Model Utah Jury Instructions - Criminal
Working Draft
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Cr101. Introduction

[Ladies/Gentlemen or 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.

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.

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.

Committee Note: 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.

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.

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.

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.

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.

Cr109. Conduct of Jurors

From time to time I will call a recess. It may be for a few minutes or longer. During recesses, do not talk about this case with anyone—not family, not friends, not even each other. Until the trial is over, do not mingle or talk with the lawyers, parties, witnesses or anyone else connected with the case. Court clerks or bailiffs can answer general questions, such as the length of breaks or the location of restrooms. But they cannot comment about the case or anyone involved. The goal is to avoid the impression that anyone is trying to influence you improperly. If people involved in the case seem to ignore you outside of court, they are just following this instruction.

Until the trial is over, do not read or listen to any news reports about this case. If you observe anything that seems to violate this instruction, report it immediately to a clerk or bailiff.

Cr110. Note-taking

Feel free to take notes during the trial to help you remember the evidence, but do not let note-taking distract you. Your notes are not evidence and may be incomplete.

Cr111. Juror Questions [Optional for judges who permit questions]

During the trial you may ask questions of the witnesses. However, to make sure the questions are legally appropriate, we will use the following procedure: After the lawyers have finished questioning each witness, I will ask if you have any questions. If you do, please do not ask the question out loud. Write it down and hand it to a bailiff. The bailiff will hand me your question. I will review it with the lawyers to make sure it is legally permissible. If the question is appropriate, it will be addressed. If not, I will tell you.

Cr200. Closing Instructions

Cr201. Closing Roadmap

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.

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.

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.]

Finally, as I explained earlier, the fact that criminal charges were filed against the defendant is not evidence of guilt. You cannot base your decision on that fact.

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.

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.

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.

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.

Note: 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. 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.

Cr208. 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.

Cr209A. 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.

Cr209B. 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.

Cr210. 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.

Cr211. 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."

Committee Note: 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.

Cr212. 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.

Cr213. 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.

Committee Note: 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.

Cr214. 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.

Cr215. 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.

Cr216. 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.

Cr217. 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.

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

Cr219. Consider All Instructions

Cr301. Elements

The defendant, [NAME], is charged in [count___ of] the Information with [CRIME]. You cannot convict (him) (her) of this offense unless you find beyond reasonable doubt and based on all the evidence, each of the following elements:

1. That on or about the DATE, the defendant, NAME:
2. ELEMENT ONE: and/or (as appropriate)
3. ELEMENT TWO: . . .

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

Cr302. Intentional

A person acts "intentionally" ["willfully,"] ["with intent'] when it is that person's *purpose* to act in a specific way or to cause a specific result. To act "intentionally" the person must act with a conscious objective or desire in mind.

Cr303. Knowing

A person acts “knowingly,” or “with knowledge” when the person:

- *is aware* that he/she is doing a specific act, or *is aware* of a particular fact or circumstance surrounding his/her conduct,

AND

- *is aware* that the action taken is reasonably certain to cause a particular result.

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.

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.

Cr305. Simple Negligence

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

Committee Note: This instruction will be used in only very limited criminal prosecutions, such as Automobile Homicide, Utah Code Ann. § 76-5-207(2)(c), or Dealing in Material Harmful to a Minor, Utah Code Ann. § 76-10-1206; *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.

Committee Note: The Committee has created a Simple Negligence instruction (Cr714). That instruction will used in rare circumstances. In most cases, either this instruction or Cr715B, 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.

Committee Note: The Committee has created a Simple Negligence instruction (Cr714). That instruction will used in rare circumstances. In most cases, either this instruction or Cr715A, 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

Cr308. 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.

Cr309. 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.

Cr401. Fact versus expert witnesses

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 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.

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.

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.

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' own memory? In answering this question, you should consider:

(a) the length of time that passed between the witness' original observation and the time the witness identified the defendant;

(b) the witness' 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.

Committee Note: 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.

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.

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.

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.

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.

Note: 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.

Note: 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 ~~it~~ 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 ~~the~~ a character trait of the defendant or to show that [he] [she] acted in a manner consistent with such a ~~character~~ 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.

Notes: ~~Ordinarily,~~ 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 ~~an~~ 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 _____.

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

Cr412. Multiple Defendants