evidence:

any facts to which the parties have stipulated, that is to say, facts to which they have agreed;

any facts of which I took as "judicial notice" and told you to accept as true.

CR207 Witness Credibility.

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony:

How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?

Does the witness have something to gain or lose from this case?

Does the witness have any connection to the people involved in this case?

Does the witness have any reason to lie or slant the testimony?

Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?

How believable was the witness's testimony in light of other evidence presented at trial?

How believable was the witness's testimony in light of human experience?

Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

References

Utah Code Ann. § 78B-1-128.
United States v. McKissick, 204 F.3d 1282, 1289 (10th Cir. 2000).
Toma v. Utah Power & Light Co., 365 P.2d 788, 792-793 (Utah 1961).
State v. Shockley, 80 P. 865, 879 (1905).
75 Am. Jur.2d Trial § 819.

CR208 Presumption of Innocence-Closing.

Remember, the fact that the defendant is charged with a crime is not evidence of guilt. The law presumes that the defendant is not guilty of the crime(s) charged. This presumption persists unless the prosecution's evidence convinces you beyond a reasonable doubt that the defendant is guilty.

References

Utah Code Ann. § 76-1-501(1).
Estelle v. Williams, 425 U.S. 501, 503 (1976).
Coffin v. United States, 156 U.S. 432, 453 (1895).
State v. Mitchell, 824 P.2d 469, 473 (Utah Ct. App. 1991).

CR209 Reasonable Doubt-Closing.

[As I instructed you before] Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If the evidence leaves you firmly convinced that the defendant is guilty of the crime charged, you must find the defendant "guilty." On the other hand, if there is a real possibility that (he) (she) is not guilty, you must give the defendant the benefit of the doubt and return a verdict of "not guilty."

References

In re Winship, 397 U.S. 358, 362 (1970).
State v. Reyes, 2005 UT 33, ¶37, 116 P.3d 305.
State v. Cruz, 2005 UT 45, ¶¶19-22, 122 P.3d 543.
State v. Austin, 2007 UT 55, 165 P.3d 1191.

Committee Notes

This is an abbreviated version of the reasonable doubt instruction approved in *State v. Reyes*, 2005 UT 33, 116 P.3d 305. The only difference is that it lacks the reference to the standard used in civil trials. This instruction may be used as a closing instruction if the full *Reyes* instruction was given as part of the preliminary instructions (as the Committee recommends). If that instruction was not given earlier, then the full *Reyes* instruction should be given at closing.

As an alternative to using the *Reyes* instruction, in *State v. Cruz*, 2005 UT 45, 122 P.3d 543 (argued the same day as *Reyes*) the Utah Supreme Court concluded that an alternative formulation of the reasonable doubt instruction, taken as a whole, adequately conveyed to the jury the concept of reasonable doubt, provided a clear and accurate definition of the concept, and correctly stated the prosecution's burden. Accordingly, the courts and counsel may appropriately

use either the *Reyes* instruction or the collective reasonable doubt instructions used in *Cruz*.

CR210 Direct/Circumstantial Evidence.

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

Before you can find the defendant guilty of any charge, there must be enough evidence—direct, circumstantial, or some of both—to convince you of the defendant's guilt beyond a reasonable doubt. It is up to you to decide.

References

29 Am. Jur.2d Evidence § 4.
29 Am. Jur.2d Evidence § 1468.

CR211A Defendant Testifying.

The defendant testified at trial. Another instruction mentions some things for you to think about in weighing testimony. Consider those same things in weighing the defendant's testimony. Don't reject the defendant's testimony merely because he or she is accused of a crime.

References

Utah Const. Art. I, § 12.
Utah Code Ann. § 77-1-6(1)(c).

CR211B Defendant Not Testifying.

A person accused of a crime may choose whether or not to testify. In this case the defendant chose not to testify. Do not hold that choice against the defendant. Do not try to guess why the defendant chose not to testify. Do not consider it in your deliberations. Decide the case only on the basis of the evidence. The defendant does not have to prove that he or she is not guilty. The prosecution must prove the defendant's guilt beyond a reasonable doubt.

References

Utah Const. Art. I, § 12.
Utah Code Ann. § 77-1-6(2)(c).
Carter v. Kentucky, 450 U.S. 288, 297-301 (1981).

CR212 Offense Requires Conduct and Mental State.

A person cannot be found guilty of a criminal offense unless that person's conduct is prohibited by law, AND at the time the conduct occurred, the defendant demonstrated a particular mental state specified by law.

"Conduct" can mean both an "act" or the failure to act when the law requires a person to act. An "act" is a voluntary movement of the body and it can include speech.

As to the "mental state" requirement, the prosecution must prove that at the time the defendant acted (or failed to act), (he) (she) did so with a particular mental state. For each offense, the law defines what kind of mental state the defendant had to have, if any. For some crimes the defendant must have acted "intentionally" or "knowingly." For other crimes it is enough that the defendant acted "recklessly," with "criminal negligence," or with some other specified mental state.

Later I will instruct you on the specific conduct and mental state that the prosecution must prove before the defendant can be found guilty of the crime(s) charged.

References

Utah Code Ann. § 76-1-501.
Utah Code Ann. § 76-2-101.
Utah Code Ann. § 76-2-102.

Committee Notes

If a party requests that the concept presented in Utah Code Ann. § 76-2-101 be given as part of the instructions, this instruction is offered for consideration by the court.

CR213 Inferring the Required Mental State.

The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state.

Ordinarily, there is no way that a defendant's mental state can be proved directly, because no one can tell what another person is thinking.

A defendant's mental state can be proved indirectly from the surrounding facts and circumstances. This includes things like what the defendant said, what the defendant did, and any other evidence that shows what was in the defendant's mind.

References

Utah Code Ann. § 76-1-501(1).
State v. James, 819 P.2d 781, 789 (Utah 1991).
State v. Murphy, 617 P.2d 399, 402 (Utah 1980).
State v. Hopkins, 359 P.2d 486, 487 (Utah 1961).
29 Am. Jur.2d Evidence § 556.

CR214 Motive.

A defendant's "mental state" is not the same as "motive." Motive is why a person does something. Motive is not an element of the crime(s) charged in this case. As a result, the prosecutor does not have to prove why the defendant acted (or failed to act).

However, a motive or lack of motive may help you determine if the defendant did what (he) (she) is charged with doing. It may also help you determine what (his) (her) mental state was at the time.

References

United States v. Santistevan, 39 F.3d 250, 255 n.7 (10th Cir. 1994).
United States v. Buford, 30 P. 433, 434 (Utah 1892).

Committee Notes

There are a few offenses where motive is an element. See e.g., Utah Code Ann. §§ 76-2-202(1)(g), Aggravated Murder; 76-5-302, Aggravated Kidnaping; or 76-8-508.3, Retaliation Against a Witness, Victim or Informant. In those cases do not give this instruction.

CR215 Do Not Consider Punishment.

In making your decision, do not consider what punishment could result from a verdict of guilty. Your duty is to decide if the defendant is guilty beyond a reasonable doubt. Punishment is not relevant to whether the defendant is guilty or not guilty.

References

State v. Cude, 784 P.2d 1197, 1202-03 (Utah 1989).
75B Am. Jur.2d Trial § 1660.

CR216 Jury Deliberations.

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty." In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.

References

Utah Const. Art. I, § 10.
Utah R. Crim. P. 21(b).
Utah R. Civ. P. 59(a)(2).
Burroughs v. United States, 365 F.2d 431, 434 (10th Cir. 1966).
State v. Lactod, 761 P.2d 23, 30-31 (Utah Ct. App. 1988).
75 Am. Jur.2d Trial §§ 1647, 1753, 1781.

CR217 Foreperson Selection and Duties.

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.

For each offense, the verdict form will have two blanks—one for "guilty" and the other for "not guilty." The foreperson will fill in the appropriate blank to reflect the jury's unanimous decision. In filling out the form, the foreperson needs to make sure that only one blank is marked for each charge.

CR218 Deadlocked Juries

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty to consult with one another and to deliberate. Your goal should be to reach an agreement if you can do so without surrendering your individual judgment. Each of you must decide the case for yourself, but do so only after impartially considering the evidence with your fellow jurors. Do not hesitate to reexamine your own views and change your position if you are convinced it is mistaken. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or just to return a verdict.

You are judges -- judges of the facts. Your sole interest is to determine the truth from the evidence in the case.

CR301 Elements.

1. The defendant, _____(NAME), is charged [in Count ___] with [CRIME]on or about [DATE]. You cannot convict (him)(her) of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

2. That the defendant _____(NAME);

3. ELEMENT ONE . . .;

4. ELEMENT TWO . . .;

5. [That the defense of _____ does not apply.]

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

Committee Notes

This is a pattern elements instruction that can apply in most cases. If the date or the location of a crime could be considered an element of the offense, those should be included within the list of elements. In some circumstances, identifying the specific counts might help the jury sort through offenses with similar elements. In those circumstances, the specific counts should be identified in the first paragraph.

With respect to the backeted defense element, unless the statute directs otherwise, the trial court must instruct the jury that the State must disprove an affirmative, a partial, or a justification defense beyond a reasonable doubt.

CR302A Intentional as to Result.

A person acts "intentionally" ["willfully"] ["with intent"] when (his)(her) conscious objective is to cause a certain result.

References

Utah Code Ann. § 76-2-103(1).

Committee Notes

Some crimes with a mens rea of "intentionally" require that the defendant intentionally engage in conduct, while others require that the defendant intentionally cause a result. Jurors must be specifically instructed as to the definition of "intentionally" which applies to the crime(s) they are considering. If the jury is considering more than one count with a mens rea of "intentionally," and if a single definition does not cover all counts, the jury must be instructed as to which definition applies to each count.

This instruction should be used when intentionality goes to the result of one's conduct rather than just to the conduct itself. See, e.g., Utah Code Ann. §§ 76-5-203 (2)(a), Murder; 76-5-109 (2)(a), Child abuse; and 76-5-301, Kidnapping.

CR302B Intentional as to Conduct.

A person acts "intentionally" ["willfully"] ["with intent"] when (his)(her) conscious objective is to engage in certain conduct.

"Conduct" means either an act or an omission.

References

Utah Code Ann. § 76-2-103(1).

Committee Notes

Some crimes with a mens rea of "intentionally" require that the defendant intentionally engage in conduct, while others require that the defendant intentionally cause a result. Jurors must be specifically instructed as to the definition of "intentionally" which applies to the crime(s) they are considering. If the jury is considering more than one count with a mens rea of "intentionally," and if a single definition does not cover all counts, the jury must be instructed as to which definition applies to each count.

This instruction should be used when intentionality goes to one's conduct rather than to the result of one's conduct. See, e.g., Utah Code Ann. §§ 76-5-209, Homicide by Assault; 76-6-106(2)(b), Criminal Mischief (variation); and 58-37-8(2)(g) having a measurable amount of controlled substance in system and driving negligently, thereby causing serious bodily injury or death.

An example of a statute where the conduct is an omission rather than an act is Failure to Report Child Abuse, Utah Code Ann. § 62A-4a-411.

CR303A Knowledge as to Result of Conduct.

A person acts "knowingly" or "with knowledge" when the person is aware that (his)(her) conduct is reasonably certain to cause a particular result.

"Conduct" means either an act or an omission.

References

Utah Code Ann. § 76-2-103(2).
State v. Graham, 2006 UT 43, ¶20, 143 P.3d 268.
Gardner v. Galetka, 2004 UT 42, ¶3, 94 P.3d 263.

Committee Notes

Some crimes with a mens rea of "knowingly" require that the defendant knowingly engage in conduct, while others require that the defendant knowingly cause a result. Jurors must be specifically instructed as to the definition of "knowingly" which applies to the crime(s) they are considering. If the jury is considering more than one count with a mens rea of "knowingly," and if a single definition does not cover all counts, the jury must be instructed as to which definition applies to each count.

This instruction should be given in crimes in which the element of the defendant's knowledge goes to the result of his or her conduct. See, e.g., Utah Code Ann. §§ 76-5-203(2)(a), Murder; 76-5-109(2)(a), Child abuse; and 76-5-301, Kidnapping.

The committee recognizes that this is not verbatim the instruction discussed by the Utah Supreme Court in *Gardner v. Galetka*, 2004 UT 42, 94 P.3d 263, but feels it adequately and more directly addresses the concept for crimes that require that the defendant knowingly cause a result. The

committee also feels that it is inherent in the concept of knowingly causing a result that a defendant is aware of the nature of his conduct or the existing circumstances.

CR303B Knowledge as to Conduct or Circumstances Surrounding Conduct.

A person acts "knowingly" or "with knowledge" when the person:

is aware of the nature of (his)(her) conduct; or

is aware of the particular circumstances surrounding (his)(her) conduct.

"Conduct" means either an act or an omission.

References

Utah Code Ann. § 76-2-103(2).
State v. Graham, 2006 UT 43, ¶20, 143 P.3d 268.
Gardner v. Galetka, 2004 UT 42, ¶3, 94 P.3d 263.

Committee Notes

Some crimes with a mens rea of "knowingly" require that the defendant knowingly engage in conduct, while others require that the defendant knowingly cause a result. Jurors must be specifically instructed as to the definition of "knowingly" which applies to the crime(s) they are considering. If the jury is considering more than one count with a mens rea of "knowingly," and if a single definition does not cover all counts, the jury must be instructed as to which definition applies to each count.

This instruction should be given in crimes in which the element of the defendant's knowledge goes to one's conduct or the circumstances surrounding one's conduct rather than to the result of one's conduct. See, e.g., *State v. Fontana*, 680 P.2d 1042 (Utah 1984), holding that the element of knowledge for purposes of depraved indifference murder, "refers to the nature of the actor's conduct or to the circumstance surrounding it, or both; it does not refer to the result produced by that conduct." Id. at 1046.

Since this instruction applies to crimes in which the element of the defendant's knowledge goes to one's conduct or the circumstances surrounding one's conduct rather than to the result of one's conduct, *Gardner v. Galetka*, 2004 UT 42, 94 P.3d 263 is inapplicable.

CR304A Reckless as to Result of Conduct.

A person acts "recklessly" when (he)(she) is aware of a substantial and unjustifiable risk that (his)(her) conduct will cause a particular result, consciously disregards the risk, and acts anyway.

The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

"Conduct" means either an act or an omission.

References

Utah Code Ann. § 76-2-103(3).

CR304B Reckless as to Circumstances Surrounding Conduct.

A person acts "recklessly" when (he)(she) is aware of a substantial and unjustifiable risk that certain circumstances exist relating to (his)(her) conduct, consciously disregards the risk, and acts anyway.

The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

"Conduct" means either an act or an omission.

References

Utah Code Ann. § 76-2-103(3).

CR305 Simple Negligence.

Simple negligence means failing to exercise that degree of care which reasonable and prudent persons exercise under like or similar circumstances.

References

State v. Haltom, 2007 UT 22, ¶8, 156 P.3d 792.
Meese v. Brigham Young Univ., 639 P.2d 720, 723 (Utah 1981).

Committee Notes

This instruction will be used in only very limited criminal prosecutions, such as Utah Code Ann. §§ 76-5-207(2)(c), Automobile Homicide, or 76-10-1206, Dealing in Material Harmful to a Minor; see also *State v. Haltom*, 2007 UT 22. Although the Committee is only aware of these two statutes, caution should be exercised to ensure the appropriate mental state instruction is used in criminal cases where negligence is asserted.

CR306A Criminal Negligence as to Result of Conduct.

A person acts with criminal negligence when (he)(she) should be aware that (his)(her) conduct creates a substantial and unjustifiable risk that a particular result will occur.

The nature and extent of the risk must be of such a magnitude that failing to perceive it is a gross deviation from what an ordinary person would perceive in that situation.

"Conduct" means either an act or an omission.

References

Utah Code Ann. § 76-2-103(4).

Committee Notes

The Committee has created CR 305, a Simple Negligence instruction. That instruction will be used in rare circumstances. In most cases, either this instruction or CR 306B, Criminal Negligence as to Circumstances Surrounding Conduct, will be used.

CR306B Criminal Negligence as to Circumstances Surrounding Conduct.

A person acts with criminal negligence when (he)(she) should be aware of a substantial and unjustifiable risk that certain circumstances exist relating to (his)(her) conduct.

The nature and extent of the risk must be of such a magnitude that failing to perceive it is a gross deviation from what an ordinary person would perceive in that situation.

"Conduct" means either an act or an omission.

References

Utah Code Ann. § 76-2-103(4).

Committee Notes

The Committee has created CR 305, a Simple Negligence instruction. That instruction will used in rare circumstances. In most cases, either this instruction or CR 306A, Criminal Negligence as to Result of Conduct, will be used.

CR307 Comparing Recklessness with Criminal Negligence.

The concepts of "recklessness" and "criminal negligence" are similar in that both require the presence of a substantial and unjustifiable risk. They differ in that it is reckless to act if one *is aware* of the risk, while it is criminally negligent to act if one *should be aware* of the risk. In either event, the behavior must be a gross deviation from what an ordinary person would do under the same circumstances.

References

Utah Code Ann. § 76-2-103(3).
Utah Code Ann. § 76-2-103(4).

CR308 Usual and Ordinary Meanings Instruction.

Unless these instructions give a definition, you should give all words their usual and ordinary meanings.

CR309A Accomplice Liability.

The defendant _____(NAME) is charged as a party [in Count_____] with committing _____ (CRIME) on or about [DATE]. You cannot convict (him) (her) of this offense unless based on the evidence, you find beyond a reasonable doubt, each of the following elements:

1. That the defendant _____(NAME):

a. [intentionally][knowingly] or [recklessly] solicitated, requested, commanded, or encouraged [the principal actor] to

i. ELEMENT ONE

ii. ELEMENT TWO

or

b. intentionally aided [the principal actor] to

i. ELEMENT ONE

ii.. ELEMENT TWO

2. And that the defendant _____(NAME),

[a. intended that [the principal actor] commit the crime of _____ (CRIME)];

[b. was aware that his conduct was reasonably certain to result in [the principal actor] committing the crime of _____ (CRIME)];

or

[c. recognized that his conduct could result in [the principal actor] committing the crime of _____ (CRIME) but chose to act anyway.]

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

CR309B Accomplice Liability.

The defendant _____(NAME) is charged as a party [in Count_____] with committing _____ (CRIME) on or about [DATE]. You cannot convict (him) (her) of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant _____(NAME):

a. [intentionally][knowingly] or [recklessly] solicitated, requested, commanded, or encouraged [the principal actor] to commit the crime of (CRIME) as set forth in elements instruction [_____]

or

b. intentionally aided [the principal actor] to commit the crime of (CRIME) as set forth in elements instruction [_____]

2. And that (NAME),

[a. intended that [the principal actor] commit the crime of _____ (CRIME)];

[b. was aware that his conduct was reasonably certain to result in [the principal actor] committing the crime of _____ (CRIME)];

or

[c. recognized that his conduct could result in [the principal actor] committing the crime of _____ (CRIME) but chose to act anyway.]

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

CR401 Fact Versus Expert Witnesses.

1. There are two types of witnesses: fact witnesses and expert witnesses. Usually a fact witness can testify only about facts that (he) (she) can see, hear, touch, taste or smell. An expert witness has scientific, technical or other special knowledge that allows the witness to give an opinion. An expert's knowledge can come from training, education, experience or skill. Experts can testify about facts, and they can give their opinions in their area of expertise.

You may have to weigh one expert's opinion against another's. In weighing the opinions of experts, you may look at their qualifications, the reasoning process the experts used, and the overall credibility of their testimony. You may also look at things like bias, consistency, and reputation.

Use your common sense in evaluating all witnesses, including expert witnesses. You do not have to accept an expert's opinion. You may accept it all, reject it all, or accept part and reject part. Give it whatever weight you think it deserves.

References

Utah R. Evid. 702.
Utah Code Ann. § 78B-1-128.
United States v. McKissick, 204 F.3d 1282, 1289 (10th Cir. 2000).
Toma v. Utah Power & Light Co., 365 P.2d 788, 792-793 (Utah 1961).
State v. Shockley, 80 P. 865, 879 (1905).
75 Am. Jur.2d Trial § 819.

CR402 Separate Consideration of Multiple Crimes.

The defendant has been charged with more than one crime. It is your duty to consider each charge separately. For each crime charged, consider all of the evidence related to that charge. Decide whether the prosecution has presented proof beyond a reasonable doubt that the defendant is guilty of that particular crime. Your verdict on one charge does not determine your verdict on any other charge.

References

United States v. Figueroa, 56 F. Supp.2d 1222, 1224 (D. Utah 1999).
75 Am. Jur.2d Trial § 149.

CR403 Party Liability.

A person can commit a crime as a "party." In other words, a person can commit a criminal offense even though that person did not personally do all of the acts that make up the offense. If you find beyond a reasonable doubt that:

(1) the defendant had the mental state required to commit the offense, **AND**

(2) the defendant solicited, requested, commanded, encouraged, or intentionally aided another to commit the offense, **AND**

(3) the offense was committed,

then you can find the defendant guilty of that offense.

References

Utah Code Ann. § 76-2-202.

CR404 Eyewitnesses Identification [*Long* instruction].

An important question in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt that the crime was committed AND that the defendant was the person who committed the crime. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

The testimony you have heard concerning identification represents the witness's expression of (his) (her) belief or impression. You don't have to believe that the identification witness was lying or not sincere to find the defendant not guilty. It is enough that you conclude that the witness was mistaken in (his) (her) belief or impression.

Many factors affect the accuracy of identification. In considering whether the prosecution has proven beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following:

(1) Did the witness have an adequate opportunity to observe the person who committed the crime? In answering this question, you should consider:

(a) the length of time the witness observed that person;
(b) the distance between the witness and that person;
(c) the extent to which that person's features were visible and undisguised;
(d) the lighting conditions at the time of observation;
(e) whether there were any distractions occurring during the observation;
(f) any other circumstance that affected the witness's opportunity to observe the person

committing the crime.

(2) Did the witness have the capacity to observe the person committing the crime? In answering this question, you should consider whether the capacity of the witness was impaired by:

(a) stress or fright at the time of observation;
(b) personal motivations, biases or prejudices;
(c) uncorrected visual defects;
(d) fatigue or injury;
(e) drugs or alcohol.

[You should also consider whether the witness is of a different race than the person identified. Identification by a person of a different race may be less reliable than identification by a person of the same race.]

(3) Even if the witness had adequate opportunity and capacity to observe the person who committed the crime, the witness may not have focused on that person unless the witness was aware that a crime was being committed. In that instance you should consider whether the witness was sufficiently attentive to that person at the time the crime occurred. In answering this question you should consider whether the witness knew that a crime was taking place during the time (he) (she) observed the person's actions.

(4) Was the witness's identification of the defendant completely the product of the witness's own memory? In answering this question, you should consider:

(a) the length of time that passed between the witness's original observation and the time the witness identified the defendant;
(b) the witness's mental capacity and state of mind at the time of the identification;
(c) the exposure of the witness to opinions, to photographs, or to any other information or influence that may have affected the independence of the identification of the defendant by the witness;
[(d) any instances when the witness either identified or failed to identify the defendant;]
[(e) any instances when the witness gave a description of the person that was either consistent or inconsistent with the defendant's appearance;]
(f) the circumstances under which the defendant was presented to the witness for identification.

[You may take into account that an identification made by picking the defendant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented alone to the witness.]

[You may also take into account that identifications made from seeing the person are generally more reliable than identifications made from a photograph.]

[A witness's level of confidence in (his) (her) identification of the perpetrator is one of many factors that you may consider in evaluating whether the witness correctly identified the perpetrator. However, a witness who is confident that (he) (she) correctly identified the

perpetrator may be mistaken.]

Again, I emphasize that it is the prosecution's burden to prove beyond a reasonable doubt that the defendant is the person who committed the crime.

References

State v. Guzman, 2006 UT 12, ¶¶15-23, 133 P.3d 363.
State v. Long, 721 P.2d 483, 487-95 (Utah 1986).
R. Sanders, Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards, 12 Am. J. Crim. L. 189, 222-24 (1984).

Committee Notes

Bracketed portions of the instruction should be used when appropriate to the facts of the case. Also, this instruction should be modified if the identification involves someone other than the defendant, or where it would otherwise be confusing, such as where the defendant is not charged with directly committing the offense, but as a party.

CR405 Flight from Scene.

Evidence was introduced at trial that the defendant may have fled or attempted to flee from the crime scene. This evidence alone is not enough to establish guilt. However, if you believe that evidence, you may consider it along with the rest of the evidence in reaching a verdict. It's up to you to decide how much weight to give that evidence.

Keep in mind that there may be reasons for flight that could be fully consistent with innocence. Even if you choose to infer from the evidence that the defendant had a "guilty conscience," that does not necessarily mean (he) (she) is guilty of the crime charged.

References

United States v. Martinez, 681 F.2d 1248, 1256-58 (10th Cir. 1982).
Bailey v. United States, 410 F.2d 1209, 1217 (10th Cir. 1969).
State v. Franklin, 735 P.2d 34, 39 (Utah 1987).
State v. Bales, 675 P.2d 573, 574-76 (Utah 1983).
State v. Simpson, 236 P.2d 1077, 1079 (Utah 1951).
29 Am. Jur.2d Evidence § 316.
75B Am. Jur.2d Trial § 1333.

CR406 Flight after Accusation.

Evidence was introduced at trial that the defendant may have fled or attempted to flee after having been accused of the crime. This evidence alone is not enough to establish guilt. However, if you believe that evidence, you may consider it along with the rest of the evidence in reaching a verdict. It's up to you to decide how much weight to give that evidence.

Keep in mind that there may be reasons for flight that could be fully consistent with innocence. Even if you choose to infer from the evidence that the defendant had a "guilty conscience," that does not necessarily mean (he) (she) is guilty of the crime charged.

References

United States v. Martinez, 681 F.2d 1248, 1256-58 (10th Cir. 1982).
Bailey v. United States, 410 F.2d 1209, 1217 (10th Cir. 1969).
State v. Franklin, 735 P.2d 34, 39 (Utah 1987).
State v. Bales, 675 P.2d 573, 574-76 (Utah 1983).
State v. Simpson, 236 P.2d 1077, 1079 (Utah 1951).
29 Am. Jur.2d Evidence § 316.
75B Am. Jur.2d Trial § 1333.

CR407 Law Enforcement Officer's Testimony.

You have heard the testimony of a law enforcement officer. The fact that a witness is employed in law enforcement does not mean that (his) (her) testimony deserves more or less consideration than that of any other witness. It is up to you to give any witness's testimony whatever weight you think it deserves.

References

Utah Code Ann. § 78B-1-128.
United States v. McKissick, 204 F.3d 1282, 1289 (10th Cir. 2000).
Toma v. Utah Power & Light Co., 365 P.2d 788, 792-793 (Utah 1961).
State v. Shockley, 80 P. 865, 879 (1905).
75 Am. Jur.2d Trial § 819.

CR408 Age of Witness.

You have heard the testimony of a young witness. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. The critical consideration is not the witness's age, but whether the witness understands the difference between what is true and what is not true, and understands the duty to tell the truth.

References

Utah R. Evid. 601(a).
Utah Code Ann. § 78B-1-127.
Utah Code Ann. § 78B-1-128.
State v. Smith, 401 P.2d 445, 447 (Utah 1965).

CR409 609–Impeaching Defendant Testimony by Prior Conviction.

Evidence has been presented that the defendant was previously convicted of a crime. This evidence was brought to your attention only to help you evaluate the credibility of the defendant as a witness. Do not use it for any other purpose. It is not evidence that the defendant is guilty of the crime(s) for which (he) (she) is now on trial.

References

Utah R. Evid. 609(a)(2).

Committee Notes

This instruction should be used when a defendant is testifying and evidence of the defendant's prior conviction(s) is being introduced only to challenge the defendant's credibility under Utah R. Evid. 609. However, do not use this instruction if the conviction is being introduced under Utah R. Evid. 404(b) as prior "crime, wrong or act" of a non-testifying defendant, or is being used for both 609 and 404(b) purposes when the defendant chooses to testify. Instead, use the applicable stock instructions for 404(b) situations.

CR410 609–Impeaching Witness Testimony by Prior Conviction.

Evidence has been presented that a witness was previously convicted of a crime. This evidence was brought to your attention only to help you evaluate the credibility of that witness. Do not use it for any other purpose. It is not evidence of anything else.

References

Utah R. Evid. 609(a)(1).

Committee Notes

This instruction should be used when evidence of a witness's prior conviction(s) is being introduced to challenge the witness's credibility under Utah R. Evid. 609. However, do not use this instruction if the conviction is being introduced under Utah R. Evid. 404(b) as prior "crime, wrong or act" of a witness, a non-testifying defendant, or for both 609 and 404(b) purposes. Instead, use the applicable stock instructions for 404(b) situations.

CR411 404(b) Instruction.

You (are about to hear) (have heard) evidence that the defendant [insert 404(b) evidence] (before) (after) the act(s) charged in this case. You may consider this evidence, if at all, for the limited purpose of [tailor to proper non-character purpose such as motive, intent, etc.]. This evidence (is) (was) not admitted to prove a character trait of the defendant or to show that (he) (she) acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crime(s) charged in this case, and for (that) (those) crime(s) only. You may not convict a person simply because you believe (he) (she) may have committed some other act(s) at another time.

References

Utah R. Evid. 105.
Utah R. Evid. 404(b).
Huddleston v. United States, 485 U.S. 681, 691-92 (1988).
State v. Forsyth, 641 P.2d 1172, 1175-76 (Utah 1982).
29 Am. Jur.2d Evidence § 461.

Committee Notes

This instruction, if given, should be given at the time the 404(b) evidence is presented to the jury and, upon request, again in the closing instructions. Under Rule 105, the court must give a limiting instruction upon request of the defendant.

The committee recognizes, however, that there may be times when a defendant, for strategic purposes, does not want a 404(b) instruction to be given. In those instances, a record should be made outside the presence of the jury that the defendant affirmatively waives the giving of a limiting instruction.

404(b) allows evidence when relevant to prove any material fact, except criminal disposition as the basis for an inference that the defendant committed the crime charged. *State v. Forsyth*, 641 P.2d 1172 (Utah 1982). In the rare instance where, after the jury has been instructed, a party identifies another proper non-character purpose, the court may give additional instruction.

If the 404(b) evidence was a prior conviction admitted also to impeach under Rule 609, see instruction CR409.

If the instruction relates to a witness other than a defendant, it should be modified.

CR412 Stipulation of Fact.

When lawyers agree that certain facts are true it is called a “stipulation of fact.” You must accept any stipulated facts as having been proven. However, the significance of these facts, as with all facts, is for you to decide.

CR413 Stipulation of Expected Testimony.

Lawyers may also agree that a witness, if called, would offer certain testimony. That is called a "stipulation of expected testimony." Although you must accept that the witness would give this testimony, you do not have to accept that testimony as true. You may consider it and give it whatever weight it deserves.

CR414A Multiple Defendants - Missing Defendant(s).

There has been evidence suggesting that [a person] [persons] other than the defendant may have been involved in the crime for which the defendant is on trial. Your duty in this case is to decide only whether the prosecutor has proven, beyond a reasonable doubt, the guilt of the defendant who is on trial.

References

United States v. Tarango, 396 F.3d 666, 674 (5th Cir. 2005).
26 Moore's Federal Practice § 630.31.

Committee Notes

This instruction should not be given when evidence of others' involvement is required to prove an element of the charged crime, i.e., conspiracy or concerted criminal activity ("gang enhancement") charges.

CR414B Multiple Defendants - Joint Trial.

There is more than one defendant on trial. If evidence was admitted only as to one defendant, you may consider it in connection with that defendant only. You must consider the charges against each defendant separately.

References

Zafiro v. United States, 506 U.S. 534, 539 (1993).
United States v. Edwards, 69 F.3d 419, 433-34 (10th Cir. 1995).
United States v. Pinto, 838 F.2d 426, 434 (10th Cir. 1988).
State v. Anderson, 158 P.2d 127, 129 (Utah 1945).

CR415 In-Custody Informant.

You have heard from a witness who may be classified as an "in-custody informant." The law allows the use of such testimony. However, the testimony of an informant who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informant's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider:

2. Whether the informant has received anything (including leniency in prosecution, personal advantage, or vindication) in exchange for testimony;

3. Other cases, and the number of other cases, in which the informant testified or offered statements against another, whether those statements are being used, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement, or believed he was likely to receive some benefit from his cooperation;

4. Whether the informant has ever changed his or her testimony;

5. The criminal history of the informant, not just limited to number of convictions, but also the level of sophistication gained through the informant's experience in the criminal justice system; and

6. Any other evidence related to the informant's credibility.

In sum, you should look at all of the evidence in deciding what credence and what weight, if any, you would give to the jailhouse informant.

You should bear in mind that a witness who has entered into such an agreement with the government may have an interest in the case different than any ordinary witness. A witness who believes that he may be able to obtain his own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has motive to testify falsely. Therefore, you must examine [his] [her] testimony with caution and weigh it with great care. If, after scrutinizing [his] [her] testimony, you decide to accept it, you may give it whatever weight, if any, you find it deserves.

References

State v. Charles, 2011 UT App 291, 263 P.3d 469.

CR501 Preamble to the Affirmative Defense Instructions.

1. As a general rule, if the evidence supports an affirmative defense, the State "has the burden to prove beyond a reasonable doubt" that the defense does not apply. *State v. Knoll*, 712 P.2d 211, 214-15 (Utah 1985). See also *State v. Low*, 2008 UT 58, ¶45, 192 P.3d 867 (stating that murder instruction was in error "because it lacked the necessary element that the State show the absence of the affirmative defense[]."); *State v. Swenson*, 838 P.2d 1136, 1138 (Utah 1992) (stating that "a long line of Utah cases imposes on the prosecution the burden to disprove the existence of affirmative defenses beyond a reasonable doubt.") There are some exceptions to the general rule. The following list provides examples of statutes which allocate the burden of proof to the defendant, who must prove the affirmative defense by a preponderance of the evidence:

Utah Code Ann. § 58-37c-19.7(3)(c), Drug precursor statute (re: red phosphorus)

Utah Code Ann. § 58-37c-20(3)(c), Drug precursor statute (re: pseudoephedrine)

Utah Code Ann. § 58-37-8(12)(d), Ceremonial use of peyote by Native Americans statute

Utah Code Ann. § 19-5-115(5)(e), Environmental code violations

Although not specifically characterized as an affirmative defense, there is a provision in Utah Code Ann. § 76-5-401(3), Unlawful Sexual Activity with a Minor, which operates similarly. If a defendant establishes by a preponderance of the evidence that he was less than 4 years older than the minor, it reduces the offense from a third degree felony to a class B misdemeanor.

CR502 Compulsion Instruction.

You must decide whether the defense of compulsion applies in this case. Under that defense, a person is not guilty of a crime if (he) (she) acted because (he) (she) was coerced to do so by

someone's use of unlawful force against (him) (her) or someone else; or someone's threat to use imminent unlawful force against (him) (her) or someone else.

The use or threatened use of force must be such that a person of reasonable firmness in defendant's situation would not have resisted.

The defense of compulsion is not available if the defendant intentionally, knowingly, or recklessly placed (himself) (herself) in a situation where it was probable that (he) (she) would be subjected to duress.

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

Committee Notes

If the evidence supports giving this instruction, the trial court must modify the elements instruction to include disproving this defense as an additional element. See *State v. Low*, 2008 UT 58; 192 P.3d 867.

The compulsion statute also provides that a married woman is not entitled to a presumption that she is subject to compulsion simply because her husband is present. See Utah Code Ann. § 76-2-302(3).

CR503 Intoxication Instruction.

The defendant has been charged with _____. The charge requires the prosecution to prove that the defendant acted [intentionally] [knowingly] [intentionally [and] [or] knowingly]. You must decide whether the defense of intoxication applies to this charge. Intoxication (due to the consumption of drugs or alcohol) is a defense if there is reasonable doubt that the defendant acted intentionally or knowingly because (he) (she) was intoxicated.

The defendant does not have to prove that the defense of intoxication applies. Rather, the prosecution must prove beyond a reasonable doubt that intoxication did not prevent the defendant from acting [intentionally] [knowingly] [intentionally [and] [or] knowingly]. The prosecution carries the burden of proof. If the prosecution has not carried this burden, then you must find the defendant not guilty.

Committee Notes

If the case involves a charge for an included offense that uses recklessness or criminal negligence as a mental state, the final sentence of the instruction should be replaced with the following:

> If you have a reasonable doubt about whether the defendant acted [intentionally] [knowingly] [intentionally [and] [or] knowingly]--due to (his) (her) intoxication--then you must find (him) (her) not guilty of the charged offense. However, intoxication is not a defense to [insert the title for the lesser offense that includes recklessness and/or criminal negligence as a mens rea].

CR504 Voluntary Termination Instruction.

You must decide whether the defense of voluntary termination applies in this case. The defendant is not guilty of [OFFENSE] if, before the crime was committed, (he) (she) voluntarily ended (his) (her) conduct in furtherance of the crime, and (he) (she)

timely warned law enforcement or the intended victim; or made (his) (her) earlier efforts completely ineffective.

This defense may apply even if the crime is completed by others.

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

CR505 Road map with lesser included offenses.

Count [#] charges the defendant with [_____]. [Lesser offense] is a lesser included offense of that charge. As you deliberate, you must determine whether the defendant is guilty of [the charged offense], guilty of [the lesser offense], or not guilty of either offense. The law does not require you to make these determinations in any particular order. However, you cannot find the defendant guilty of both [the charged offense] and [the lesser offense]. In other words, you can only return one verdict on count [#]: guilty of [the charged offense], guilty of [the lesser offense], or not guilty of either offense.

The elements for [the charged offense] are set forth in Instruction [#].

The elements for [the lesser offense] are set forth in Instruction [#].

Committee Notes

Cases involving one or more lesser offenses and/or affirmative defenses should include instructions for the elements of the lesser offense(s) and affirmative defense(s), definitional instructions, and/or special verdict forms.

The roadmap instruction proposed here may be appropriate in a case where only one lesser offense is at issue. If the case involves more than one lesser offense and/or affirmative defense, the roadmap should give more direction.