CHAPTER 1

INTRODUCTORY INSTRUCTIONS

A. VOIR DIRE

Committee Comments

These instructions are to be used by the trial judge at the time of voir dire. Their purpose is to acquaint prospective jurors with what is expected of them and to explain why the court and counsel will inquire into their backgrounds. The instructions also serve as a guide to the trial judge in questioning the jury panel prior to questioning by counsel. *They need not be reduced to writing and distributed to the jury along with the other instructions in the case.*

The Commission does not claim originality for the instructions, nor the language. It has relied heavily upon instructions used in Oklahoma and instructions prepared by the Ohio and West Virginia Jury Instruction Committees. Credit should also be given to R. McBride, *The Art of Instructing the Jury* (1979).

OUJI-CR 1-1

ROLE OF THE JUROR

For those who have been summoned as jurors, I remind you that jury service is a legal obligation as well as a civic duty. Each of you is an officer of the court just as the judge, the **attorney(s)** representing the prosecution, and the **attorney(s)** representing the defense. Your office as juror is one of extreme public trust. The services you perform as juror are as important and essential to the administration of justice as those performed by the judge and the attorneys.

As prospective jurors you will take an oath to answer completely and truthfully all questions asked you by myself and the attorneys.

OUJI-CR 1-2

VOIR DIRE OATH

Do you, and each of you, solemnly **swear/affirm** to well and truly answer questions asked of you concerning your qualifications to sit as jurors in the case now on trial, **(so help you God?)/(this you do affirm under the penalties of perjury)**?

Committee Comments

The Court of Criminal Appeals noted in *Salazar v. State*, 852 P.2d 729, 733 (Okl. Cr. 1993), that while the administration of this voir dire oath was appropriate, it was not required by statute.

OUJI-CR 1-3

CHARGE

The **defendant(s) is/are** charged with the **crime(s)** of **[Name the Crime(s)]**, committed against **[Name the Alleged Victim(s)]**.

OUJI-CR 1-4

FAIR AND IMPARTIAL JURY

Both the State of Oklahoma and the **defendant(s)** are entitled to jurors who approach this case with open minds and agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice, or sympathy. Jurors must not be influenced by preconceived ideas as to the facts or as to the law.

From this point until the conclusion of this trial, do not discuss this case with any other person, including family and friends. You should not read or listen to any media discussing this case nor research this case in any way, including through the internet or any other tools of technology. Nor should you use any of these means to communicate to others about the case. It is important that this case be decided solely on the evidence you receive in this courtroom.

You are undoubtedly qualified to serve as a juror but you may not be qualified to serve as a juror in this particular case. Hence, the law permits unlimited challenges for cause. Moreover, the law grants both the State and the **defendant(s) 3/5/9** peremptory challenges. A peremptory challenge permits either the State or the defendant to excuse a prospective juror for any reason allowed by law. If you are excused from being a juror in this particular case, it is no reflection on you. You well may be chosen to serve as a juror in another case.

Committee Comments

The United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits peremptory challenges on the basis of race or gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994) (gender); *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986) (race). See also *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (setting out 3 step analysis that trial court should use in ruling on objection to peremptory challenge); *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (criminal defendant may object to race-based peremptory challenges even though the excluded jurors and the criminal defendant are not of the same race); *Neill v. State*, 1994 OK CR 69, ¶ ¶ 17-23, 896 P.2d 537, 546-47 (procedure for ruling on objections to peremptory challenges); *Black v. State*, 1994 OK CR 4, ¶ ¶ 16-17, 871 P.2d 35, 41 (*Batson* hearing was required even though some black jurors remained on the jury); *Green v. State*, 1993 OK CR 30, ¶ ¶ 6-9, 862 P.2d 1271, 1272-73 (applying *Powers v. Ohio*).

(2013 Supp.)

OUJI-CR 1-5

EXAMINATION BY THE COURT

I will now ask you a number of questions to determine your qualifications to serve as jurors in this case. To determine your qualifications I will need to obtain information from each of you, including some personal information. The purpose of these questions is to obtain a fair jury and it is not to embarrass you. If any of my questions should touch on sensitive subjects that you do not want to have heard by everyone present, you should tell me, and you can then come forward so that we can discuss those matters privately.

1. Do you reside in **[Name of County]** County?

Committee Comments

Okla. Const. art. 2, § 20 requires "trial by an impartial jury of the county in which the crime shall have been committed." Not every juror who reports for service on the jury panel is necessarily a resident of the county, and so the judge should make sure that all non-residents are removed from the jury.

2. The **attorney(s)** for the State **is/are [Name the Attorney(s)]**. Do any of you know the **attorney(s)** for the State? Has the District Attorney's office handled any matter for any of you?

3. The **attorney(s)** for the **defendant(s) is/are [Name the Attorney(s)]**. Do any of you know the **attorney(s)** for the **defendant(s)**? **Has/Have** the **attorney(s)** for the **defendant(s) [or his/her law firm]** represented you on any legal matter?

4. The **defendant(s)** in this case **is/are** is **[Name the Defendant(s)]**. Do any of you know the **defendant(s)**?

5. **Do/Did** any of you know **[Name the Alleged Victim(s)]**, or any member of **his/her/their** family?

6. The witnesses who may be called in this case are **[Name the Witness(es)]**: Do any of you know any of the witnesses, or any member of their families?

7. Have any of you read or heard the alleged facts of this case? Have you expressed or formed an opinion concerning this case? Would any information you have read or heard concerning this case influence your ability to hear or decide this case impartially? Have you discussed this case with anyone prior to today?

8. Have any of you had any experience that you feel might affect your consideration of this case?

9. Are you or any of your friends or relatives employed or involved with a law enforcement agency or organization? Have you or any of your friends or relatives been connected with law enforcement in the past? Do you hold or have you held a "Reserve Deputy Commission," a "Special Deputy Commission," or an "Honorary Deputy Commission"?

Committee Comments

Under 38 O.S. 2001, § 28 , sheriffs or deputy sheriffs are disqualified from serving as jurors. The Court of Criminal Appeals has held that a person who holds a "reserve deputy commission," a "special deputy commission," or an "honorary deputy commission" is similarly disqualified from serving as a juror, even though the person holding this commission has no legal authority or legal duty to act as a deputy sheriff. *State v. Smith*, 1958 OK CR 6, 320 P.2d 719 ; *Henderson v. State*, 95 Okl. Cr. 342, 246 P.2d 393 (1952); *Allen v. State*, 70 Okl. Cr. 143, 105 P.2d 450 (1940); *Carr v. State*, 63 Okl. Cr. 201, 84 P.2d 42 (1938); *Tripp v. State*, 63 Okl. Cr. 41, 72 P.2d 529 (1937).

10. Have any of you ever been charged with or accused of a crime? Have any of your friends or relatives ever been charged with or accused of a crime?

11. Have any of you ever been victims of a crime? Have any of your friends or relatives ever been victims of a crime?

12. I will instruct you on the law and the rules by which the jury reaches a verdict. Your duty as jurors is to accept and follow the law as included in the instructions and rules given to you by me. If selected as a juror, will each of you accept and follow the law as included in the instructions and rules that I will give to you?

One instruction I will give is that **the/each** defendant is presumed innocent of the crime charged, and the presumption continues unless after consideration of all the evidence you are convinced of **his/her/(each defendant's)** guilt beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes the guilt of **the/each** defendant beyond a reasonable doubt. **The/Each** defendant must be found not guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the crime. If selected as a juror, will each of you presume **the/each** defendant innocent unless proven guilty beyond a reasonable doubt?

[Select either Alternate 1 (No Death Penalty) or Alternate 2 (Death Penalty)].

Alternate 1 (No Death Penalty)

Another instruction I will give is that as jurors, if you find the **defendant(s)** guilty, you will have the duty to assess punishment. The punishment for the crime of **[Name the Crime Charged]** is a possible maximum punishment of (**a term in the State Penitentiary for [possible maximum years in Penitentiary])/(a term in the County Jail for [possible maximum jail term]) and/or [a fine of (possible maximum fine)]**.

If selected as a juror and you find the defendant(s) guilty, will each of you assess punishment in accordance with the law?

Notes on Use

Alternate 1 shall be given except when the crime charged is murder in the first degree and the death penalty is sought. It should be repeated for each crime charged.

Committee Comments

If the charge involves an "after former conviction" charge, Question 11, Alternate 1, should not be given at voir dire. *See* 22 O.S. 2001, § 860.1. No discussion of the possible punishment in an "after former conviction" case should be given to the jury until the second stage of the trial.

Alternate 2 (Death Penalty)

The defendant is charged with murder in the first degree. It will be the duty of the jury to determine whether the defendant is guilty or not guilty after considering the evidence and instructions of law presented in court.

If the jury finds beyond a reasonable doubt that the defendant is guilty of murder in the first degree, the jury will then have the duty to assess punishment. The punishment for murder in the first degree is death, imprisonment for life without parole or imprisonment for life.

You may not consider imposing the death penalty unless you find that one or more aggravating circumstances exist beyond a reasonable doubt. Aggravating circumstances are those which increase the defendant's guilt or enormity of the offense. You also may not consider imposing the death penalty unless you unanimously find that the aggravating circumstance or circumstances outweigh any mitigating circumstances which may be present. Mitigating circumstances are 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty. Even if you find that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

If you find the defendant guilty of murder in the first degree, can you consider all three of these legal punishments--death, imprisonment for life without parole or imprisonment for life--and weigh the aggravating circumstance(s) against the mitigating circumstances to impose the punishment warranted by the law and evidence?

[If the answer to the preceding question is negative]

If you found beyond a reasonable doubt that the defendant was guilty of murder in the first degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of **death/(imprisonment for life without parole)/(imprisonment for life)**, are your reservations about the penalty of **death/(imprisonment for life without parole)/ (imprisonment for life)** so strong that regardless of the law, the facts and circumstances of the case, you would not consider the imposition of the penalty of **death/(imprisonment for life without parole)/(imprisonment for life)**?

[Required To Be Asked In All Death Penalty Cases] - If you find beyond a reasonable doubt that the defendant is guilty of murder in the first degree, will you automatically impose the penalty of death?

Notes on Use

Alternate 2 shall be given when the crime charged is murder in the first degree and the death penalty is sought. The Oklahoma Court of Criminal Appeals emphasized in *Hanson v. State*, 2003 OK CR 12, ¶ 6, 72 P.3d 40, 46-47 , that "[t]his Court has repeatedly held that, if a defendant so requests, either he or the trial court must ask prospective jurors whether they would automatically impose a sentence of death." While the Committee acknowledges that *Morgan v. Illinois* , 504 U.S. 719 (1992) does not require the last question to be asked absent the request of defense counsel, the Committee believes that the interests of justice and judicial economy will be best served if the trial court asks this question in all death penalty cases.

Committee Comments

The punishments authorized in 21 O.S. 2001 § 701.9 are death, imprisonment of life without parole, and imprisonment for life.

The United States Supreme Court held in *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968), that the death penalty could not be carried out if it was imposed by a jury from which jurors had been excluded because they voiced general objection to the death penalty or conscientious or religious scruple to it. A juror may be challenged for cause, however, if that jurors's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), *quoting Adams v. Texas*, 448 U.S. 38, 45 (1980). *See also Trice v. State*, 1993 OK CR 19 , ¶ 8, 853 P.2d 203 , 209 (applying this standard). A juror should not be excused for cause because he or she disagrees with the death penalty or even if imposing it would do violence to the juror's conscience. *Banks v. State*, 1985 OK CR 60 , ¶ 10, 701 P.2d 418 , 422 ("Violence done to one's conscience is not the point of the *Witherspoon* voir dire examination."). Instead, the trial court's concern should be "whether each jury member will consider the imposition of the death sentence, as one of the alternatives provided by state law, should the case be appropriate for that punishment." *Duvall v. State*, 1991 OK CR 64 , ¶ 24, 825 P.2d 621 , 630.

In addition to being willing to consider imposition of a death sentence, if warranted, a juror must also be willing to consider the alternative sentences of imprisonment for life without parole and imprisonment for life. The United States Supreme Court held in *Morgan v. Illinois*, 504 U.S. 719, 735 (1992), that a trial court's refusal to inquire into whether a potential juror would automatically impose the death penalty upon conviction of a defendant was a violation of due process of law. *See also Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) (juror who stated that he would vote to impose death automatically if the jury decided that the defendant was guilty should have been removed for cause). In *Hanson v. State*, 2003 OK CR 12 , ¶¶ 6-8, 72 P.3d 40, 46-47, the Oklahoma Court of Criminal Appeals remanded for capital resentencing because the trial court did not allow

defense counsel to ask whether any juror would automatically impose death.

Although Alternate 2 does not conform exactly to the language that the Court of Criminal Appeals recommended in *Duvall v. State*, *supra*, Alternate 2 is consistent with *Duvall*'s holding. It also incorporates the requirement in *Morgan v. Illinois*, *supra*, that the trial judge should question the jurors about whether they would give appropriate consideration to life imprisonment as well as the death penalty. *Cf. Hammon v. State*, 1995 OK CR 33 , ¶ 54, 898 P.2d 1287 , 1300 ("A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under the belief that upon conviction the death penalty should automatically be imposed.").

The Court of Criminal Appeals stated in *Eizember v. State*, 2007 OK CR 29 , ¶ 64, n.10, --- P.3d ----, 2007 WL 2142304, that the trial judge should inform the jury of the process to be followed for determining the punishment and elicit a response to whether the jurors would be able to follow that process.

13. Having been asked these questions, do any of you know at this time any reason why you could not be a fair and impartial juror? If so please raise your hand.

14. The court now requests that each of you give your name, your spouse's name if you are married, your occupation, your spouse's occupation, and the number of children you have. Please speak slowly and clearly. Let us begin with [Note: Indicate the juror who is to begin.]

Committee Comments

The Commission urges that the trial court prepare and distribute to the attorneys a sheet with a facsimile of the jury box providing spaces for the attorneys to copy the information requested by the court in question 13.

Jurors should not be asked to give their addresses during voir dire. 38 O.S. 2001 § 36 ("Persons serving as jurors during a trial shall not be asked or required to give their complete residence addresses or telephone number in the presence of the defendant.").

(2008 Supp.)

OUJI-CR 1-6

EXAMINATION BY THE ATTORNEYS

The attorneys for the State and the **defendant(s)** will now ask you questions. The questions are not designed to pry into your personal affairs but to discover if you have any information or opinions concerning this case which you cannot lay aside, or personal experiences in your life which might cause you to favor or disfavor the State or the defendant or persons who may be witnesses. The questions may further be designed to ascertain your attitude on social, religious and moral issues. These questions are necessary to assure the State and the **defendant(s)** an impartial jury.

The attorney for the State will proceed first.

Committee Comments

The Commission reminds the trial judge that the attorneys for both the State and the defense have the right to voir dire the prospective jurors. Although counsel should be encouraged to ask questions of the jury panel as a group, counsel shall not be deprived of the right to ask reasonable questions of each prospective juror. 12 O.S. ch. 2 app., Rules for the District Courts of Oklahoma, R. 6.

B. PRELIMINARY REMARKS

Committee Comments

Preliminary remarks are to be made by the trial judge after the jury has been sworn but prior to the opening statements of counsel. The purpose of these preliminary remarks is to orient the jury and to inform about the conduct of the trial and their role.

(2000 Supp.)

OUJI-CR 1-7

OATH TO THE JURY

Do you, and each of you, solemnly **swear/affirm** that you will well and truly try the issues submitted to you in the case now on trial and reach a true verdict, according to the law and evidence presented to you, **(so help you God?)/(this you do affirm under the penalties of perjury)**?

Notes on Use

Continue directly with OUJI-CR 1-8.

Committee Comments

The changes made from a prior version of this Instruction were intended to make the oath more understandable to the jury and to conform the oath given in criminal cases more closely to that prescribed for civil cases. *See* OUJI(Civil) 1.3.

(2000 Supp.)

OUJI-CR 1-8

OPENING INSTRUCTION

You have been selected and sworn as the jury to try the case of the State of Oklahoma against **[Name the Defendant(s)]**. The **defendant(s) is/are** charged with the **crime(s)** of **[Name the Crime Charged]** by an **information/indictment** filed by the State.

The **information/indictment** in this case is the formal method of accusing the **defendant(s)** of **[a] crime(s)**. The information/indictment is not evidence and the law is that you should not allow yourselves to be influenced against the **defendant(s)** by reason of the filing of the **information/indictment**.

The **defendant(s) has/have** pled not guilty. A plea of not guilty puts in issue each element of the crime with which the **defendant(s) is/are** charged. A plea of not guilty requires the State to prove each element of the crime beyond a reasonable doubt.

The **defendant(s) is/are** presumed innocent of the **crime(s)** and the presumption continues unless after consideration of all the evidence you are convinced of **his/her** guilt beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt. The defendant must be found not guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the **crime(s)**.

Evidence is the testimony received from the **witness(es)** under oath, agreements as to fact made by the attorneys, and the exhibits admitted into evidence during the trial.

It is your responsibility as jurors to determine the facts from the evidence, to follow the law as stated in the instructions from the judge, and to reach a verdict of not guilty or guilty based upon the evidence [and to determine punishment if you should find the **defendant(s)** guilty].

Notes on Use

The immediately preceding bracketed clause should be used only in a non-bifurcated trial.

(2013 Supp.)

OUJI-CR 1-8A

OPENING INSTRUCTION - DUTY OF JURORS

It is your responsibility as jurors to determine the credibility of each witness and the weight to be given the testimony of the witness. In order to make this determination, you may properly consider the overall reaction of the witness while testifying; the frankness or lack of frankness of the witness; the interest and bias, if any, of the witness; the means and opportunity the witness had to know the facts about which the witness testifies; and the reasonableness or unreasonableness of the testimony in light of all the evidence in the case. You are not required to believe the testimony of any witness simply because the witness is under oath. You may believe or disbelieve all or part of the testimony of any witness. It is your duty to determine what testimony is worthy of belief and what testimony is not worthy of belief.

It is my responsibility as the judge to insure the evidence is presented according to the law, to instruct you as to the law, and to rule on objections raised by the attorneys. No statement or ruling by me is intended to indicate any opinion concerning the facts or evidence.

It is the responsibility of the attorneys to present evidence, to examine and cross-examine witnesses, and to argue the evidence. No statement or argument of the attorneys is evidence.

From time to time during the trial, the attorneys may raise objections. When an objection is made, you should not speculate on the reason why it is made. When an objection is approved or sustained by me, you should not speculate on what might have occurred or what might have been said had the objection not been sustained.

Throughout the trial you should remain alert and attentive. Do not form or express an opinion on the case until it is submitted to you for your decision. Do not discuss this case among yourselves until that time. Do not tell anybody about the case, discuss this case with anyone else, or permit anyone else to discuss this case in your presence. This includes either in person or by electronic, telephonic or any other means. Do not talk to the attorneys, the **defendant(s)**, or the **witness(es)**. If anyone should attempt to discuss this case with you, report the incident to me or to the bailiff immediately. This case must be decided solely upon the evidence presented to you in this courtroom, free from any outside influence. This means that during the trial you must not conduct any independent research about the case, the matters in the case, the individuals, witnesses, attorneys, or organizations in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about the case or to help you decide the case. Do not read newspaper reports or obtain information from any other source about this trial or the issues, parties, or witnesses involved in this case, and do not watch or listen to television or radio reports about it. Do not attempt to visit the scene or investigate this case on your own.

While court is in session, please power off or place in airplane mode, all electronic devices. These devices include, but are not limited to, cell phones, Apple Watches, Garmins, or other personal electronics worn on your person. This will allow you to concentrate on the evidence without interruption. If you are required to use your device for medical reasons, please inform the court clerk. You may keep your cell phone or other devices with you until deliberation begins.

At this point in the trial, the attorney for the State reads the information/indictment, the plea of the **defendant(s)**, and gives an opening statement. The attorney for the **defendant(s)** may give an opening statement after the attorney for the State, or may elect to reserve **his/her** opening statement until the conclusion of the evidence by the State. Opening statements are not evidence but serve as guides so that you may better understand and evaluate the evidence when it is presented.

Following the opening statements, witnesses are called to testify. Witnesses are sworn and then examined and cross-examined by the attorneys. Exhibits may also be introduced into evidence.

After the evidence is completed, I will instruct you on the law applicable to the case. The attorneys are then permitted closing arguments. Closing arguments are not evidence and are permitted for purposes of persuasion only.

When closing arguments are completed, the case will be submitted to you. You will then retire to consider your verdict.

The attorney for the State may now proceed.

(2022 Supp.)

OUJI-CR 1-9

NOTETAKING BY JURORS

You may take notes during the presentation of evidence in this case. In that regard remember this:

1. Notetaking is permitted but is not required.

2. Take notes sparingly. Do not try to write down all the testimony. Your notes will only be used for the purpose of refreshing your memory. They are helpful when dealing with measurements, times, distances, identities and relationships.

3. Be brief in your notetaking. It is for you to determine the credibility of the witnesses, and to do so you must observe them. Do not let notetaking distract you from this duty.

4. Your notes are for your private use only. Do not share your notes with any other juror during the presentation of the case. You may discuss the contents of your notes only after all sides have rested and you have commenced your deliberations.

Notes on Use

This Instruction is recommended **IF** the court permits jurors to take notes.

Committee Comments

The Court of Criminal Appeals first affirmed the discretion of the trial court to permit jurors to take notes during trial in *Glazier v. State*, 1973 OK CR 386, ¶ 15, 514 P.2d 87, 91. The*Glazier* opinion included dicta that jurors should not be allowed to take their notes into the jury room while deliberating, but in *Cohee v. State*, 1997 OK CR 30, ¶¶ 4-5, 942 P.2d 211, 212-13, the Court of Criminal Appeals repudiated this dicta, and it held that jurors may use their notes during deliberations. *Id.* at 213. This Instruction is based on one suggested by the Oklahoma Supreme Court in *Sligar v. Bartlett*, 1996 OK 144, n.2, 916 P.2d 1383, 1387.

(2000 Supp.)

OUJI-CR 1-10

INTRODUCTORY INSTRUCTIONS - JUROR QUESTIONNAIRES

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA, Plaintiff,	))	
	)	CASE NO. _____
Vs.	))	
JOHN DOE, Defendant.	))	

JUROR QUESTIONNAIRE

Each prospective juror must complete and sign this standard juror questionnaire and any supplemental questionnaire provided by the court. This questionnaire and any supplemental questionnaire shall be confidential and will be used by the judge and the attorneys to aid them in selecting the jury in this case. If you do not understand a question, please indicate. If you do not have enough room to give adequate explanation to your answer, please use the space in question 27 for additional information. If there is any question that you would rather discuss with the judge and attorneys privately outside the presence of the other jurors, please mark the question with an asterisk (*).

1. Name: _____
(Last) (First) (Middle Initial)

2. Sex: ( ) Male ( ) Female

3. Marital Status: ( ) Married ( ) Never Married ( ) Separated ( ) Divorced ( ) Widowed

4. Date of Birth: _____

5. Place of Birth: _____

6. Length of Residency in Oklahoma (years):_____

7. What County Do You Live In? _____

8. List Other Places (City and State) You Have Lived _____

9. What Is Your Occupation? _____
(If retired or unemployed, write retired or unemployed and give your previous occupation.)

10. If You Are Currently Employed Outside the Home, Please Provide:

Name of Employer _____

Job Title _____

Length of Time Worked There _____

11. List Other Types of Jobs You Have Held as an Adult _____

_____

_____

12. Educational Background: _____

_____

_____

13. If You Attended College or Vocational School, Specify Your Major Areas of Study and Any Degrees or Certificates You Earned and Whether You Have Taken Any Course in Law: _____

_____

_____

14. If You Have Had Military Experience, State Your Highest Rank, Branch of Service, Length of Service, and Specify Whether Service Was Reserve or Active Duty: _____

_____

_____

15. List the Organizations That You Belong to or Participate In, and the Offices, If Any, That You Hold in These Organizations: _____

_____

_____

16. If You Are Married, State Spouse's Full Name, Occupation and Employer

_____

_____

17. If You Have Any Children or Step Children, Please Provide the Following Information:

Child # 1: Sex _____ Age _____ Occupation _____

Child # 2: Sex _____ Age _____ Occupation _____

Child # 3: Sex _____ Age _____ Occupation _____

Child # 4: Sex _____ Age _____ Occupation _____

18. Have You Ever Served as a Juror? ( ) Yes ( ) No

If Yes, Please Provide the Following Information:

Year	Court/ Location	Type of Case	Were You the Foreperson?
_____	_____	_____	( ) Yes ( ) No
_____	_____	_____	( ) Yes ( ) No
_____	_____	_____	( ) Yes ( ) No

19. Have You Ever Appeared as a Witness in Any Court Proceeding, Either Civil, Criminal or Military? ( ) Yes ( ) No

If Yes, What Were the Circumstances? _____

_____

_____

20. Have You, Any Member of Your Immediate Family, or Any Close Friend Been a Defendant in a Criminal or Military Court Martial Case? ( ) Yes ( ) No

If Yes, Who and Relationship to You: _____

Type of Crime Accused of Committing? _____

Was There a Conviction? ( ) Yes ( ) No

21. Have You, Any Member of Your Immediate Family, or Any Close Friend Been the Victim of a Crime? ( ) Yes ( ) No

If Yes, Who Was the Victim? _____

What Was the Crime? _____

When Did it Occur? _____

Was an Arrest Made? ( ) Yes ( ) No

22. Have You, Any Family Member, or Any Close Friend Ever Been an Employee of or Volunteer for Any Federal, State or Local Law Enforcement Agency or Ever Worked in a Jail, Prison or Detention Center? ( ) Yes ( ) No

If Yes, State Each Person's Name and Relationship to You: _____

Position Held _____

Agency _____

Dates of Employment _____

23. Have You, Any Family Member, or Any Close Friend Ever Worked for a District Attorney or Other Prosecuting Attorney's Office? ( ) Yes ( ) No

If Yes, State Each Person's Name and Relationship to You: _____

Position Held _____

Name of Attorney and Office _____

Dates of Employment _____

24. Have You, Any Family Member, or Any Close Friend Ever Worked for Any Other Attorney or Law Office? ( ) Yes ( ) No

If Yes, State Each Person's Name and Relationship to You: _____

Position Held _____

Name of Attorney and Office _____

Dates of Employment _____

25. Are You Presently Taking Medicine or Have Any Hearing or Other Health Issues Which May Affect Your Ability to Serve as a Juror? ( ) Yes ( ) No

If Yes, Please Explain _____

_____

26. Is There Any Reason You Could Not Serve as a Juror? ( ) Yes ( ) No

If Yes, Please Explain _____

_____

_____

27. Use this Space for Any Additional Comments: _____

_____

_____

_____

I affirm that the foregoing is true and correct to the best of my knowledge and belief.

_____ _____

(Date and Place) (Signature)

Notes on Use

In its discretion, the trial court may direct the use of this juror questionnaire as well as supplemental questionnaires as a supplement to, rather than a substitute for, voir dire. If used, juror questionnaires should be distributed to the members of the jury pool before the commencement of voir dire, and adequate time for the court and attorneys to review the jurors' responses should be allowed before voir dire begins.

Juror questionnaires should be kept confidential, and copies of them should be made available only for use during voir dire to the attorneys for the prosecution and defense, and to the trial court, except as needed for appellate review. Juror questionnaires should not be made a part of the public record. After the jury has been impaneled, the original questionnaires of all impaneled or questioned jurors should be retained pursuant to Okla. Ct. of Crim. App. R. ____ until all appeals have been concluded. All copies of juror questionnaires should be destroyed at the conclusion of the voir dire, and the originals of all questionnaires for jurors who were not questioned during voir dire should be destroyed at the conclusion of the jurors'

service, unless the court orders otherwise for good cause shown. See Okla. Ct. of Crim. App. R. ____.

Committee Comments

In *Cohee v. State*, 1997 OK CR 30, Attachment 1, 942 P.2d 211, 213-14, the Court of Criminal Appeals adopted the following Guideline for use in criminal proceedings:

> Guideline 3. Jury Questionnaires; Confidentiality.
>
> > The trial court may, upon request of the parties and at its discretion, allow a written juror questionnaire to be sent to members of the jury pool before voir dire commences, and may allow the results of that questionnaire to be used in voir dire. The trial court must examine and approve the questions contained in the questionnaire. The court shall keep all jurors' home and business telephone numbers confidential unless good cause is shown to the court which would require such disclosure.

Since the *Cohee* decision, Oklahoma trial courts have used juror questionnaires in a number of criminal cases, and this juror questionnaire form is provided to offer further guidance in the use of juror questionnaires. A number of benefits from the use of juror questionnaires have been identified. Juror questionnaires may shorten the time required for voir dire; however, this benefit will not be realized unless counsels refrain from rehashing the information from the questionnaires during voir dire. Another benefit is that juror questionnaires may enable the court and counsel to weed out jurors who could not serve in a case before voir dire begins, and thereby accelerate the process of sending these prospective jurors to a different case. Juror questionnaires may also highlight particular areas (such as prior employment with law enforcement) for more focused inquiry during voir dire. The use of juror questionnaires provides jurors more time to think about their answers and provide more complete responses than voir dire. In addition, since jurors cannot hear the responses of other jurors when they are filling out questionnaires on their own, juror questionnaires can elicit the jurors' own opinions without the influence of the responses by other jurors. Jurors may also be more likely to reveal socially unacceptable attitudes, such as racial prejudice or sexism, in juror questionnaires. Similarly, jurors may be more apt to disclose private or embarrassing information (such as a prior criminal record) in a juror questionnaire than in open court. See Gregory P. Joseph, *American Bar Association Principles for Juries & Jury Trials*, SL044 ALI-ABA 653, 730 (2005); Lin S. Lilley, *Let Jurors Speak the Truth, In Writing*, 41 TRIAL 64 (July. 2005); Valerie Hans & Alyana Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process*, 78 CHI-KENT L. REV. 1179, 1198 (2003).

The American Bar Association has endorsed the use of juror questionnaires. In February, 2005, the ABA House of Delegates approved 19 Principles for Juries and Jury Trials. Principle 11 states: "Courts should ensure that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury." Paragraph A under Principle 11 provides:

> Before voir dire begins, the court and parties, through the use of appropriate questionnaires, should be provided with data pertinent to the eligibility of jurors and to matters ordinarily raised in voir dire, including such background information as is provided by prospective jurors in their responses to the questions appended to the notification and summons considered in Standard 10 D. 1.
>
> > 1. In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire. The parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party.
> >
> > 2. Jurors should be advised of the purpose of any questionnaire, how it will be used and who will have access to the information.
> >
> > 3. All completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination.

American Bar Association, PRINCIPLES FOR JURIES AND JURY TRIALS 13 (2005). In addition, New Mexico, New York, and Pennsylvania have adopted uniform juror questionnaires for criminal cases. N.M.R.A. Crim. UJI 14-110; N.Y. Ct. R., App. E; Pa. St. R. Crim. P. 632(A)(1) ("Each prospective juror shall complete and verify the standard, confidential juror information questionnaire required by paragraph (H) of this rule, and any supplemental questionnaire provided by the court.").

While juror questionnaires may provide a number of benefits to the jury selection process, there have been concerns raised about juror privacy. Mary R. Rose, *Juror's Views of Voir Dire Questions*, 85 JUDICATURE 10 (2001); Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18 (2001). Juror questionnaires pose a different threat to juror privacy than voir dire in open court, because juror questionnaires are written records. A concern for juror privacy is reflected in the ABA's Principles for Juries and Jury Trials in Principle 7, which states: "Courts should protect juror privacy insofar as consistent with the requirements of justice and the public interest." Both New York and Pennsylvania address concerns for juror privacy by providing for destruction of juror questionnaires at the conclusion of the case. N.Y. Ct. R., App. E, ¶ A(1) ("Upon completion of jury selection, or upon removal of a prospective juror, the questionnaires shall be either returned to the respective jurors or collected and discarded by court staff in a manner that ensures juror privacy."); Pa. St. R. Crim. P. 632 (F), (G). Similarly, the Oklahoma Court of Criminal Appeals has provided for destruction of juror certain questionnaires upon completion of the juror's service. Okla. Ct. Crim. App. R. ____.

(1/2007 Supp.)

OUJI-CR 1-11

DEFENDANT'S SELF REPRESENTATION

The Sixth Amendment to the United States Constitution guarantees that a person charged with a crime has the right to the assistance of counsel. This Constitutional guarantee also provides that an individual charged with a crime has the right to waive representation by legal counsel, and proceed to trial representing **himself/herself,** and act as **his/her** own attorney. The defendant has elected to waive **his/her** right to counsel and represent **himself/herself** in this matter. You are not to let the fact that [**Name of Defendant**] has elected to represent **himself/herself** influence your decision in this case. Instead, you must decide this case based upon the law in the court's instructions and the evidence received during the course of the trial.

[**Name of Standby Counsel**] has been appointed as standby counsel to the defendant but not to act as **his/her** attorney in this case. The role of standby counsel is limited to answering [**Name of Defendant**]'s questions and providing other assistance but standby counsel will not be participating directly in the trial. In electing to represent **himself/herself**, the defendant has assumed the full responsibility of acting as **his/her** own attorney in this case and will be held to the same standards and requirements of an actual practicing attorney. Standby counsel will be available to answer [**Name of Defendant**]'s questions during the course of the trial but the defendant will solely make all of the decisions concerning **his/her** defense.

Notes on Use

The trial court should give the second paragraph if it has appointed a standby counsel for the defendant.

Committee Comments

The Oklahoma Court of Criminal Appeals emphasized in *Brown v. State*, 2018 OK CR 3, ¶ 48, 422 P.3d 155, 166, that "the trial court must ensure that a defendant choosing self-representation understands his rights, not only in the guilt/innocence process, but also in the sentencing process."

(2019 Supp.)

OUJI-CR 2-1

ACCESSORY- INTRODUCTION

The **defendant(s) is/are** charged with being **[an] accessory(ies)** to the crime of **[Underlying Felony]** on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 2-2

ACCESSORY - ELEMENTS

No person may be convicted of being an accessory to the felony of **[Underlying Felony]** unless the State has proved beyond a reasonable doubt each element of the crime of accessory. These elements are:

First, actively **conceals/aids** the offender;

Second, after commission of the felony of **[Underlying Felony]**;

Third, such **concealing/aiding** must be performed with knowledge that the offender has committed the acts which constitute the felony of **[Underlying Felony]**;

Fourth, such **concealing/aiding** must be performed with the intent that the offender **avoid/(escape from) arrest/trial/conviction/punishment**.

Statutory Authority: 21 O.S. 1991, § 173.

OUJI-CR 2-3

ACCESSORY - ELEMENTS OF UNDERLYING CRIME

The elements of the **[Underlying Felony]** to which the **defendant(s) is/are** allegedly **[an] accessory(ies)** are as follows:

[Give Elements of Underlying Felony]

OUJI-CR 2-4

ACCESSORY - DEFINITIONS

Aid - Render overt personal assistance.

References: Wilson v. State, 552 P.2d 1404 (Okl. Cr. 1976); Farmer v. State, 56 Okl. Cr. 380, 40 P.2d 693 (1935).

Conceal - Hide or secrete to prevent discovery.

References: Brewer v. State, 554 P.2d 18 (Okl. Cr. 1976); Black's Law Dictionary 261 (5th ed. 1979).

Knowledge - Personal awareness of the facts.

Reference: 21 O.S. 1991, § 96.

Statutory Authority: 21 O.S. 1991, §§ 173, 174.

Committee Comments

With respect to the offense of accessory to a felony, such offense is not a lesser included offense of the principal crime. An individual becomes an accessory under Oklahoma statutory provisions only when that individual becomes associated with the offender and his fate subsequent to the commission of the original offense. One who participates either prior to or during the commission of the offense is liable as a principal. *Wilson v. State*, 552 P.2d 1404 (Okl. Cr. 1976); *Vann v. State*, 21 Okl. Cr. 298, 207 P. 102 (1922).

Since the prior commission of a felony by the offender who is aided or concealed is an element of the crime of being an accessory, an instruction concerning the elements of the underlying felony must be given in every case.

These instructions are similar to instructions approved by the Court of Criminal Appeals. *See, e.g., Harwood v. State*, 543 P.2d 761 (Okl. Cr. 1975); *Thompson v. State*, 6 Okl. Cr. 50, 117 P. 216 (1911); *Drury v. Territory*, 9 Okl. 398, 60 P. 101 (1900).

OUJI-CR 2-5

AIDING AND ABETTING - INTRODUCTION

All persons concerned in the commission of a crime are regarded by the law as principals and are equally guilty thereof. A person concerned in the commission of a crime as a principal is one who **(directly and actively commits the act(s) constituting the offense)/(knowingly and with criminal intent aids and abets in the commission of the offense)/(whether present or not, advises and encourages the commission of the offense)**.

Notes on Use

If the court uses the second alternative in the second sentence, it should also inform the jury of the definition of "criminal intent" in OUJI-CR 2-9, *infra*. If this Instruction is given, the court must also give OUJI-CR 2-6, *infra*.

(2000 Supp.)

OUJI-CR 2-6

AIDING AND ABETTING - PRINCIPAL DEFINED

Merely standing by, even if standing by with knowledge concerning the commission of a crime, does not make a person a principal to a crime. Mere presence at the scene of a crime, without participation, does not make a person a principal to a crime.

One who does not actively commit the offense, but who aids, promotes, or encourages the commission of a crime by another person, either by act or counsel or both, is deemed to be a principal to the crime if **he/she** knowingly did what **he/she** did either with criminal intent or with knowledge of the other person's intent. To aid or abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding in the commission of that criminal offense.

Statutory Authority: 21 O.S. 1991, §§ 171, 172.

Notes on Use

The definition of "criminal intent" in OUJI-CR 2-9, infra, should accompany this Instruction.

Committee Comments

At common law, the parties to a felony were classified in accordance with their degree of participation. Principals were classed as either first or second degree; accessories were designated as either before or after the fact. The principal in the first degree was the criminal actor himself, the person whose conduct directly engendered the criminal result. An individual who aided and abetted the principal in the first degree was punishable either as a principal in the second degree or as an accessory before the fact, depending upon whether the individual was present, either actually or constructively, at the commission of the crime. An accessory after the fact was an individual who, cognizant of the completed felony, rendered aid and comfort to the felon for the purpose of hindering his apprehension, conviction, or punishment. W. LaFave and A. Scott, *Criminal Law* § 495, at 498 (1972); R. Perkins, *Criminal Law* 643 (2d ed. 1969).

In Oklahoma, these distinctions have been statutorily abolished. Those formerly classified at common law as principals in the first and second degree, as well as those classified as accessories before the fact, are statutorily defined as principals. Those classified at common law as accessories after the fact are statutorily denominated as accessories. *Wilson v. State*, 1976 OK CR 167, 552 P.2d 1404; *Wishard v. State*, 5 Okl. Cr. 610, 115 P. 796 (1911); *Drury v. Territory*, 9 Okl. 398, 60 P. 101 (1900).

An aider and abettor does not personally need to intend to commit a crime to be liable as a principal. A person may also be liable as a principal for aiding and abetting the perpetrator knowing of the perpetrator's intent to commit the crime. *Conover v. State*, 1997 OK CR 6, 40-47, 933 P.2d 904, 914-16. As the Court of Criminal Appeals explained in the *Conover* case, restricting liability to a person who intended to commit a crime would eliminate aiders and abettors, because a person who intended to commit a crime would be liable as a perpetrator or principal in the first degree. *Id.* at 916. Because Oklahoma provides that aiders and abettors are liable as principals, criminal liability must extend beyond persons who intend to commit a crime to persons who aid and abet the perpetrator knowing of the perpetrator's intent to commit the crime.

Participation in the commission of a crime remains a question of fact, and may be established by circumstantial proof. *Morrison v. State*, 1974 OK CR 18, 518 P.2d 1279; *Dean v. State*, 1972 OK CR 283, 509 P.2d 1365; *Love v. State*, 1969 OK CR 16, 449 P.2d 729. However, more than consent to, or acquiescence in, the criminal acts of another is required to constitute participation; consent or acquiescence involves cognitive or mental activity which, unless communicated to the perpetrator of the offense, does not serve to aid and abet him

in its commission. *Anderson v. State*, 66 Okl. Cr. 291, 91 P.2d 794 (1939); *Moore v. State*, 4 Okl. Cr. 212, 111 P. 822 (1910): *Drury v. Territory*, 9 Okl. 398, 60 P. 101 (1900). The Court of Criminal Appeals addressed the issue of acquiescence in the context of homicide in the following terms:

> [N]o one can be properly convicted of a crime to the commission of which he has never expressly or impliedly given his assent. To hold otherwise would be contrary to natural right and shocking to every sense of justice and humanity. When the accused is present and aiding and abetting another in its commission, he may be considered as expressly assenting thereto, so, where he has entered into a conspiracy with others to commit a felony or other crime under such circumstances as will, when tested by experience, probably result in the unlawful taking of human life, he must be presumed to have understood the consequences which might reasonably be expected to flow from carrying into effect such unlawful combination, and also to have assented to the aiding of whatever should reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. But further than this the law does not go; for if the accused in such case has not expressly assented to the commission of the crime, and the unlawful enterprise is not of such character as will probably involve the necessity of taking life in carrying it into execution, there can be no implied assent, and consequently no criminal liability. The mere presence of the accused at the scene of the homicide does not make him a criminal; he may have known that a crime was committed, yet, if he did not participate in it directly or indirectly, or encourage the party doing the killing, his mere presence would not constitute him a principal in the transaction or connect him criminally with the killing.

Polk v. State, 26 Okl. Cr. 283, 301, 224 P. 194, 206 (1924) (citation omitted).

Although 21 O.S. 1991, § 174, restates the common law position that there can be no accessories to a misdemeanor, an individual who aids in the commission of a misdemeanor may be charged, tried, and convicted of that crime as a principal. *Hishaw v. State*, 1979 OK CR 140, 603 P.2d 1167; *Patterson v. State*, 67 Okl. Cr. 98, 92 P.2d 1079 (1939).

(2000 Supp.)

OUJI-CR 2-7

AIDING AND ABETTING - DEFENSE OF ABANDONMENT

It is a defense to the charge of aiding and abetting that a person abandoned the commission of the alleged crime. However, the responsibility of one who has aided and abetted in the commission of a crime, or engaged in a criminal undertaking, does not cease unless, within time to prevent the commission of the contemplated act, **he/she** has done everything practicable to prevent its consummation. It is not enough that **he/she** may have changed **his/her** mind, and tried when too late to avoid responsibility. **He/she** will be liable if **he/she** fails within time to let the other **party/parties** know of **his/her** withdrawal, and unless **he/she** does everything in **his/her** power to prevent the commission of the crime.

Committee Comments

In *Daniels v. State*, 558 P.2d 405 (Okl. Cr. 1977), the Court of Criminal Appeals stated: "While the law on abandonment of a crime is not developed at length in Oklahoma, it is established that it takes more than a change of mind to exonerate the defendant." *Id.* at 411.

The Court quoted a passage from *People v. King*, 30 Cal. App. 2d 185, 85 P.2d 928 (1938), which was deemed to be an excellent statement of the law. The instruction submitted restates that passage. *See also Collins v. State*, 561 P.2d 1373 (Okl. Cr.), *cert. denied*, 434 U.S. 906 (1977).

(2000 Supp.)

OUJI-CR 2-8

AIDING AND ABETTING, DEFENSE OF ABANDONMENT - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that the **defendant(s)** did not abandon **his/her/their** commission of the crime charged. If you find that the State has failed to sustain that burden, the **defendant(s)** must be found not guilty.

(2000 Supp.)

OUJI-CR 2-9

AIDING AND ABETTING - DEFINITION

Criminal Intent - Design to commit a crime or to commit acts the probable consequences of which are criminal.

References: Vanostrum v. State, 1974 OK CR 187, 539 P.2d 395; Heartsill v. State, 1959 OK CR 53, 341 P.2d 625; Methvin v. State, 60 Okl. Cr. 1, 60 P.2d 1062 (1936).

Committee Comments

Since the claim that the defendant abandoned participation in the crime charged, notified others engaged in the criminal endeavor of the withdrawal, and attempted to prevent the commission of the crime is a defense, the onus of producing evidence sufficient to raise the defense of abandonment remains on the defendant, unless the evidence of the prosecution has raised the issue. **If the defendant fails to adduce any evidence that tends to prove that the defendant's participation in the criminal venture was abandoned, or if the defendant's evidence is insufficient as a matter of law, then the issue of abandonment of the crime is not presented, and no instruction should be given.** If the defendant presents sufficient evidence to raise the defense of abandonment, or if the defense is raised by the evidence of the prosecution, an instruction must be given in order to apprise the jurors of the defendant's theory of the case.

Once the defense of abandonment is properly raised, the burden of proving the nonexistence of the defense should rest on the State. *Cf. Mullaney v. Wilbur*, 421 U.S. 684 (1975) (due process requires that the prosecution prove beyond a reasonable doubt the absence of heat of passion or sudden provocation in a prosecution for homicide). No instructions concerning the defendant's burden to come forward with evidence, or the question of whether the defendant has presented sufficient evidence to warrant an instruction, are included because these matters pertain to questions of law and of trial procedure, both of which are beyond the legitimate concern of the jurors.

(2000 Supp.)

OUJI-CR 2-10

ATTEMPT - INTRODUCTION

The **defendant(s) is/are** charged with attempt to commit the crime of **[Underlying Felony]** on **[Date]** in **[Name of County]** County, Oklahoma.

Statutory Authority: 21 O.S. 1991, §§ 42, 44.

Committee Comments

The statutes form the basis for charging an attempted crime only where no statute specifically designates an attempt to commit a particular crime as unlawful. When a specific attempt statute exists, the general attempt statutes cannot form the basis for the charge. For example, 21 O.S. Supp. 1995, § 652(C), defines the offense of attempting to kill another. In *Ex parte Smith*, 95 Okl. Cr. 370, 246 P.2d 389 (1952), the Court of Criminal Appeals declared that the crime of attempted murder by shooting was covered by the specific statute, section 652, so that a prosecution under the general attempt provision, section 42, was erroneously brought. *See also Minter v. State*, 75 Okl. Cr. 133, 129 P.2d 210 (1942) (attempt to kill by poisoning was covered by 21 O.S. 1941 § 832).

(2000 Supp.)

OUJI-CR 2-11

ATTEMPT - ELEMENTS

No person may be convicted of an attempt to commit the crime of **[Underlying Felony]** unless the State has proved beyond a reasonable doubt each element of the attempt. These elements are:

First, the **defendant(s)** formed the specific intent to commit the crime of **[Underlying Felony]**;

Second, the defendant(s)

Note -- Give One or More of the Following Alternatives:

- Performed a perpetrating act or acts toward committing the crime of **[Underlying Felony]** but **(such act(s) failed to constitute the commission of)/(defendant(s) was/were prevented from committing)/(defendant(s) was/were intercepted in the perpetration of)** that crime.

- Purposely engaged in conduct which would have constituted the crime if the attendant circumstances were as the **defendant(s)** believed them to be.

- When causing a particular result in an element of the crime, did anything with the purpose of causing or with the belief that it would cause such result, without further conduct on the part of the **defendant(s)**.

(2000 Supp.)

OUJI-CR 2-12

ATTEMPT - PERPETRATING ACT DEFINED

A perpetrating act, for purposes of these instructions, is one that would end in the commission of the crime the **defendant(s)** intended to commit, but for the intervention of circumstances independent of the will of the **defendant(s)**.

The requirement that the **defendant(s)** commit a perpetrating act must be distinguished from mere preparation to commit a crime. Preparation consists of devising or arranging the means or measures necessary for the commission of a crime.

(2000 Supp.)

OUJI-CR 2-13

ATTEMPT - ELEMENTS OF UNDERLYING CRIME

The elements of the **[Underlying Felony]** that the **defendant(s)** allegedly attempted to commit are as follows:

[Give Elements of Underlying Crime]

OUJI-CR 2-14

ATTEMPT - DEFINITION

Specific Intent - Deliberate purpose to accomplish the consequences.

References: Carter v. State, 309 P.2d 737 (Okl. Cr. 1957); Vandiver v. State, 97 Okl. Cr. 217, 261 P.2d 617 (1953), overruled on other grounds, Parker v. State, 917 P.2d 980, 986 n.4 (Okl.Cr. 1996); Temple v. State, 71 Okl. Cr. 301, 111 P.2d 524 (1941).

Statutory Authority: 21 O.S. 1991, §§ 41, 42, 43, 44.

Committee Comments

Criminal attempt is a relatively recent development of the common law, traceable to the 1784 decision of the King's Bench in the case of *Rex v. Scofield*, Cald. 397 (1784). The defendant in that case was tried for arson. The defendant had placed a lighted candle and combustible material in a house in which he was a tenant, with the intent to set fire to it. However, no proof of burning was adduced. The court determined that completion of the criminal act was not required to constitute criminality if the attempt was committed with the necessary intent.

The motivating purpose for criminalizing attempts is not to deter the proliferation of completed offenses, but rather to subject to criminal sanctions those individuals who have, by their conduct, sufficiently manifested their dangerousness to society. W. LaFave & A. Scott, *Criminal Law* § 59, at 423-38 (1972).

In Oklahoma, it is settled beyond argument that an attempt, as defined by section 42, requires proof of three elements: (1) intent to commit a crime; (2) performance of some perpetrating act toward the commission of the crime; and, (3) failure to consummate its commission. *Weimer v. State*, 556 P.2d 1020 (Okl. Cr. 1976); *Kidd v. State*, 462 P.2d 281 (Okl. Cr. 1969); *Ervin v. State*, 351 P.2d 401 (Okl. Cr. 1960); *Place v. State*, 300 P.2d 666 (Okl. Cr. 1956); *State v. Thomason*, 23 Okl. Cr. 104, 212 P. 1026 (1923).

The requisite intent implies a specific purpose to accomplish the consummation of the crime, and must be alleged and proved by the State. *Carter v. State*, 309 P.2d 737 (Okl. Cr. 1957); *Vandiver v. State*, 97 Okl. Cr. 217, 261 P.2d 617 (1953), *overruled on other grounds*, *Parker v. State*, 917 P.2d 980, 986 n.4 (Okl.Cr. 1996); *Turman v. State*, 75 Okl. Cr. 405, 132 P.2d 347 (1942); *Dunbar v. State*, 75 Okl. Cr. 275, 131 P.2d 116 (1942), *overruled on other grounds*, *Parker v. State*, 917 P.2d 980, 986 n.4 (Okl.Cr. 1996); *Temple v. State*, 71 Okl. Cr. 301, 111 P.2d 524 (1941). The requisite specific intent may be inferred from circumstances surrounding the defendant's conduct. *Weimer v. State*, 556 P.2d 1020 (Okl. Cr. 1976); *Place v. State*, 300 P.2d 666 (Okl. Cr. 1956).

Evil, socially undesirable thoughts alone, however, do not constitute a criminal offense; criminalization occurs only when the reprehensible mens rea of the defendant is coupled with discernible behavior. The Court of Criminal Appeals addressed the issue of the nature of the act necessary in order to suffice as fulfillment of the actus reus in an early case, *Ex parte Turner*, 3 Okl. Cr. 168, 104 P. 1071 (1909). The court defined preparation to engage in criminal conduct in the language set forth in the instruction submitted, and distinguished a perpetrating act performed in "commencement of the consummation" of the intended crime, *id.* at 173, 104 P., at 1074, as follows:

> [T]he act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must be not merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct

movement towards the commission of the offense after the preparations are made.

Id. at 172, 104 P. at 1071 (1909). *See also Weimer v. State*, 556 P.2d 1020 (Okl. Cr. 1976) (mixing chemicals sufficient to constitute a perpetrating act in prosecution of attempt to manufacture controlled dangerous substance); *Turman v. State*, 75 Okl. Cr. 405, 132 P.2d 347 (1942) (breaking and removing glass of a store window sufficient to sustain a conviction for attempted burglary in the second degree); *State v. Thomason*, 23 Okl. Cr. 104, 212 P. 1026 (1923) (acquiring a boiler and stove, as well as manufacturing 40 gallons of mash, which was ready to be distilled into whiskey, sufficient to constitute a perpetrating act in prosecution for attempt to manufacture whiskey).

OUJI-CR 2-15

ATTEMPT - IMPOSSIBILITY UNAVAILABLE AS A DEFENSE

The fact that it would be impossible for the **defendant(s)** to accomplish the intended crime is not a defense to the attempt to commit the crime of **[Underlying Felony]**.

Committee Comments

The degree of confusion engendered by the defense of impossibility in criminal attempt law is virtually unmatched in substantive criminal law. The traditional viewpoint held that a "legal" impossibility constituted a valid defense to a criminal attempt prosecution, whereas a "factual" impossibility did not. W. LaFave & A. Scott, *Criminal Law* § 60, at 438-53 (1972). Technically., the distinction between a "legal" and a "factual" impossibility is articulated with facility. A "factual" impossibility exists where facts present at the time of the attempt, but unknown to the actor, render the consummation of the intended substantive crime impossible. *Booth v. State*, 398 P.2d 863 (Okl. Cr. 1964). Common examples of this variety of impossibility include: attempting to perform an abortion on a woman who is not pregnant, *People v. Huff*, 339 Ill. 328, 171 N.E. 261 (1930); bludgeoning an empty bed with the intent to murder its customary occupant, *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902); or dipping into an empty pocket with an intent to pilfer, *People v. Moran*, 123 N.Y. 254, 25 N.E. 412 (1890). "Factual" impossibility has never been accepted as a valid defense.

An attempt is deemed to be a "legal" impossibility when the attemptor has completed all of his intended acts, but the sum of his acts fails to fulfill all the elements of a substantive crime. *Booth v. State*, 398 P.2d 863 (Okl. Cr. 1964). "Attempting to do what is not a crime," opines Professor Perkins, "is not attempting to commit a crime." R. Perkins, *Criminal Law* 570 (2d ed. 1969). Commonplace examples of a "legal" impossibility include: "bribing" a person assumed to be a juror who is not, *State v. Taylor*, 345 Mo. 325, 133 S.W.2d 336 (1939); receiving "stolen" goods which are, in fact, not "stolen," *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906); *cf. People v. Rojas*, 55 Cal. 2d 252, 358 P.2d 921 (1961).

This dichotomy in the concept of impossibility reflects the struggle of the judiciary to reconcile apparently conflicting considerations: the concern for affording protection to societal interests from obvious manifestations of dangerousness, and the principle of legality which decrees that an individual can be convicted only for criminal acts specifically proscribed by law. However, this factual/legal dichotomy engendered numerous difficulties for the courts. The rules, simple enough in articulation, proved extraordinarily difficult in application. W. LaFave & A. Scott, *Criminal Law* § 60, at 438 (1972).

Dissatisfaction with the factual/legal distinction led the drafters of the Model Penal Code to a position of total abandonment of the defense of impossibility. Section 5.01(1) of the Code (Tent. Draft No. 10, 1960) provides:

> (1) Definition of attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> > (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
> >
> > (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

While this section does not explicitly mention impossibility, the commentary accompanying Tentative Draft No. 10 of the Code states in unequivocal terms that "the approach of the Code is to eliminate the defense of

impossibility in all situations." And again, in referring specifically to subsection 1(a) of section 5.01, the drafters comment that "[t]he purpose of this paragraph is to reverse the results in cases where attempt convictions have been set aside on the ground that it was legally impossible for the actor to have committed the crime contemplated."

Most jurisdictions have now abolished the defense of legal impossibility to a charge of attempt either by statute or case law. *See State v. Curtis*, 603 A.2d 356, 358-59 (Vt. 1991), and authorities cited therein.

The history of impossibility as a defense in Oklahoma involves a tale of two cases. Oklahoma's main case in support of the defense is *Nemecek v. State*, 72 Okl. Cr. 195, 114 P.2d 492 (1941), *overruled on other grounds*, *Broadway v. State*, 818 P.2d 1253, 1255 (Okl.Cr. 1991). In that case, the defendant was convicted of attempting to obtain under false pretenses reimbursement from his insurer for fire loss. The defendant's policy was valued at $600.00, and he had claimed that his total loss amounted to $1,591.47. In doing so, he intentionally claimed items had been destroyed, when, in fact, these items were not damaged by the blaze. Even without falsely listing items, however, the defendant's genuine loss still exceeded $600.00. The Court of Criminal Appeals reversed the conviction, holding that, despite the fact that the defendant had done all he intended to do, no substantive crime was committed.

In 1964, the Court of Criminal Appeals decided the case of *Booth v. State*, 398 P.2d 863 (Okl. Cr. 1964), a decision generally looked upon as a pivotal point in Oklahoma attempt law. The defendant had made arrangements with a thief to buy a stolen coat. Prior to delivery the thief was apprehended by police and the coat was recovered. The thief agreed to cooperate with the police by making the transfer as scheduled. The exchange was made under police surveillance, and Booth was subsequently arrested for receiving stolen goods. The trial court instructed the jury that, because the coat in question had been recovered, and thus was no longer "stolen" property, it could only consider Booth's guilt as to the lesser included crime of attempt to receive stolen goods. The jury convicted, and the Court of Criminal Appeals reversed, on the ground that "a legal impossibility precluded defendant from being prosecuted for the crime of knowingly receiving stolen property." *Id.* at 871. (This was in reality only a factual impossibility. *See* R. Perkins, *Criminal Law* 570-71 (2d ed. 1969).)

The court, bound by the statutory law and precedent of Oklahoma, reversed the conviction, yet articulated substantial misgivings. The court permitted itself to "earnestly suggest" that the Oklahoma legislature revise the State's attempt law in accordance with the Model Penal Code's definition of attempt, section 5.01. It then quoted that section in its totality. 398 P.2d, at 872. In 1965, less than a year after the decision, the legislature substantially responded to the court's wishes and adopted Model Penal Code language in 21 O.S. 1991, § 44.

The wording of section 44 is almost identical to that of the Code, the only variance occurring after the word "does" in subsection (b). The Code language adds "or omits to do" here. Subsection (c) of the Code, which deals with substantial steps toward commission of a crime, was omitted in its totality. This may have been done because the wording of the old general attempt statute, 21 O.S. 1961, § 42, appears to cover the same area.

Courts of other jurisdictions have cited *Booth* and section 44 as standing for the proposition that Oklahoma has abolished the defense of impossibility in criminal attempt prosecutions. *See, e.g., Darr v. People*, 193 Colo. 445, 568 P.2d 32, 34 (1977). However, the Court of Criminal Appeals has not ruled squarely on the issue of legal impossibility since the enactment of the new attempt law. *Cf. Reeves v. State*, 535 P.2d 706 (Okl. Cr. 1975), *cert. denied*, 434 U.S. 1046 (1978) (section 44 contains appropriate language for jury instructions).

The court has intimated in one subsequent case that the legal-impossibility defense has survived in Oklahoma. In *Weimer v. State*, 556 P.2d 1020 (Okl. Cr. 1976), the defendant raised the impossibility issue on appeal, as a defense to the charge of attempt to manufacture a controlled dangerous substance. In addressing the defendant's assertion, the court declared, "It is no defense that the attendant circumstances are not as the defendant believes them to be and they thereby render commission of the crime factually impossible." *Id.* at 1025.

Despite the absence of decisive judicial pronouncement, the Commission has concluded that the language of section 44(a) is facially clear in its derogation of the impossibility defense to an attempt prosecution. This conclusion is buttressed by reference to the Model Penal Code and commentary. Nevertheless, the Commission recognizes that counterarguments exist supporting the view that section 44(a) does not constitute a legislative rejection of the defense of legal impossibility. First, the statutory language does not specifically mention any form of impossibility. It simply states that a defendant is guilty of an attempt if he has performed sufficient acts "which would constitute the crime if the attendant circumstances were as he believes them to be." Second, **this language, if literally construed, would convict a defendant no matter how absurd the situation or unlikely the success of the attempt.** For example, the legally sane but mentally defective individual who truly believes he can effect the death of an enemy by utilizing voodoo magic, so long as the belief in the adequacy of these means is demonstrated, could be convicted of attempted murder, regardless of whether the voodoo rites were practiced hundreds of miles from the location of the intended victim. Note, *The Status of Impossibility in Oklahoma Criminal Attempt Law*, 31 Okla. L. Rev. 422 (1978).

OUJI-CR 2-16

CONSPIRACY - INTRODUCTION

The **defendant(s) is/are** charged with conspiracy

[to commit the crime of (Underlying Felony)]

[falsely and maliciously to indict another for any crime]

[falsely and maliciously to procure another to be charged or arrested for any crime]

[falsely to move or maintain a suit, action, or proceeding]

[to cheat and defraud a person of property by means which are in themselves criminal]

[to cheat and defraud a person of property by means which, if executed, would amount to a cheat or to obtaining money or property by false pretenses]

[to commit an act injurious to the public health, to public morals, or to trade or commerce]

[to commit an act for the perversion or obstruction of justice or the due administration of the laws]

[to commit an offense against the State of Oklahoma]

[to defraud the State of Oklahoma]

on **[Date]** in **[Name of County]**, Oklahoma.

OUJI-CR 2-17

CONSPIRACY - ELEMENTS

The elements of conspiracy are as follows:

First, an agreement by two or more persons,

Second, to commit **[Crime or Conduct Charged]**,

Third, the **defendant(s) (was/were [a] party(ies) to the agreement at the time it was made)/(knowingly became [a] party(ies) to the agreement at some time after it was made)**,

Fourth, an overt act by one or more of the parties performed subsequent to the formation of the agreement.

OUJI-CR 2-18

CONSPIRACY - OVERT ACT DEFINED

An overt act is any act performed by any member of the conspiracy which is done for the purpose of furthering or carrying out the ultimate intent of the agreement, or which would naturally accomplish the object of the conspiracy.

OUJI-CR 2-19

CONSPIRACY - ELEMENTS OF UNDERLYING CRIME

The elements of the crime of **[Underlying Felony]** that **defendant(s) is/are** charged with conspiracy to commit are as follows:

[Give Elements of Underlying Crime]

Statutory Authority: 21 O.S. 1991, §§ 421, 422.

Notes on Use

This instruction must be given where the purpose of the agreement is to commit a crime under the statutes of Oklahoma.

Committee Comments

The elements constituting the offense of conspiracy are well established in Oklahoma. *See, e.g., Pearson v. State*, 556 P.2d 1025 (Okl. Cr.), *cert. denied*, 431 U.S. 935 (1976); *Wright v. State*, 535 P.2d 315 (Okl. Cr. 1975); *Crabtree v. State 18 Okl. Cr. 125*, 193 P. 1005 (1920). The gravamen of the offense of conspiracy is the formulation of an agreement or plan to commit a prohibited offense. Whether such an agreement exists is obviously an issue for the finder of fact. *Fetter v. State*, 598 P.2d 262 (Okl. Cr. 1979); *Blaylock v. State*, 598 P.2d 251 (Okl. Cr. 1979); *Pearson v. State*, 556 P.2d 1025 (Okl. Cr.), *cert. denied*, 431 U.S. 935 (1976); *Wishard v. State*, 5 Okl. Cr. 610, 115 P. 796 (1911). The existence of the conspiracy may be circumstantially demonstrated by the conduct or declarations of the alleged conspirators. *Holmes v. State*, 6 Okl. Cr. 541, 119 P. 430 (1911); *Ex parte Hayes*, 6 Okl. Cr. 321, 118 P. 609 (1911); *Starr v. State*, 5 Okl. Cr. 440, 115 P. 356 (1911).

The Court of Criminal Appeals has described the requirement that an overt act be perpetrated in order to effect the unlawful object of the illegal combination as follows:

> An "overt act" is one done to carry out the intent, and it must be such as would naturally effect that result. Whether a certain act was in pursuance of the conspiracy depends entirely upon what the conspiracy was, and upon whether the parties conspired to accomplish their purpose by the means alleged.

Williams v. State, 16 Okl. Cr. 217, 234-35, 182 P. 718, 724 (1919). *See also Blaylock v. State*, 598 P.2d 251 (Okl. Cr. 1979) (travel to Louisiana by defendant to discuss details concerning proposed murder sufficient to constitute overt act); *Wright v. State*, 535 P.2d 315 (Okl. Cr. 1975) (transfer of valuable consideration as partial payment for completion of murder sufficient to constitute overt act). **The definitional instruction with respect to what conduct constitutes an overt act must be given in every case.**

The Court of Criminal Appeals has held that the offense of conspiracy does not merge into a completed felony upon attainment of the illegal object of the conspiracy, so long as the conspiracy does not itself constitute an integral element of the crime(s) which the conspiracy was forged to accomplish. The plan or agreement to pursue unlawful conduct constitutes an independent crime, distinct from the substantive offense that is plotted. *Pinkerton v. United States*, 328 U.S. 640 (1946); *McCreary v. Venable*, 86 Okl. Cr. 169, 190 P.2d 467 (1948); *Burns v. State*, 72 Okl. Cr. 432, 117 P.2d 155 (1941).

However, this general rule of nonmerger must be considered in the context of the *Wharton Rule*, which may be

stated as follows: "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." R. Anderson, *1 Wharton's Criminal Law & Procedure* § 89, at 191 (1957). Underlying the *Wharton Rule* is the premise that "when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a nature that it is aggravated by a plurality of agents, cannot be maintained." 2 F. Wharton, *Criminal Law* § 1604 (12th ed. 1932). As a principle of criminal law, the *Wharton Rule* is well entrenched in federal courts. *See, e.g., Gebardi v. United States*, 287 U.S. 112 (1932); *United States v. Figueredo*, 350 F. Supp. 1031 (M.D. Fla. 1972), *reversed on other grounds*, 490 F.2d 799 (5th Cir. 1974). *See generally*, R. Perkins, *Criminal Law* 621-23 (2d ed. 1969); W. LaFave & A. Scott, *Criminal Law* § 62, at 491-94 (1972).

Classic illustrations of the application of the *Wharton Rule* include adultery, bigamy, incest, and certain gambling crimes. Several limitations on the applicability of the *Wharton Rule* may be identified. For example, the rule does not apply when the offense could be committed by one of the conspirators alone. *Laughter v. United States*, 259 F. 94 (6th Cir. 1919) (transporting intoxicating liquors in a prohibition state). Nor does the rule apply, according to the prevailing view, when the number of actual participants exceeds the essential number of participants in the contemplated crime. *Baker v. United States*, 393 F.2d 604 (9th Cir. 1968). Accordingly, there can be no conspiracy prosecution if the defendant agrees with a legislator to give the legislator a bribe. However, conspiracy will lie if the defendant and an accomplice agree to bribe the same legislator. *United States v. Burke*, 221 F. 1014 (S.D.N.Y. 1915), *reversed on other grounds*, 234 F. 842 (2d Cir. 1916).

A final limitation upon the application of the *Wharton Rule* is that, if the law that defines the substantive offense does not specify any punishment whatsoever for one of the necessary participants, prosecution for conspiracy between these necessary participants will lie. *Vanatta v. United States*, 289 F. 424 (2d Cir. 1923) (where A agrees to make an illegal sale of liquor to B but the statute penalizes only the seller, both may be prosecuted for conspiracy).

The *Wharton Rule* stipulates that if all the necessary participants would be subject to punishment for the consummated substantive offense, and if only these necessary participants are parties to the agreement to commit the substantive offense, then such agreement presents no danger beyond that inherent in the crime anticipated. This rule is sound where the crime is accomplished, for it prohibits cumulative punishment for conspiracy and for the completed offense as well. However, where the substantive offense is not actually perpetrated, application of the *Wharton Rule* might undermine whatever legitimacy inheres in the criminalization of conspiracy as an inchoate offense. The drafters of the Model Penal Code rejected the *Wharton Rule* instead providing that an individual who could not be convicted of a substantive offense as an accomplice cannot be convicted of conspiracy to commit it. Model Penal Code § 5.04(2).

The object of a conspiracy may involve conduct that has been declared violative of the criminal law. **Where the agreement is to commit an offense that is punishable under the criminal law, the elements of that offense must be the subject of a jury instruction**, as provided in OUJI-CR 2-19.

[The weight to be afforded the testimony of a coconspirator is the subject of "evidentiary instructions" in Chapter 9.]

OUJI-CR 2-19A

CONSPIRACY – CO-CONSPIRATORS ARE JOINTLY LIABLE

When a conspiracy is entered into to do an unlawful act, the conspirators are responsible for all that is said and done in furtherance of the conspiracy by their co-conspirators. If two or more persons conspire to commit a crime, each is criminally responsible for the acts of **his/her** co-conspirators in furtherance of the conspiracy, or where the connection between the acts and the conspiracy is reasonably apparent.

Therefore, if you find beyond a reasonable doubt that [**Name of Defendant**] was a member of a conspiracy, and that **another/other conspirator(s)** committed the crime of [**Specify Crime**] in furtherance of, or as a foreseeable consequence of, the conspiracy, then you may find [**Name of Defendant**] guilty of [**Specify Crime**], even though [**Name of Defendant**] may not have participated in any of the acts that constitute the crime of [**Specify Crime**].

Committee Comments

For discussions of the law of conspiracy in Oklahoma, see *Littlejohnv. State*, 2008 OK CR 12, 181 P.3d 736, and *Hatch v. State*, 1983 OK CR 47, 662 P.2d 1377.

2009 SUPPLEMENT

OUJI-CR 2-20

CONSPIRACY - DEFENSE OF WITHDRAWAL

It is a defense to the crime of conspiracy that a person who has entered into an agreement to commit a crime withdraws from and abandons the agreement prior to the commission of an overt act by any party to the agreement. A withdrawal is effective only if the person withdrawing notifies all of the other parties to the agreement in a manner sufficient to inform a reasonable person of the withdrawal.

Notes on Use

This instruction should be used where withdrawal is raised as a defense to the crime of conspiracy. In contrast, where an overt act has completed the crime of conspiracy, the defendant has a defense only to subsequent substantive crimes committed in furtherance of the conspiracy under the defense of abandonment with respect to aiding and abetting the subsequent crimes. *See* OUJI-CR 2-7.

OUJI-CR 2-21

CONSPIRACY, DEFENSE OF WITHDRAWAL - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that the **defendant(s)** did not make an effective withdrawal from the agreement. If you find that the State has failed to sustain that burden, then the **defendant(s)** must be found not guilty.

CONSPIRACY - DEFINITIONS

Conspirator – A "conspirator" is one who enters into an unlawful agreement between two or more persons in order to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means.

Cheat and Defraud - To induce a person to part with possession of property by reason of intentionally false representations, including any tricks, devices, artifices, or deceptions.

Reference: Black's Law Dictionary 215 (5th ed. 1979).

Maliciously - With a wish to vex, annoy, or injure another person.

References: State v. McCray, 1918 OK CR 186, 176 P. 418, 15 Okl. Cr. 316; 21 O.S. 2001, § 95.

Treason - Levying war against the State, or adhering to its enemies, giving them aid and comfort.

Reference: Okla. Const. art. 2, § 16.

Committee Comments

The law in Oklahoma relative to the issue of withdrawal from an illegal agreement as a defense to a charge of conspiracy is sparse. The Commission has found only one case which addresses the issue. *Blaylock v. State*, 1979 OK CR 75, 598 P.2d 251 .

The traditional view is harsh and inflexible: since the offense of conspiracy is consummated with the combination in order to effectuate an illicit goal, no subsequent act of withdrawal can exonerate the conspirator of his crime. W. LaFave & A. Scott, *Criminal Law* § 62, at 487 (1972). However, since Oklahoma has enacted a statutory overt act requirement, 21 O.S. 2001, § 423, there is support for the argument that the defendant is not punishable as a member of a conspiracy if he withdraws prior to the commission of the overt act by any member of the combination. As a practical matter, the defense is of little utility, since most unlawful combinations will be accompanied by overt acts, precluding the possibility for effective withdrawal.

The Model Penal Code recognizes withdrawal as an affirmative defense to a conspiracy charge, but requires that the putative conspirator must have "thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." Model Penal Code § 5.03(6). The underlying premise for this stringent mandate is dual: (l) the defendant should be exonerated from criminal liability if a subsequent withdrawal is effected; but, (2) only where defendant assures by his conduct that the objective of the illicit agreement will not be further pursued, despite his withdrawal. Model Penal Code § 5.03, Comment (Tent. Draft No. 10, 1960).

Since the claim of effective withdrawal is a defense, the onus of producing evidence sufficient to raise that defense remains on the defendant, unless the evidence of the prosecution has raised the issue. **If the defendant fails to adduce any evidence that tends to prove an effective withdrawal from the conspiracy, or if the defendant's evidence is insufficient as a matter of law, the issue of withdrawal is not presented and no instruction should be given.** If the defendant presents sufficient evidence to raise the defense of withdrawal, or if the defense is raised by the evidence of the prosecution, an instruction **must be given** in order to apprise the jurors of the defendant's theory of the case.

Once the defense of withdrawal is properly raised, the burden of proving the nonexistence of the defense should rest on the State. No instructions concerning the defendant's burden to come forward with evidence, or the question whether the defendant has presented sufficient evidence to warrant an instruction, are included because these matters pertain to questions

of law and of trial procedure, both of which are beyond the legitimate concern of the jurors.

(2008 Supp.)

OUJI-CR 2-23

ATTEMPT ACT OF VIOLENCE - ELEMENTS

No person may be convicted of attempting to perform an act of violence unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **attempting/conspiring/endeavoring**;

Third, to perform an act of violence;

Fourth, **involving/(intended to involve) (serious bodily harm to)/(the death of)** another person.

Statutory Authority: 21 O.S. 2011, § 1378(A).

Notes on Use

For an Instruction on attempt, see OUJI-CR 2-11, *supra*. For an Instruction on conspiracy, see OUJI-CR 2-17, *supra*. For a definition of endeavoring, see OUJI-CR 6-16, *infra*.

(2018 Supp.)

OUJI-CR 2-24

THREATEN ACT OF VIOLENCE -

ELEMENTS

No person may be convicted of threatening to perform an act of violence unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, threatening;

Third, to perform an act of violence;

Fourth, **involving/(intended to involve) (serious bodily harm to)/(the death of)** another person.

Statutory Authority: 21 O.S. 2011, §§ 1378(B).

(2018 Supp.)

OUJI-CR 2-25

PLAN TO CAUSE (SERIOUS BODILY INJURY)/DEATH - ELEMENTS

No person may be convicted of planning to cause **(serious bodily harm to)/(the death of)** another person unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, devising a **plan/scheme/program**;

Third, **involving/(intended to involve) (serious bodily harm to)/(the death of)** another person;

Fourth, with the intent to perform a malicious act of violence.

Statutory Authority: 21 O.S. 2011, §§ 1378(C).

(2018 Supp.)

OUJI-CR 3-1

BRIBERY - INTRODUCTION

The **defendant(s) is/are** charged with bribery of **[Name of Person to Whom Alleged Bribe was Offered or from Whom Solicited]** on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is meant for use with 21 O.S. 1991, §§ 265, 266, 306, 309, 318 (first part), 380, 381, 382, 383, 384, 399, 400, and 456. These sections create crimes which are very similar to each other; they can all be designated as bribery crimes.

This introductory instruction does not concern other crimes defined in Title 21, *e.g.*, unauthorized reward (§§ 269 and 386), buying appointments to office (§§ 273 and 396), and selling appointments to office (§ 274), which are closely related to bribery but which are, in the opinion of the Commission, sufficiently distinct as to necessitate separate treatment.

OUJI-CR 3-2

BRIBERY OF EXECUTIVE OFFICER - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **offering/giving/promising**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, to an executive officer of a governmental unit;

Fourth, known by **defendant(s)** to be an executive officer of a governmental unit;

Fifth, with corrupt intent to influence **his/her** official action.

Statutory Authority: 21 O.S. 1991, § 265.

OUJI-CR 3-3

BRIBERY OF LEGISLATOR - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **offering/giving/promising**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, to a Legislator;

Fourth, known by **defendant(s)** to be a Legislator;

Fifth, with corrupt intent to influence **his/her** official action.

OUJI-CR 3-4

BRIBERY OF LEGISLATOR - ELEMENTS (ALTERNATE)

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, attempting, either directly or indirectly;

Second, to influence the official action;

Third, of a legislator;

Fourth, known by the **defendant(s)** to be a Legislator;

Fifth, by menace, deceit, suppression of truth or any other corrupt means.

Statutory Authority: 21 O.S. 1991, §§ 308, 318.

OUJI-CR 3-5

BRIBERY OF PUBLIC OFFICIAL - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **offering/giving/promising**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, to **a/n (executive officer of a governmental unit)/(legislative/ judicial/county/municipal/(law enforcement)/public officer)/(public employee)**;

Fourth, known by **defendant(s)** to be **a/n (executive officer of a governmental unit)/(legislative/judicial/county/ municipal/(law enforcement)/public officer)/(public employee)**;

Fifth, with intent to influence **his/her** official action.

Statutory Authority: 21 O.S. 1991, § 381.

OUJI-CR 3-6

BRIBERY OF ADJUDICATORY OFFICIAL - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **offering/giving/promising**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, to **a/n (judicial officer)/juror/referee/arbitrator/umpire/assessor)/ (person authorized by law/[agreement of the parties] to hear/determine a controversy)**;

Fourth, known by **defendant(s)** to be **a/n (judicial officer)/juror/referee/ arbitrator/umpire/assessor)/(person authorized by law/[agreement of the parties] to hear/determine a controversy);**

Fifth, with intent to influence **his/her vote/opinion/decision**.

Statutory Authority: 21 O.S. 1991, § 383.

OUJI-CR 3-7

BRIBERY OF ATHLETIC PERSONNEL - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **offering/giving/promising**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, to **a/n player/participant/coach/referee/umpire/official/(person in authority)** in an athletic contest;

Fourth, known by **defendant(s)** to be **a/n player/participant/coach/referee/ umpire/official/(person in authority)** in an athletic contest;

Fifth, with intent to influence **his/her (playing ability)/refereeing/coaching/ staging**.

Statutory Authority: 21 O.S. 1991, § 399.

OUJI-CR 3-8

BRIBERY OF WITNESS - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **offering/giving/promising**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, to a **witness/(potential witness)**;

Fourth, known by **defendant(s)** to be a **witness/(potential witness)**;

Fifth, with intent to influence **his/her** testimony.

Statutory Authority: 21 O.S. 1991, § 456.

OUJI-CR 3-9

BRIBERY OF FIDUCIARY - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **offering/giving/(promising to give)**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, to **a/n agent/employee/trustee/guardian/lawyer/(officer of a corporation)/partner/(Specify Other Fiduciary Listed in 21 O.S. 1991, § 380)**;

Fourth, known by **defendant(s)** to be **a/n agent/employee/trustee/guardian/ lawyer/(officer of a corporation)/partner/(Specify Other Fiduciary Listed in 21 O.S. 1991, § 380)**;

Fifth, with intent to influence **his/her** conduct in relation to the affairs of **his/her employer/beneficiary/client/corporation/partnership/ (the person for whom he/she is acting)**;

Sixth, which if accepted by the **agent/employee/ trustee/guardian/lawyer/ (officer of a corporation)/partner/(Specify Other Fiduciary Listed in 21 O.S. 1991, § 380)** would constitute the crime of accepting a bribe, the elements of which are as follows:

1. **a/n agent/employee/trustee/guardian/lawyer/(officer of a corporation)/partner/(Specify Other Fiduciary Listed in 21 O.S. 1991, § 380)**;

2. with a corrupt intent;

3. without the consent of the **employer/beneficiary/client/corporation/ partnership/(the person for whom he/she is acting)**;

4. knowingly;

5. **solicits/accepts/(agrees to accept)** a bribe;

6. to influence the conduct of the **agent/employee/trustee/ guardian/lawyer/(officer of a corporation)/partner/(Specify Other Fiduciary Listed in 21 O.S. 1991, § 380)**;

7. in relation to the affairs of the **employer/beneficiary/client/ corporation/partnership/(the person for whom he/she is acting)**.

Statutory Authority: 21 O.S. 1991, § 380(B).

Committee Comments

Sections 265, 308, 381, 383, 399, and 456 of Title 21 concern crimes for conduct whereby any person attempts to influence the actions, decisions, or opinions of certain specified people through a bribe. Although the language of the specific sections varies, the Commission has concluded that the crimes created by these sections have almost identical elements. In the opinion of the Commission, the same social interest is meant to be protected by all these sections, *i.e.*, to prevent improper influence on certain kinds of activities, primarily in the area of governmental decision-making. Very few Oklahoma cases have construed these bribery statutes.

The first element sets forth the prohibited conduct. Although the statutory language of sections 265, 308, and 383 is "gives or offers," with no mention of "promises," the Commission has concluded that a promise is also prohibited by these sections, in view of the definition of "bribe" given in 21 O.S. 1991, § 97. Section 97 provides:

> The term "bribe" signifies any money, goods, right in action, property, thing of value or advantage, present or prospective, or any promise or undertaking, asked, given or accepted, with a corrupt intent to influence unlawfully the person to whom it is given, in his action, vote or opinion, in any public or official capacity.

The statutory language of sections 381, 399, and 456 specifically includes "promises."

It should be emphasized that the conduct prohibited is the offer, gift, or promise of a bribe regardless of whether or not such offer, gift, or promise is accepted or acknowledged. In the opinion of the Commission, the language in section 456 seems to indicate that no crime of bribery has been committed unless an agreement has been reached between the person who offers the bribe and the person to whom the offer is made, and this language is surplusage. Whether or not an agreement has been reached is irrelevant for conviction. The only relevant mental state is that of the person who offers, gives, or promises the bribe as set forth in the fifth element. *See* Note, 2 Okla. L. Rev. 221 (1949); *cf. People v. Brigham*, 72 Cal. App. 2d 1, 163 P.2d 891 (1946) ("agrees to receive a bribe" within the meaning of California bribery statute refers to the bribe seeker's state of mind, not the victim's).

The second element indicates what must be offered, promised, or given in order to constitute a bribe. The language used in the second element is taken from the definition of "bribe" set forth in section 97, *supra*. The Commission has chosen to use the language from the definition of "bribe," rather than the word "bribe" itself, to promote clarity and simplicity in the instruction. In the opinion of the Commission, the Legislature did not mean to create any distinctions between a bribe under sections 265, 308, 383, 399, and 456, and the language of section 381, which uses "gift or gratuity whatever," instead of "money, position, thing of value." Hence, for purposes of uniformity of language, the Commission has used only the language from the definition of "bribe." The Court of Criminal Appeals has held that what constitutes a bribe is to be interpreted broadly. *Handley v. State*, 69 Okl. Cr. 321, 102 P.2d 947 (1940).

The third element indicates to whom the bribe must be offered. Any person can commit the bribery crimes created by section 265, 308, 383, 399, and 456, so long as the bribe is given, offered, or promised to those classes of people enumerated in the third element of the various element instructions. The bribery statute protects only limited kinds of people from improper attempts to influence their actions, opinions, and decisions. Bribery has been committed, however, when a person offers, promises, or gives a bribe to a public officer even though the public officer does not have the authority to do what the person who offers the bribe intends. *Ex parte Covell*, 63 Okl. Cr. 256, 74 P.2d 626 (1937). For a definition of public officer, *see State v. Sowards*, 64 Okl. Cr. 430, 444, 82 P.2d 324, 330-31 (1938), *overruled on other grounds*, *Parker v. State*, 917 P.2d 980, 986 n.4 (Okl.Cr. 1996). The various statutes under discussion may be distinguished from one another with respect to the third element.

Except for section 399, concerning athletic contest personnel, all sections described above provide protection for persons who are exercising governmental or public duties. Moreover, bribery has generally been classified as a crime against the administration of governmental functions. W. Clark & W. Marshall, *A Treatise on the Law of Crimes* § 14.02, at 1032-38 (7th ed. 1967); R. Perkins, *Criminal Law* 469 (2d ed. 1969). Hence, even though sections 265 and 381 use the term "executive officer," the Commission is of the opinion that only executive officers of governmental units are meant to be protected. The Commission does not believe private corporate executive officers are meant to be protected by the bribery statutes. (See also the language of the companion statutes, sections 266 and 382.)

Section 381 is a general bribery statute. Passage of section 381 may have impliedly repealed section 265. *Pettiti v. State*, 7 Okl. Cr. 12, 121 P. 278 (1912). *But see McCormick v. State*, 279 P.2d 359 (Okl. Cr. 1954). (Here the Court of Criminal Appeals indicates a prosecution under section 265 would have been proper.)

The fourth element, a special mens rea requirement, is not specifically stated in any statute. Two cases have clearly held, however, that the accused must know the position held by the person to whom the bribe is offered. *Allen v. State*, 63 Okl. Cr. 16, 72 P.2d 516 (1937) (section 243, now repealed); *Pettiti v. State*, *supra*, (section 381). Since the Commission considers that sections 265, 308, 318 (first part), 383, 399, and 456 create similar bribery crimes, it has included the fourth element in the instructions for all the bribery crimes created by these sections.

The fifth element sets forth the primary mens rea element for the crime of bribery. While section 243 did not use the language "influence," the Commission has concluded that the mens rea element under all the sections is an "intent to influence." *Allen*, *supra*. The fifth element has been tailored to the specific statute, however, to indicate what kinds of activities were intended to be influenced.

One final comment: Section 456 seems to indicate that, if a witness actually takes the witness stand and commits perjury, the appropriate charge is not bribery, but rather subornation of perjury. (See the Subornation of Perjury instructions at OUJI-CR 3-20 through 3-22, *infra*.)

OUJI-CR 3-10

BRIBERY BY EXECUTIVE OFFICER - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(asking for)/receiving/(agreeing to receive)**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, by an executive officer of a governmental unit;

Fourth, with intent to permit **his/her** official action to be influenced.

Statutory Authority: 21 O.S. 1991, § 266.

OUJI-CR 3-11

BRIBERY BY LEGISLATOR - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(asking for)/receiving/(agreeing to receive)**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, by a legislator;

Fourth, with intent to permit **his/her** official action to be influenced.

Statutory Authority: 21 O.S. 1991, §§ 309, 318.

OUJI-CR 3-12

BRIBERY BY PUBLIC OFFICIAL - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(asking for)/receiving/(agreeing to receive)**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, by **a/an (executive officer of a governmental unit)/(legislative/judicial/ county/municipal/(law enforcement)/public officer)/(public employee)**;

Fourth, with intent to permit **his/her** official action to be influenced.

Statutory Authority: 21 O.S. 1991, § 382.

OUJI-CR 3-13

BRIBERY BY ADJUDICATORY OFFICIAL - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(asking for)/receiving/(agreeing to receive)**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, by **a/n (judicial officer)/juror/referee/arbitrator/umpir e/assessor)/ (person authorized by law/[agreement of the parties]) to hear/determine a controversy]**;

Fourth, with intent to permit **his/her vote/opinion/decision** to be influenced.

Statutory Authority: 21 O.S. 1991, § 384.

OUJI-CR 3-14

BRIBERY BY ATHLETIC PERSONNEL - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(asking for)/receiving/(agreeing to receive)**;

Second, **money/goods/(right in action)/property/(valuable thing)**;

Third, by **a/n player/participant/coach/referee/umpir e/official/(person in authority)** in an athletic contest;

Fourth, with intent to permit **his/her (playing ability)/refereeing/coaching/ staging** to be influenced.

Statutory Authority: 21 O.S. 1991, § 400.

OUJI-CR 3-15

BRIBERY BY FIDUCIARY - ELEMENTS

No person may be convicted of bribery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **a/n agent/employee/trustee/guardian/lawyer/ (officer of a corporation)/ partner/(Specify Other Fiduciary Listed in 21 O.S. 1991, § 380)**;

Second, with a corrupt intent;

Third, without the consent of the **employer/beneficiary/client/corporatio n/ partnership/(the person for whom he/she is acting)**;

Fourth, knowingly;

Fifth, **solicits/accepts(agrees to accept)** a bribe;

Sixth, to influence the conduct of the **agent/employee/trustee/guardian/lawyer / (officer of a corporation)/partner/(Specify Other Fiduciary Listed in 21 O.S. 1991, § 380)**;

Seventh, in relation to the affairs of the **employer/beneficiary/client/ corporation/partnership/(the person for whom he/she is acting)**.

Statutory Authority: 21 O.S. 1991, § 380(A).

Committee Comments

The crimes created by sections 266, 309, 318 (second part), 382, 384, and 400 of Title 21 involve solicitation of bribes by certain persons, primarily government officials. These crimes are the obverse of crimes created by section 265, 308, 318 (first part), 381, 383, and 399, which are discussed above under the heading "Offering, Giving, or Promising." Although the statutory language of sections 266, 309, 318 (second part), 382, 384, and 400 varies, it is the opinion of the Commission that the crimes created by these sections have substantially identical elements. The Commission reached this conclusion because the social interest meant to be protected is identical, *i.e.*, to prevent specified persons from peddling their influence. Very few Oklahoma cases have construed these statutes.

The first element sets forth the prohibited conduct. Sections 266, 309, and 384 contain the language, "asks, receives, or agrees to receive," that has been adopted for use in these instructions. Sections 382 and 400 contain the language "accepts or requests," while section 318 (second part) uses the language "accepts." The Commission has used the language "asking for, receiving or agreeing to receive" to promote uniformity in language and because these words are, in the opinion of the Commission, synonymous with the words of sections 318 (second part), 382, and 400.

It should be emphasized that the crime of bribery is complete when a bribe is asked for or received regardless of whether or not an agreement exists or receipt is formally acknowledged. Of course, the crime is also complete if an agreement is involved. In the opinion of the Commission, language in sections 266, 309, and 384, which seems to indicate that an agreement must always be reached between the person asking for or receiving the bribe and the person from whom the bribe is requested or received before the crime is committed, is surplusage. What is relevant for the completion of the crime is that the person who is asking for or receiving the bribe intend to peddle his authority or power, and not whether a meeting of minds, in a contractual sense, has occurred.

People v. Brigham, 72 Cal. App. 2d 1, 163 P.2d 891 (1946). *Contra, State v. Ferraro*, 67 Ariz. 397, 198 P.2d 120 (1948). See Note, 2 Okla. L. Rev. 221 (1949).

The second element indicates what must be asked for, received, or agreed to be received in order to constitute a bribe. Although the statutory language concerning what must be asked for, received, or agreed to be received varies among the sections, the Commission has used the language from the definition of "bribe" in 21 O.S. 1991, § 97, for the same reasons stated in the comment on the second element under the previous heading.

The third element indicates who must ask for, receive, or agree to receive the bribe. The bribery crimes discussed under the heading "Offering, Giving, or Promising" can be committed by any person as long as that person offers, gives, or promises a bribe to certain persons statutorily protected from improper attempts to influence them. In contrast, the bribery crimes discussed under the heading "Asking for, Agreeing to Receive, or Receiving" can be committed only by certain governmental officials, governmental employees, and persons connected with athletic contests. It should be pointed out, however, that a person who aids or abets or conspires with a governmental official or other person listed in the third element can be convicted of bribery under these statutes. Aiders and abettors and conspirators are considered principals in Oklahoma although by themselves they could not have committed the crime. *Wilkins v. State*, 70 Okl. Cr. 1, 104 P.2d 289 (1940); *Capshaw v. State*, 69 Okl. Cr. 440, 104 P.2d 282 (1940). Moreover, a person who holds public office de facto can be convicted of bribery under these sections, even though as a matter of law that person was not authorized to hold the office. *Ex parte Winters*, 10 Okl. Cr. 592, 140 P. 164 (1914).

Section 382 is a general bribery statute. Passage of section 382 may have impliedly repealed section 266. *Pettiti v. State*, 7 Okl. Cr. 12, 121 P. 278 (1912). *But see Ex parte Winters*, supra (habeas corpus relief from conviction under section 266 denied). The Court of Criminal Appeals has also held that, if sections overlap, the prosecutor has discretion to bring the charge under either section. *Wilkins*, *supra*.

The bribery crimes of section 266, 309, 318 (second part), 382, 384, and 400 should be distinguished from the crime of petit extortion under 21 O.S. 1991, §§ 1481 and 1484. Petit extortion is extortion under color of official right. Petit extortion is apparently committed when the person from whom the property is obtained believes that the person requesting the property is making a lawful request. By contrast, if the person from whom the property is sought believes that it is being requested unlawfully, then the crime of bribery is the appropriate charge. *Finley v. State*, 84 Okl. Cr. 309, 181 P.2d 849 (1947).

The fourth element sets forth the mens rea requirement of these bribery crimes. The language in the several sections varies, but the Commission has concluded that the intent to permit influence most accurately and simply states the required mens rea. Since the crimes created by section 266, 309, 318 (second part), 382, 384, and 400 are the obverse of the bribery crimes discussed under the previous heading, the Commission has patterned the fourth element after the mens rea requirement, the fifth element of the previous crimes. The fourth element has been tailored to the specific statute, however, to indicate the kinds of activities which are subject to influence.

As a final comment, it should be pointed out that only one instruction was drafted for sections 309 and 318 (second part). This was done because, in the opinion of the Commission, the two statutes have identical elements. No appellate case has involved either section.

OUJI-CR 3-16

BRIBERY - DEFINITIONS

Bribe - The term "bribe" signifies any money, goods, right in action, property, thing of value or advantage, present or prospective, or any promise or undertaking, asked, given or accepted with a corrupt intent to influence unlawfully the person to whom it is given, in his action, vote or opinion, in any public or official capacity.

Reference: 21 O.S. 1991, § 97.

Corrupt Intent -- A wrongful intent to obtain money or other benefit.

Reference: 21 O.S. 1991, § 94.

Person - A human being; may, where appropriate, include a corporation.

Reference: 21 O.S. 1991, § 105.

Property - Property includes:

(a) Real Property - Every estate, interest, and right in lands including structures or objects permanently attached to the land;

(b) Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

References: 21 O.S. 1991, §§ 102, 103, 104.

Public Employee - A person who, after election or appointment, whether or not he/she has taken his/her seat, is:

(a) An executive, legislative, judicial, county, or municipal officer; or

(b) An employee of the State of Oklahoma or any county, city, or other political subdivision, including peace officers and other law enforcement officers.

References: Wilkins v. State, 70 Okl. Cr. 1, 104 P.2d 289 (1940); State v. Sowards, 64 Okl. Cr. 430, 82 P.2d 324 (1938); 21 O.S. 1991, § 381.

Public Officer - A person, acting in executive, legislative, or judicial capacity, who is elected or appointed, with authority or duty given to him by law, exercising functions concerning the public or for public benefit, and who, in doing so, is vested with some portion of the sovereign power of the State.

References: State v. Evans, 319 P.2d 1112 (Okl. 1957); State v. Sowards, 64 Okl. Cr. 430, 82 P.2d 324 (1938); Allen v. State, 63 Okl. Cr. 16, 72 P.2d 516 (1937); 21 O.S. 1991, §§ 265, 381.

OUJI-CR 3-17

PERJURY - INTRODUCTION

The **defendant(s) is/are** charged with **perjury/(perjury by contradictory statements)** by **[Describe Briefly Means by Which Alleged Perjury Committed, e.g., Testimony in Trial of (Name of Parties), Affidavit Concerning (Subject)**] on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is meant for 21 O.S. 1991, ch. 17, §§ 491 through 502, and deals solely with the two perjury crimes listed in sections 491 and 496. The introductory instruction does not cover subornation of perjury. (See OUJI-CR 3-21.)

Chapter 17 contains two perjury crimes: a general perjury crime created by section 491, and a perjury by contradictory statements crime created by section 496. These are the only two sections for which element instructions are needed. The remaining sections of Chapter 17, excluding sections 504 and 505 dealing with subornation of perjury, provide definitions, rules of evidence, and the penalty for perjury. These sections concerning definitions and penalty are discussed as appropriate in the Committee Comments.

OUJI-CR 3-18

PERJURY - ELEMENTS

No person may be convicted of perjury unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/subscribing**;

Second, a statement;

Third, **(known by the defendant(s) to be not true)/(believed by the defendant(s) to be not true)/(with intent to avoid or obstruct the ascertainment of truth)**;

Fourth, under **oath/affirmation/(legally binding assertion)**;

Fifth, **authorized/required** by law in **a/an trial/hearing/investigation/ deposition/certification/declaration**.

Statutory Authority: 21 O.S. 1991, § 491.

Committee Comments

The last sentence of section 491 makes it a defense to the charge of perjury that the statement is a true statement. Although the defense of truth is discussed later in the Committee Comments, all materials included herein should be read with the defense of truth in mind.

The first element indicates how perjury can be committed: either by an oral statement from the accused, or by a written statement of the accused. "Subscribing" seems to be one method of "making" a statement, but "subscribing" is specifically listed as an alternative because of the statutory language. See 21 O.S. 1991, § 497, for a statutory definition of when the "making" or "subscribing" of a deposition is complete.

The second element indicates that what must be made or subscribed is a statement. It is probably helpful to explain more fully the meaning of the word "statement." If a witness is asked, "Do you own a Ford Mustang automobile?", the witness must answer from his knowledge, "Yes," "No," "I do not know." So long as the witness answers from his knowledge, the witness cannot be prosecuted for perjury, regardless of the objectively verifiable answer. Likewise, if a witness is asked, "Is it your opinion that the finest automobile made is a Ford Mustang?", the witness must answer in accordance with the opinion the witness holds, "Yes," "No," "I do not have an opinion." So long as the witness answers in accordance with the opinion he holds, the witness cannot be prosecuted for perjury, regardless of whether the opinion is objectively verifiable as true or false. If the witness answers not in accordance with the opinion that the witness holds, however, then the witness can be prosecuted for perjury, if the other elements of perjury exist, even though the statement for which the witness is being prosecuted is a statement relating to an opinion. Hence, the Commission has used the language "a statement" in the second element, rather than "a statement of fact," because the latter expression could be a source of confusion.

Nor is it necessary to modify the word "statement" in the second element with the word "false." The social interest meant to be protected by the perjury statute is that of having persons answer questions under oath to the best of their ability in accordance with their knowledge or opinion. Society desires the witness's knowledge or opinion regardless of what is objectively true. Witnesses undermine this social interest when they do not answer according to what they think, or when they answer according to what others want them to say. Hence, in the case of opinion testimony, the statement does not have to be false in order for the crime of perjury to be

committed. W. Clark & W. Marshall, *A Treatise on the Law of Crimes* § 14.03, at 1041 (7th ed. 1967); R. Perkins, *Criminal Law* 459-60 (2d ed. 1969).

The third element sets forth the mens rea requirement of the crime. Statements given when any of three mental states exist can subject one to a possible perjury conviction. For clarity, examples will be used to explain the mens rea alternatives.

If a witness is asked, "Does X own a Ford Mustang?", and the witness knows that X owns a Ford Mustang, then the witness must answer, "Yes." If the witness answers, "No," or "I do not know," the witness has made a statement for which perjury could be charged. This first example is covered by the alternative "known by the defendant to be not true."

If a witness is asked, "Does X own a Ford Mustang?", and the witness does not believe that X owns a Ford Mustang, but the witness answers, "Yes," the witness can be subject to perjury charges, even though it turns out to be true that X does, in fact, own a Ford Mustang. To avoid perjury, the witness should have answered, "No," or "I do not believe so." This second example is covered by the language "believed by the defendant to be not true."

If a witness is asked, "Does X own a Ford Mustang?", and the witness knows that he has no idea as to the make of automobile that X owns, but the witness answers positively either "Yes," or "No," both answers can subject the witness to perjury charges because the answer that the witness should have given is, "I do not know." This third example is covered by the language "with intent to avoid or obstruct the ascertainment of truth."

The three mens rea alternatives in the third element have always been the mens rea elements for perjury in Oklahoma. *Rose v. State*, 3 Okl. Cr. 294, 127 P. 873 (1912); *Pilgrim v. State*, 3 Okl. Cr. 49, 104 P. 383 (1909); 21 O.S. 1961, § 498. Confusion of interpretation between 21 O.S. 1961, §§ 491 and 498, however, led to the repeal of the then 21 O.S. 1961, § 498, with a concurrent clarification of the mens rea element in section 491. Laws 1965, c. 126. The 1965 amendments to the perjury statutes did not change the mens rea element of perjury, but insured that the confusion which previously existed was eliminated. M. Merrill, *Oklahoma and the National Conference of Commissioners on Uniform State Laws, 1965*, 36 Okla. B.A.J. 2205, 2212 (1965).

In light of the discussion of the second and third elements, it is apparent that the State need neither allege nor prove what the truth is. The State need only allege and prove that a statement was given when the accused had one of the three mens rea requirements. *Gray v. State*, 4 Okl. Cr. 292, 111 P. 825 (1910). It is necessary, however, to emphasize that under sections 491 and 499(1), it is a defense for the accused to prove that the statement made under oath is true. If the witness is lucky enough to have an answer proven true, which answer the witness believed to be false when given, the witness cannot be convicted. But the witness must establish the truth as a defense, and failure to establish the truth means that a conviction is proper. The mens rea element of perjury can be proven by circumstantial evidence. *Pitman v. State*, 487 P.2d 716 (Okl. Cr. 1971).

As indicated in the fourth element, section 491 mandates that the statement be given under oath, affirmation, or some other form of legally binding assertion, such as a statement at the bottom of an income tax return that the answers were given and the signature subscribed "under penalties of perjury." *See also* 21 O.S. 1991, §§ 492 and 493. Although it may be morally reprehensible for a person to lie, no legal criminal sanction is imposed for lying until after a person has sworn to tell the truth. Hence, the State must allege and prove that the statement was given under oath or affirmation administered by an authorized person, or under some other form of legally binding assertion. *Pitman*, *supra*; *Phillips v. State*, 483 P.2d 1386 (Okl. Cr. 1971); *Dunkin v. State*, 53 Okl. Cr. 115, 7 P.2d 912 (1932); 22 O.S. 1991, § 748. An irregularity in the administration of the oath, however, does not invalidate the oath. *Campbell v. State*, 23 Okl. Cr. 250, 214 P. 738 (1923) (construing 21 O.S. 1991, § 494); *cf. Town of Checotah v. Town of Eufaula*, 31 Okl. 85, 119 P. 1014 (1911) (construing 21 O.S. 1991, § 497).

The fifth element indicates that perjury has not been committed unless the statement under oath, affirmation, or some other form of legally binding assertion is given in a document or proceeding in which an oath, affirmation, or some other form of legally binding assertion is authorized or required by law. When none is authorized or required by law, perjury cannot exist even though the accused voluntarily took an oath from a person authorized by law to administer oaths. *Ex parte Pack*, 51 Okl. Cr. 277, 1 P.2d 817 (1931); *Morgan v. State*, 45 Okl. Cr. 268, 282 P. 1110 (1929). Affidavits presented to a court on a Motion for New Trial are authorized by law. Hence, a statement contained in the affidavit can be the basis for a perjury conviction. *Arnold v. State*, 48 Okl. Cr. 452, 132 P. 1123 (1913), *reh. denied* (1929), *overruled on other grounds*, *Roley v. State*, 48 Okl. Cr. 60, 290 P. 195 (1930). Other examples include: *Campbell*, *supra*, (statement in a marriage application can be basis of perjury conviction); *Town of Checota*, *supra*, (statement in elector's affidavit can be basis of perjury conviction).

Prior to the 1965 amendments, section 491 contained the language "having taken an oath ... before any competent tribunal, officer, or person ...." The Court of Criminal Appeals interpreted this language to require that the court, officer, or other legal entity have jurisdiction of the subject matter in relation to which the statement, serving as the basis for the perjury charge, was made. If jurisdiction did not exist, then no perjury could be committed in that document, court, or proceeding. *E.g., Bennett v. District Court*, 81 Okl. Cr. 351, 162 P.2d 561 (1945) (Grand Jury investigation beyond proper authority); *Perry v. State*, 10 Okl. Cr. 308, 136 P. 195 (1913) (Justice of Peace exceeding authority). The 1965 amendments, however, deleted the requirement of competency jurisdiction. Section 491 now requires solely that the statement under oath, affirmation, or some other legally binding assertion be given in a document or proceeding in which an oath, affirmation, or some other legally binding assertion is authorized or required by law. The Legislature thereby indicated its intent that a perjury conviction is proper in a proceeding, if an oath is authorized or required by law, even though the proceeding is jurisdictionally defective. M. Merrill, *supra*, at 2212. Hence, jurisdiction is not an element of the offense and need not be pled or proved. On this issue of jurisdiction, the statutory amendments of 1965 have overruled *Bennett*, *supra*; *Berry*, *supra*; *Grey*, *supra*, and other cases.

The amendments of 1965 also changed several other evidentiary requirements of perjury. Prior to the 1965 amendments, it was necessary to allege and prove the materiality of the statement upon which the charge was based. *E.g., Washburn v. State*, 47 Okl. Cr. 321, 288 P. 371 (1930); *Huffine v. State*, 13 Okl. Cr. 239, 163 P. 557 (1917). Materiality is no longer an element of the crime of perjury, because 21 O.S. 1991, § 498(b), makes materiality relevant solely for purposes of sentencing. Another change caused by the 1965 amendments is illustrated by a comparison of the holding in *Scott v. State*, 66 Okl. Cr. 441, 92 P.2d 847 (1939), with 21 O.S. 1991, § 498(a). In *Scott* the Court of Criminal Appeals held that a conviction of perjury could not be sustained upon the testimony of only one witness. The court stated that the charge must be supported by at least two witnesses, or by one witness and corroborating circumstances. Section 498(a) makes it clear that no particular quantum or type of evidence is necessary to sustain a perjury conviction. *Scott* is to this extent overruled. For a brief comment on both changes discussed in this paragraph, see M. Merrill, *supra*, at 2212-13.

Section 495 makes it clear that, despite the lack of competency as a witness, if a person does testify under oath, the person would be subject to prosecution for perjury. No instructions need be drafted for this section.

Section 500 sets the punishment for perjury. Perjury is not divided into several crimes classified according to degree. But section 500 does set three different penalties depending upon the type of proceeding or circumstances in which the perjury is committed. Hence, it is necessary to be careful to instruct the jury properly with regard to the appropriate penalty. Only a brief discussion of the three penalty subsections is given.

Section 500(1) provides: "When committed on the trial of an indictment for felony, by imprisonment not less than two years, nor more than twenty years." Despite the word "indictment," the Court of Criminal Appeals has held that subsection one applies to all felony cases, whether prosecuted by indictment or by information. *Roley*, *supra*, *overruling on this point*, *Arnold*, *supra*; *Washburn*, *supra*.

Section 500(2) provides: "When committed on any other trial or proceeding in a court of justice, by imprisonment for not less than one nor more than ten years." *Arnold*, *supra*, held that a hearing on a Motion for New Trial is not part of the trial of a felony. Hence, perjury committed at the hearing on the Motion is punished under subsection two as opposed to subsection one. Subsection two would also encompass, apparently, other pretrial and posttrial proceedings in criminal cases, trials for misdemeanors, and trials and hearings in civil cases.

Section 500(3) provides: "In all other cases by imprisonment not more than five years." Proceedings before Grand Juries are not proceedings "in a court of justice" under subsection two. Perjury before a Grand Jury is thereby punished under subsection three. *Coleman v. State*, 6 Okl. Cr. 252, 113 P. 594 (1911). Other examples of perjury that must be punished under subsection three include the filing of an affidavit containing a false statement for purposes of obtaining service by publication, *West v. State*, 13 Okl. Cr. 312, 164 P. 327 (1917), and making a false statement in a marriage license application, *Campbell*, *supra*.

The Oklahoma Court of Criminal Appeals analyzed the various penalty provisions in 21 O.S. 1991, § 500 with respect to depositions in civil actions in *Lenzy v. State*, 864 P.2d 847 (Okl.Cr. 1993). The court held that while the crime of perjury is committed at the time of the false statement, a deposition must be delivered or filed with the court in order for the crime to be punished under subdivisions one and two of section 500, because those subdivisions require the perjury to be committed at trial or in a court proceeding. If the deposition is not used or attempted to be used in court, the punishment is limited to subdivision three. 864 P.2d at 850.

Sections 501 through 503 provide a summary committal procedure by which a court can commit a person to jail if the court has probable cause to believe that the person committed perjury before the court. If a judge attempts to use this summary committal procedure as a substitute for the normal procedures by which a charge is brought and prosecuted, the Court of Criminal Appeals has intimated strongly that the summary committal procedure would be in violation of the Oklahoma Constitution. *Ex parte Ellis*, 3 Okl. Cr. 220. 105 P. 184 (1910). By contrast, if the judge uses the summary committal procedure as a substitute for arrest without attempting to undermine the normal procedures by which the charge is brought and prosecuted, the summary committal procedure is permissible. *Lawson v. State*, 492 P.2d 1113 (Okl. Cr. 1972). No instructions need be drafted for these three sections.

OUJI-CR 3-19A

FALSE STATEMENT DURING INTERNAL INVESTIGATION - ELEMENTS

No person may be convicted of making a materially false statement during an internal investigation unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, making;

Third, a materially false statement, either verbally or in writing;

Fourth, in the course of an internal State agency investigation;

Fifth, after being informed, in writing and prior to the interview, that providing a materially false statement shall subject the person to criminal prosecution.

Statutory Authority: 21 O.S. 2011, § 281.

2012 SUPPLEMENT

OUJI-CR 3-19A

FALSE STATEMENT DURING INTERNAL INVESTIGATION - ELEMENTS

No person may be convicted of making a materially false statement during an internal investigation unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, making;

Third, a materially false statement, either verbally or in writing;

Fourth, in the course of an internal State agency investigation;

Fifth, after being informed, in writing and prior to the interview, that providing a materially false statement shall subject the person to criminal prosecution.

Statutory Authority: 21 O.S. 2011, § 281.

2012 SUPPLEMENT

OUJI-CR 3-20

SUBORNATION OF PERJURY - INTRODUCTION

The **defendant(s) is/are** charged with subornation of perjury by suborning **[Name of Person Allegedly Suborned]** on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is meant for section 504 and 505 of Title 21, Chapter 17. Section 504 creates the crime of subornation of perjury, while section 505 sets forth the punishment applicable.

OUJI-CR 3-21

SUBORNATION OF PERJURY - ELEMENTS

No person may be convicted of subornation of perjury unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, bringing about;

Second, perjury by another person;

Third, **known/believed** by **defendant(s)** to be perjury committed by that other person.

Notes on Use

This instruction must be given in every prosecution for subornation of perjury.

OUJI-CR 3-22

SUBORNATION OF PERJURY - PERJURY DEFINED

Note: The trial judge should define perjury by setting forth the elements of perjury or perjury by contradictory statements as appropriate to the type of perjury allegedly brought about by the defendant. (See OUJI-CR 3-18 or OUJI-CR 3-19, *supra*.)

Statutory Authority: 21 C.S. 1991, § 504.

Committee Comments

The first element sets forth the conduct in which the defendant must have engaged. Although the statutory language of section 504 is "procures," the Commission has used the words "bringing about" to promote simplicity and clarity in language for the jurors. The word "procures" may not be accurately understood by many people, whereas the words "bringing about" should be understood by all jurors. The words "bringing about" are synonymous with the word "procuring."

The second element indicates that what must have been brought about by the defendant is perjury on the part of another person. Subornation of perjury should be distinguished from solicitation of another to commit perjury. Subornation of perjury entails perjury already committed at the behest of the person charged. Solicitation of another to commit perjury would be attempted subornation of perjury which is also created by section 504. (See the Attempt instructions at OUJI-CR 2-10 et seq. for a guide to drafting an appropriate instruction.)

Perjury by subornation of perjury has the identical elements as perjury for the perjury crimes created by section 491 or section 496. Hence, in a prosecution for subornation of perjury, the State must allege and prove the elements of perjury as presented in either section 491 or section 498. *Thomas v. State*, 36 Okl. Cr. 209, 253 P. 514 (1927). *See Ex parte Pack*, 1 Okl. Cr. 277, 1 P.2d 817 (1931).

The third element sets forth the mens rea of the crime of subornation of perjury. The defendant must know that the testimony caused by him constitutes perjury by the other person. For a brief general discussion of subornation of perjury, see R. Perkins, *Criminal Law* 466 (2d ed. 1969).

OUJI-CR 3-23

CONTEMPT (INDIRECT - PENAL)

No person may be convicted of contempt of court unless the State has proved the following beyond a reasonable doubt:

First, the willful;

Second, **disobedience/(interference with the carrying out)**;

Third, of a **lawful order/process** of a court.

Statutory Authority: 21 O.S. 2011, §§ 565, 567.

Notes on Use

A clear and convincing standard for the burden of proof should be used when the purpose of the indirect contempt is coercive or remedial in nature and the defendant is capable of terminating the imprisonment at any time by compliance with, or by a promise to comply with the court order. *See* Chapter 31 of the Oklahoma Uniform Jury Instructions – Civil. The beyond a reasonable doubt standard should be used when the purpose of the indirect contempt is penal in nature and the defendant cannot shorten the incarceration by compliance or promised compliance with the court order.

Committee Comments

21 O.S. 2011, § 565 categorizes contempts of court as either direct or indirect. Direct contempts involve disruptive conduct in the presence of the court, while indirect contempts involve disobeying or resisting execution of court orders or process outside of the court's presence. Direct contempts may be summarily punished and there is no right to jury trial for a direct contempt. 21 O.S. 2011, § 565.1; *Hogg v. State*, 2008 OK CR 8, ¶ 6, 181 P.3d 724, 725. "The power of a judge to impose significant punishment for direct contempt immediately and without the full panoply of due process rests upon the absolute necessity of maintaining a structured order in our courts." *Id.* at ¶ 4, 181 P.3d at 724 (quoting *Autry v. State*, 2007 OK CR 41, ¶ 10, 172 P.3d 212, 214). 21 O.S. 2011 § 567 provides for a right to jury trial for indirect contempts.

The Oklahoma Supreme Court has held that the purpose of indirect contempt sanctions may serve one of two purposes: (1) remedial, or (2) penal. *Henry v. Schmidt*, 2004 OK 34, ¶ 13, 91 P.3d 651, 654. If the purpose of the punishment for indirect contempt is to coerce the defendant's behavior, it is remedial and the defendant is capable of terminating the imprisonment at any time by compliance with, or by a promise to comply with the court order. However, if the purpose of the sanction is to punish the defendant and the incarceration is for a definite period of time and cannot be shortened by compliance with a court order, it is penal. *Id.*

When the purpose of the indirect contempt proceeding is to impose remedial or coercive sanctions the burden of proof is by clear and convincing evidence. If the

purpose of the indirect contempt proceeding is to impose penal sanctions the burden of proof is beyond a reasonable doubt. *Id.* at ¶¶ 20, 21, 91 P.3d at 656.

(2015 Supplement)

OUJI-CR 3-24

VIOLATION OF PROTECTIVE ORDER - ELEMENTS

No person may be convicted for violation of a protective order unless the State has proved beyond a reasonable doubt each and every element of the crime. These elements are:

First, willful;

Second, violation of a protective order;

Third, served on the defendant.

Statutory Authority: 22 O.S. Supp. 1995, § 60.6.

OUJI-CR 3-25

VIOLATION OF PROTECTIVE ORDER (ENHANCED) - ELEMENTS

No person may be convicted for violation of a protective order unless the State has proved beyond a reasonable doubt each and every element of the crime. These elements are:

First, willful;

Second, violation of a protective order;

Third, which had been served on the defendant;

Fourth, while committing the violation, the defendant caused physical **injury/impairment** to the person protected by the order;

Fifth, without justifiable excuse to cause the **injury/impairment**.

Statutory Authority: 22 O.S. Supp. 1995, § 60.6.

Notes on Use

This instruction shall be accompanied by the definition of willful in OUJI-CR 4-28.

OUJI-CR 3-26

VIOLATION OF PROTECTIVE ORDER - DEGREE OF INJURY

If you find that the defendant caused physical **injury/impairment** to the person protected by the protective order, you shall consider the degree of physical **injury/impairment** in determining the term of imprisonment.

Statutory Authority: 22 O.S. Supp. 1995, § 60.6(C).

Notes on Use

This instruction should be used only with OUJI-CR 3-25.

OUJI-CR 3-27

REMOVAL OF PUBLIC OFFICER

A/n [Identify Public Officer] may be removed from office for **[any of]** the following **causes(s)**:

[habitual or willful neglect of duty]

[gross partiality in office]

[oppression in office]

[corruption in office]

[extortion or willful overcharge of fees in office]

[willful maladministration]

[habitual drunkenness]

[failure to produce and account for all public funds and property in his/her hands, at any settlement or inspection authorized or required by law].

[Willful neglect of duty means that the **[Identify Public Officer]'s act/(failure to act)** was for a bad or evil purpose, or that the **[Identify Public Officer]** deliberately **acted/(failed to act)** contrary to a known duty. Mere thoughtless acts, with no bad or evil purpose, in which there is no inexcusable carelessness or recklessness on the part of **a/n [Identify Public Officer]** do not justify removal from office.].

[Corruption in office means the **[Identify Public Officer]'s** unlawful and wrongful use of **his/her** public office to procure a benefit for **himself/herself** or another person, contrary to duty and the rights of others.]

[Willful maladministration means that the **[Identify Public Officer]'s** acts were done with a bad or evil intent or were contrary to a known duty, or the **[Identify Public Officer]** was inexcusably reckless in **performing/(failing to perform)** an official duty. Mere thoughtless acts, with no bad or evil purpose, or not involving inexcusable recklessness, even though they involve serious errors of judgment, do not justify removal from office.].

Statutory Authority: 22 O.S. 1991, §§ 1181-1197.

Notes on Use

Since a proceeding for removal of a public officer is initiated by an accusation from a grand jury (or the board of county commissioners for a county or township officer), OUJI-CR 1-8 should be modified to remove the references to informations and indictments. *See* 22 O.S. 1991, §§ 1182 (grand jury), 1194 (board of county commissioners).

The trial court should select the appropriate grounds for removal from office from the list in the first paragraph, and it should then give the definitions that correspond to the grounds that were selected.

Committee Comments

A proceeding for removal of a public officer has attributes of both a criminal and a civil action. *State ex rel. Grand Jury v. Pate*, 572 P.2d 226, 228 (Okl. 1977). Nevertheless, the trial is conducted in the same way as a misdemeanor trial. 22 O.S. 1991, § 1191.

The definitions of willful neglect of duty and willful maladministration were taken from *Phillips v. State*, 75 Okl. Cr. 46, 181 P. 713 (1919) (Syllabus 2) (willful neglect of duty), and *Shields v. State*, 184 Okl. Cr. 618, 89 P.2d 756 (1939).

OUJI-CR 3-28

RACKETEERING - ELEMENTS (CONDUCTING OR PARTICIPATING)

The **defendant(s)** may not be convicted of conducting or participating in the affairs of an enterprise through **(a pattern of racketeering activity)/(the collection of an unlawful debt)** unless the State has proved beyond a reasonable doubt each and every element of the crime.

These elements are:

First, the **defendant(s) was/were (employed by)/(associated with)** an enterprise;

Second, **conducted/(participated in)**, either indirectly or directly, the affairs of the enterprise; and

Third, through **(a pattern of racketeering activity)/(the collection of an unlawful debt)**.

Statutory Authority: 22 O.S. 1991, § 1403.

Notes on Use

For instructions on attempt and conspiracy, see Chapter 2. Various definitions of the terms used in this instruction are provided in the following instructions.

Committee Comments

See Yellow Bus Lines, Inc. v. Local Union 639, 913 F.2d 948 (D.C. Cir. 1990). The Court of Appeals held that participation in the conduct of an enterprise's affairs means to guide, manage, direct or otherwise exercise control over the course of the enterprise's activities. However, the language of 18 U.S.C. § 1962(c) is narrower than that of 22 O.S. 1991, § 1403(A) in that it requires "to control or participate ... in the conduct," whereas 22 O.S. 1991, § 1403(A) requires either the conduct of the affairs of the enterprise or participation in the affairs of the enterprise.

OUJI-CR 3-29

RACKETEERING - ELEMENTS

(ACQUIRING OR MAINTAINING AN INTEREST IN)

The **defendant(s)** may not be convicted of acquiring or maintaining an interest in an enterprise through **(a pattern of racketeering activity)/(the collection of an unlawful debt)** unless the State has proved beyond a reasonable doubt each and every element of the crime.

These elements are:

> First, the **defendant(s)** acquired or maintained, directly or indirectly, an interest in or control of any **enterprise/(real property)**;
>
> Second, through **(a pattern of racketeering activity)/(the collection of an unlawful debt)**.

Statutory Authority: 22 O.S. 1991, § 1403(B).

OUJI-CR 3-30

RACKETEERING - ELEMENTS (INVESTMENT OF PROCEEDS)

The **defendant(s)** may not be convicted of investing the proceeds from **(a pattern of racketeering activity)/(the collection of an unlawful debt)** unless the State has proved beyond a reasonable doubt each and every element of the crime.

These elements are:

First, the **defendant(s)** received any proceeds derived, directly or indirectly;

Second, from **(a pattern of racketeering activity)/(the collection of an unlawful debt)**;

Third, in which the **defendant(s)** participated as a principal;

Fourth, used or invested, directly or indirectly, part or all of the proceeds derived from the use or investment of any of those proceeds to acquire any right, title, or interest in real property or in the establishment or operation of any enterprise;

[Fifth, if the investment or use involved a purchase of securities on the open market, in addition to the elements listed above, the State must prove beyond a reasonable doubt (a) the defendant intended to control or participate in the control of the issuer or intended to assist another to do so; and (b) all of the defendant's securities held by the defendant, **his/her** immediate family and their accomplices amount to one percent (1%) or more of the outstanding stock of any one class of the issuer and confer the power to elect one or more directors of the issuer.]

Statutory Authority: 22 O.S. 1991, § 1403(C).

Notes on Use

The fifth element is not required unless there is evidence that the investment was in securities on the open market.

Committee Comments

Although 22 O.S. Supp. 1995, § 1402(9) provides a definition of "principal," the definition of principal provided in OUJI-CR 2-5 and 2-6 may be more helpful to the jurors in weighing the third element.

OUJI-CR 3-31

PATTERN OF RACKETEERING ACTIVITY - DEFINITION

A pattern of racketeering activity means two or more occasions of conduct that include each of the following:

(1) constituted racketeering activity,

(2) were related to the affairs of the enterprise,

(3) were not isolated,

(4) were not so closely related to each other and connected in point of time and place that they constituted a single event, and

and where each of the following is present:

(1) the last of the occasions of conduct occurred within three (3) years of a prior occasion of conduct,

(2) each of the occasions of conduct constituted a felony under Oklahoma law.

Statutory Authority: 22 O.S. Supp. 1995, § 1402(5).

Committee Comments

The United States Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989), ruled that in addition to the Federal Act's version of the above elements there was a legislative intent evinced by the choice of the word "pattern" that the predicates (occasions) "amount to or pose a threat of continued criminal activity." Because the Oklahoma Court of Criminal Appeals has not yet addressed this issue, the "continuity element" has not been grafted to the statutory elements by the Commission. It should be noted that there is a substantial difference in the time element between the Federal Act and Oklahoma's. In the Federal Act, the "predicates" must be within ten (10) years of each other; in the Oklahoma Act, the "occasions" must have occurred within three (3) years of each other. 22 O.S.Supp.1993, § 1402(5)(b)(2).

OUJI-CR 3-32

WHAT CONSTITUTES RACKETEERING ACTIVITY

The following conduct constitutes a felony under Oklahoma law: **[State the Elements of the Alleged Predicate Criminal Act(s) from the List of Felonies Set Out in 22 O.S. Supp. 1995, § 1402(10)]**.

OUJI-CR 3-33

COLLECTION OF AN UNLAWFUL DEBT - DEFINITION

An unlawful debt means any **money/(thing of value)** that is the principal or interest on a debt that is unenforceable in the Oklahoma courts because the debt violates **[Specify Law]**, which prohibits **[Describe Law]**, **[but it does not include a debt [(owed to a bank/(savings and loan association)/(credit union)]/ [assigned to a debt collection agency]**.

Notes on Use

The jury should be informed of the particular law that makes the debt unenforceable. The trial court should include the last clause in the instruction only if there is a jury issue concerning whether the debt was owed to a bank or similar institution.

OUJI-CR 3-34

RACKETEERING - DEFINITIONS

Enterprise -- Enterprise includes any **individual/(sole proprietorship)/ partnership/corporation/trust/(governmental entity)/(other legal entity)/union/ association/(group of persons, associated in fact although not a legal entity,)** involved in any lawful or unlawful **project/undertaking**.

Reference: 22 O.S. Supp. 1995, § 1402(2).

Person - Any **individual/entity owning/(capable of owning)** property.

Reference: 22 O.S. Supp. 1995, § 1402(7).

Committee Comments

The definition of "enterprise" in 22 O.S.Supp.1995, § 1402(2) is similar to the definition in the federal RICO statute, 18 U.S.C. § 1961(4) (1988), except that the Oklahoma definition includes the additional phrase "involved in any lawful or unlawful project or undertaking." The United States Supreme Court stated in *United States v. Turkette*, 452 U.S. 576, 583 (1981), that the prosecution was required to prove the existence of an enterprise that was "separate and apart from the pattern of [racketeering] activity in which it engages." The Ninth Circuit Court of Appeals noted in *United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993), that there is a split in the federal circuits over whether this would require proof that the enterprise has an "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity" (citing *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982)), or would be satisfied even when "the enterprise was, in effect, no more than the sum of the predicate racketeering acts" (citing *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983)).

OUJI-CR 3-35

FALSE CLAIM AGAINST THE STATE

No person may be convicted of filing a false claim against the State unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, any person **making/presenting/(causing the making/presenting of)** a;

Second, **false/fictitious/fraudulent** claim for payment of money from **(the State of Oklahoma)/(any department/ agency of the State of Oklahoma)**;

Third, known by **him/her** to be **false/fictitious/fraudulent**.

As used in this instruction:

["False" means documents wholly or partly fabricated or materially altered.]

["Fictitious" means imaginatively created past facts.]

["Fraudulent" means a false suggestion of facts or the suppression of the truth brought about through trick, false appearance, or through any other unfair way in order to cheat.]

Statutory Authority: 21 O.S. 1991, § 358.

Committee Comments

The funds of the State Insurance Fund are not "public funds" for purposes of the crime of filing a false claim against the State under 21 O.S. 1991, § 358. *State v. Young*, 1999 OK CR 14, ¶ 28, 989 P.2d 949, 955.

(2000 Supp.)

OUJI-CR 3-36

DESTRUCTION OF PUBLIC RECORDS

No person may be convicted of destruction of public records unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, unlawful;

Third, destruction of records;

Fourth, of a State governmental entity reflecting **financial/business** transactions.

Statutory Authority: 21 O.S. 1991, § 590.

Notes on Use

This instruction shall be accompanied by the definition of willful in OUJI-CR 4-28.

(2000 Supp.)

OUJI-CR 3-37

DESTRUCTION OF EVIDENCE - ELEMENTS

No person may be convicted of destruction of evidence unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, destruction of any **book/paper/record/(instrument in writing)/ matter/thing**;

Third, knowing it was about to be produced in evidence at any **trial/proceeding/ inquiry/investigation** authorized by law;

Fourth, with the intent to prevent the **book/paper/record/(instrument in writing)/matter/thing** from being produced.

Statutory Authority: 21 O.S. 1991, § 454.

(2000 Supp.)

OUJI-CR 3-38

FILING A FALSE/FORGED INSTRUMENT - ELEMENTS

No person may be convicted of filing a false/forged instrument unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, **procuring/offering**;

Third, a **false/forged** instrument;

Fourth, to be **filed/registered/recorded** in any public office in Oklahoma.

An instrument is any document which, if genuine, could be **filed/ registered/recorded** under any law of Oklahoma or the United States.

Statutory Authority: 21 O.S. 1991, § 463.

OUJI-CR 3-39

WITNESS INTIMIDATION - ELEMENTS

No person may be convicted of witness intimidation unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **prevented/ (attempted to prevent)**;

Third, a person who **(has been duly summoned/subpoenaed/ (endorsed on a (criminal information)/(juvenile petition))/(has made a report of abuse/neglect required by law)/(is a witness to a reported crime);**

Fourth, from **testifying/(producing a record/ document/object).**

OR

First, willfully;

Second, **threatened/procured**;

Third, **physical/mental** harm;

Fourth, through **force/fear**;

Fifth, to a person;

Sixth, **[with the intent to prevent the person from appearing in court to testify/produce a record/document/object]**

OR

Sixth, **[with the intent to make the person alter that person's testimony]**

OR

First, willfully;

Second, **(threatened physical harm through force/fear)/(caused/procured physical harm to be done)** to a person;

Third, because of **(testimony given by the person in a civil/criminal trial/proceeding)/(a report of abuse/neglect required by law).**

OR

First, willfully;

Second, **(harassed a person)/(caused a person to be harassed);**

Third, because of **(testimony given by the person in a civil/criminal trial/proceeding)/(a report of abuse/neglect required by law).**

Statutory Authority: 21 O.S. Supp. 2014, § 455.

Notes on Use

The witness intimidation statute, 21 O.S. Supp. 2014, § 455, refers to reports of abuse or neglect pursuant to 10A O.S. Supp. 2014, § 1-2-101 and 43A O.S. 2011, § 10-104. If the witness intimidation was related to a report of abuse or neglect, the trial court should determine whether the report was made pursuant to one of these statutes.

Committee Comments

This instruction is similar to the instruction promulgated by the Oklahoma Court of Criminal Appeals in *Pinkley v. State*, 2002 OK CR 26, Appendix A, 49 P.3d 756, 759-60. However, it omits the statutory references in the sixth element because they would not be helpful to a jury. Whether a report of abuse or neglect was made pursuant to the particular statutes would not ordinarily be a jury issue, but if it were a jury issue, additional instructions would be necessary. The Court of Criminal Appeals discussed the definition of "testimony" in *Pinkley*. *Id.* at ¶¶ 6-8 and n. 7, 49 P.3d at 758-59. For a definition of "procured," see OUJI-CR 4-28.

(2015 Supplement)

OUJI-CR 3-40

FAILURE TO REGISTER AS A SEX OFFENDER

No person may be convicted of failing to register as a sex offender unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the person has **(been convicted of)/(received a suspended sentence for)/(received a probationary term for)/(received a deferred judgment for) [specify the particular crime listed in 57 O.S. 2011, § 582]**;

Second, the person received notice that **he/she** was required to register as a sex offender;

Third, the person failed to register with the **(Department of Corrections)/([specify the particular local law enforcement agency in 57 O.S. 2011, § 583(A) for the area where the person resides or intends to reside])/(Department of Corrections and the [specify the particular local law enforcement agency for the area where the person resides or intends to reside])**;

Fourth, **(within (three (3))/(two (2)) business days after)/(at least three (3) business days before) [specify the particular event in 57 O.S. 2011, § 582 that triggered the registration requirement]**.

Statutory Authority: 57 O.S. 2011, §§ 582, 583.

Notes on Use

The period for which registration as a sex offender is required is based onthe numeric risk level assigned by the Department of Corrections. See 57 O.S. 2011, §§ 582.5, 583(D). The length of the period and whether the defendant is within it would generally be an issue of law for the judge to determine, rather than an issue for the jury.

2012 SUPPLEMENT

OUJI-CR 3-41

FAILURE TO REGISTER AS A VIOLENT OFFENDER

No person may be convicted of failing to register as a violent offender under the Mary Rippy Violent Crime Offenders Registration Act unless the State has proved beyond a reasonable doubt each element of the crime.

First, the person has **(been convicted of)/(received a suspended sentence for)/(received a probationary term under the law of [specify other jurisdiction] for)/(received a deferred judgment for) [specify the particular crime listed in 57 O.S. 2021, § 593(B)**];

Second, the person received notice that **he/she** was required to register as a violent offender with the Department of Corrections and the local law enforcement authority having jurisdiction in the area where the offender resides or intends to reside;

Third, the person failed to register with the **(Department of Corrections)/([specify the particular local law enforcement agency for the area where the person resides or intends to reside])/(Department of Corrections and the [specify the particular local law enforcement agency for the area where the person resides or intends to reside])**;

Fourth, within **[specify period of time in 57 O.S. 2021, § 594(A) or (B)]** after **[specify the particular event in 57 O.S. 2021, § 594(A) or (B) that triggered the registration requirement]**.

Statutory Authority: 57 O.S. 2011, §§ 593, 594.

Notes on Use

The "local law enforcement authority" is defined in 57 O.S. 2021, § 592.

Committee Comments

The Oklahoma Court of Criminal Appeals held in *Burns v. State*, 2019 OK CR 27, ¶ 6, 453 P.3d 1244, 1245, that the defendant must have been given notice of the registration requirement. To aid trial courts in providing that notice, the Court modified the Uniform Plea of Guilty form, Form 13.10, and the Uniform Judgment and Sentence form Form 13.8. *Id.* at ¶ 9, 453 P.3d at 1246. The Court also provided a suggested uniform jury instruction for the guidance of trial courts. *Id.* at ¶ 12, 453 P.3d at 1247.

(2022 Supp.)

OUJI-CR 4-1

ASSAULT AND BATTERY - INTRODUCTION

The **defendant(s) is/are** charged with:

[shooting with intent to kill]

[use of vehicle to facilitate the discharge of a weapon]

[assault and battery with a deadly weapon]

[assault and battery by means of force likely to produce death]

[an attempt to kill another]

[assault and battery in resisting execution of legal process]

[assault with intent to kill]

[assault with a dangerous weapon]

[battery with a dangerous weapon]

[assault and battery with a dangerous weapon]

[aggravated assault and battery]

[assault upon a police or other law officer]

[battery upon a police or other law officer]

[assault and battery upon a police or other law officer]

[aggravated assault and battery upon a police or other law officer]

[assault with intent to commit a felony]

[assault and battery upon a/an referee/(court officer)/(Department of Corrections employee)/(emergency medical care provider)]

[aggravated assault and battery upon an emergency medical care provider]

[interfering with an emergency medical care provider]

[assault]

[battery]

[assault and battery]

[stalking]

[malicious intimidation/harassment]

[inciting imminent violence]

of **[Name of Alleged Victim]** on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 4-2

ASSAULT DEFINED

An assault is any willful and unlawful attempt or offer to do a bodily hurt to another with force or violence.

OUJI-CR 4-3

BATTERY DEFINED

A battery is any willful and unlawful use of force or violence upon the person of another.

Statutory Authority: 21 O.S. 1991, §§ 641, 642.

Committee Comments

This introductory instruction is intended for use with regard to the offenses defined in sections 641 through 652, and section 681, of Title 21. These offenses, despite the precise conduct prohibited, involve the commission of an assault, a battery, or an assault and a battery, so these words are defined in statutory terms at the outset. The only possible exception is the crime of attempted murder, as set forth in section 652, so if the attempt is perpetrated by means other than assault and battery, those terms need not be defined.

Assault and battery constitute distinct crimes. Oklahoma defines assault as an attempted battery, as well as an intentional placing of another in apprehension of receiving an imminent battery. *Tyner v. United States*, 2 Okl. Cr. 689, 103 P. 1057 (1909). Therefore, an oral threat alone, without an overt act, is insufficient to constitute an assault.

Crilley v. State, 15 Okl. Cr. 44, 181 P. 316 (1919). Although assault is always a lesser included offense of battery, the converse is obviously not true. *Parks v. State*, 14 Okl. Cr. 413, 171 P. 1129 (1918). Some of the offenses defined in this section require that the defendant commit both assault and battery. *See* 21 O.S. Supp. 1995, § 652. Other statutes, such as section 645, require commission of either, or of both. Section 681 requires only that an assault be perpetrated. The specific conduct and mental state required for each crime are discussed in the Committee Comments pertinent to each instruction.

OUJI-CR 4-4

ASSAULT AND BATTERY, SHOOTING WITH INTENT TO KILL - ELEMENTS

No person may be convicted of shooting with intent to kill unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, intentional and wrongful;

Second, **(shooting another person with)/(discharging)** a firearm;

Third, with the intent to kill any person.

Statutory Authority: 21 O.S. Supp. 2005, § 652 (A).

Notes on Use

If the victim was an unborn child, the court should also give OUJI-CR 4-57, *infra* and, if appropriate, OUJI-CR 4-57A or 4-57B, or both.

2006 SUPPLEMENT

OUJI-CR 4-5

ASSAULT AND BATTERY, USE OF VEHICLE

(DRIVE BY SHOOTING) - ELEMENTS

No person may be convicted of use of a vehicle to facilitate the discharge of a **firearm/crossbow/weapon** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, use of any vehicle;

Second, to facilitate the intentional discharge;

Third, of any **firearm/crossbow/weapon**;

Fourth, in the conscious disregard for the safety of any other person or persons.

Statutory Authority: 21 O.S. Supp. 2005, § 652(B).

Notes on Use

It is the Committee's view that the terms used in this instruction are understandable to a jury and that further definition is not necessary.

If the victim was an unborn child, the court should also give OUJI-CR 4-57, infra, and, if appropriate, OUJI-CR 4-57A or 4-57B, or both.

2006 SUPPLEMENT

OUJI-CR 4-6

ASSAULT AND BATTERY WITH A DEADLY WEAPON - ELEMENTS

No person may be convicted of assault and battery with a deadly weapon unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon another person; and

Third, with a deadly weapon

_____

Statutory Authority: 21 O.S. 2011, § 652(C).

Notes on Use

If the victim was an unborn child, the court should also give OUJI-CR 4-57, infra, and, if appropriate, OUJI-CR 4-57A or 4-57B, or both.

Committee Comments

Before the amendment of 21 O.S. § 652 in 1992, an intent to take a human life was an element of assault and battery with a deadly weapon. This element was removed from the statute by the 1992 amendment. *Goree v. State*, 2007 OK CR 21 , ¶¶ 3-5, 163 P.3d 583, 584-85.

2012 SUPPLEMENT

OUJI-CR 4-6A

ASSAULT AND BATTERY - DOMESTIC ASSAULT AND BATTERY WITH A DEADLY WEAPON - ELEMENTS

No person may be convicted of assault and battery with a deadly weapon unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, shooting;

Second, a **[Specify Applicable Relationship in 21 O.S. 2011, § 644(D)(2)]**;

Third, with a deadly weapon;

Fourth, that is likely to produce death;

Fifth, without justifiable or excusable cause.

Statutory Authority: 21 O.S. 2011, § 644(D)(2).

Notes on Use

The relationships listed in 21 O.S. 2011, § 644(D)(2) are "a current or former spouse, a present spouse of a former spouse, a parent, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is in a dating relationship as defined by Section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant."

2012 SUPPLEMENT

OUJI-CR 4-7

ASSAULT AND BATTERY

BY MEANS OR FORCE LIKELY TO PRODUCE DEATH - ELEMENTS

No person may be convicted of assault and battery by means or force likely to produce death unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon another person;

Third, with force likely to produce death;

Notes on Use

If the victim was an unborn child, the court should also give OUJI-CR 4-57, *infra*, and, if appropriate, OUJI-CR 4-57A or 4-57B, or both.

Committee Comments

The requirement that the assault and battery was done with the intent to take a human life was removed from 21 O.S. § 652 in 1992. See 1992 Okla. Sess. Laws ch. 192, § 1; *Goree v. State*, 2007 OK CR 21, ¶¶ 3-5, 163 P.3d 583, 584-85. *But see Goree v. State*, 2007 OK CR 21, ¶ 5,163 P.3d 583, 585 (Lumpkin, J., concurring in results) (specific intent to kill is required for offense in § 652(C) of assault and battery in attempting to kill another).

2012 SUPPLEMENT

OUJI-CR 4-8

ANY OTHER ATTEMPT TO KILL - ELEMENTS

No person may be convicted of an attempt to kill another unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an attempt to kill;

Second, another person;

Third, by **(performing an act)/(omitting to perform an act when a duty to do so exists)**;

Fourth, with the **(intent to cause)/(belief that it would cause)** death.

Notes on Use

If the victim was an unborn child, the court should also give OUJI-CR-4-57, *infra*, and, if appropriate, OUJI-CR 4-57A or 4-57B, or both.

2006 SUPPLEMENT

OUJI-CR 4-9

ASSAULT AND BATTERY

RESISTING THE EXECUTION OF LEGAL PROCESS - ELEMENTS

No person may be convicted of assault and battery committed while avoiding legal process unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon another person;

Third, while resisting the execution of any legal process.

Statutory Authority: 21 O.S. Supp. 2000, § 652(C).

Committee Comments

As recognized by the Court of Criminal Appeals in *Davis v. State*, 1960 OK CR 6, 354 P.2d 466, section 652 encompasses four different methods by which an assault and battery might be perpetrated, as well as an attempted-murder provision. In the interest of clarity, a separate instruction is presented to cover each of these five situations.

OUJI-CR 4-4. Shooting with intent to kill. Section 652(A) proscribes those assaults and batteries wherein a firearm is wrongfully used with the intention of killing another. This statute was amended in 1977 by deleting attempted shootings from this first sentence. Thus, limiting the first sentence to cases where the defendant "shoots" another restricts application of this portion of section 652 to situations where the defendant discharges a loaded firearm and the bullet actually penetrates or contacts the body of the victim. *Flowers v. State*, 4 Okl. Cr. 320, 111 P. 675 (1910). The court should not instruct under this subsection unless the facts reasonably demonstrate a shooting of the victim by the defendant.

In order to be convicted under section 652(A), the shooting must be wrongful and performed without justification or excuse, *Bartell v. State*, 4 Okl. Cr. 135, 111 P. 669 (1910), as well as being intentional, the consequence of volitional conduct. In view of the statutory requirement that the defendant must have formed a specific intent to destroy human life, inclusion of the requirement that the act of defendant be volitional in the first element may seem redundant. The element is phrased as requiring "intentional" conduct in order to accord with statutory language.

The intent to kill another person is the gravamen of the offenses described in section 652(A), and it is the distinguishing factor between sections 652 and 645. *Meggett v. State*, 1979 OK CR 89, 599 P.2d 1110; *Davis v. State*, *supra*. Section 652(A) proscribes shooting performed with the intent to inflict death. Section 645 applies to assaultive conduct performed with no intent to kill, but to inflict injury upon the victim. Use of a gun or other deadly weapon, in itself, does not give rise to a presumption of intent to kill. Rather, intent remains a question of fact to be determined by the jurors. *Watkins v. State*, 25 Okl. Cr. 10, 218 P. 895 (1923).

This requisite intent may be negated by proof that the discharge of the firearm occurred accidentally. So long as there is proof that the defendant was conducting himself in a lawful manner, with reasonable regard for the lives and safety of others, the jurors should be instructed regarding the defense of accident, and the defendant is entitled to an acquittal if the issue is determined in his favor. *Holdge v. State*, 1978 OK CR 116, 586 P.2d 744; *Childs v. State*, 68 Okl. Cr. 435, 99 P.2d 539 (1940). However, the court has consistently held that

interposition of the defense of accident does not in itself entitle the defendant to an instruction on simple assault and battery. *Holdge*, *supra*; *Childs*, *supra*.

The element describing the mental state is framed in terms of an "intent to take a human life," since the intent to kill need not be directed toward the person actually felled by the defendant's shot. The Court of Criminal Appeals has held that the act of shooting into a group of persons with the intention of killing a particular person constitutes an assault and battery under section 652 upon each member of the group. *Holdge*, *supra*; *Phillips v. United States*, 2 Okl. Cr. 628, 103 P. 861 (1909).

In numerous cases, the court has addressed the question of lesser included offenses. Generally, all of the crimes defined by sections 641, 642, 645, 649, and 650 of Title 21 are lesser included offenses of assault and battery with intent to kill. The court has consistently stated that instructions on lesser included offenses are warranted where any evidence in support of the lesser charge is adduced. *Holdge*, *supra*; *Bailey v. State*, 536 P.2d 985 (Okl. Cr. 1975); *Gist v. State*, 509 P.2d 149 (Okl. Cr. 1973); *Pettigrew v. State*, 430 P.2d 808 (Okl. Cr. 1967); *Childs*, *supra*.

OUJI-CR 4-6. Use of a deadly weapon. Section 652(C) proscribes all assaults and batteries perpetrated with intent to effect death through use of a deadly weapon. The statutory language clearly requires that the conduct of the defendant constitute both an assault and a battery, due to a wording change enacted in the 1977 revision of section 652. Therefore, the judge should not instruct under section 652(C) unless the defendant's conduct could reasonably be found to constitute both an assault and a battery.

The issue raised by this portion of the statute concerns the determination of whether a particular weapon is "deadly," and therefore within the purview of section 652(C). In the leading case, *Beeler v. State*, 334 P.2d 799 (Okl. Cr. 1959), the court declared that certain implements of damage and destruction may be termed deadly per se, or deadly as a matter of law. Other weapons, although not deadly when used in accordance with the purpose for which they were designed, may be established as deadly under the circumstances, depending upon the intention of the person wielding the weapon and the manner of its use.

In determining whether a weapon is to be denominated deadly per se, the court stated that cognizance must first be afforded to the legislative determination incorporated in section 1272 of Title 21, the current version of which forbids carrying, under most circumstances, "any pistol, revolver, dagger, bowie knife, dirk knife, switch-blade knife, spring-type knife, sword cane, knife having a blade which opens automatically .... blackjack, loaded cane, billy, hand chain, metal knuckles, or any other offensive weapon. ..." Each of these devices is deemed deadly per se "by virtue of being an instrument which, when used in the ordinary manner contemplated by its design or construction, will or is likely to cause death or great bodily harm." *Beeler*, *supra*, at 806. *Accord*, *State v. Spurlock*, 371 P.2d 739 (Okl. Cr. 1962).

However, the court further stated that its determination of which weapons should be denominated deadly per se was not circumscribed by the statutory enumeration. In *Beeler*, the court affirmed the trial court's determination that a trace chain wrapped around the hand of the defendant and thus used to beat the complaining witness was indistinguishable from a pair of brass knuckles, although the latter were included within the statutory enumeration at that time, and the former was not. The court held that determination of per se deadliness would be premised upon a logical two-part inquiry:

> Can the instrumentality be used to injure or kill, and has it been so used sufficiently to set a pattern of criminal conduct, a pattern so definite that for the better protection of society the courts must take cognizance.... [T]he trial judge may declare a weapon to be a dangerous weapon per se if the weapon used appears to have been designed as a weapon of combat and is capable by its description or appearance of producing death or serious bodily injury.

Beeler, *supra*, 334 P.2d, at 807.

Many implements utilized with the intent to inflict death, however, are not deadly per se. *Heritage v. State*, 503 P.2d 247 (Okl. Cr. 1972) (a hammer); *Bean v. State*, 77 Okl. Cr. 73, 138 P.2d 563 (1943) (the defendant's hands and feet); *Ponkilla v. State*, 69 Okl. Cr. 31, 99 P.2d 910 (1940) (ordinary pocket knife); *Moody v. State*, 11 Okl. Cr. 471, 148 P. 1055 (1915) (a plank). Where the weapon charged to have been used is not deadly per se, the information must set forth facts to establish a sufficient description of the instrument, the manner in which it was used, and the effect produced by such use. *Eaton v. State*, 418 P.2d 710 (Okl. Cr. 1966); *Davis v. State*, 354 P.2d 466 (Okl. Cr. 1960); *Ponkilla*, *supra*; *Moody*, *supra*. The question of deadliness, for purposes of section 652, then becomes a matter of factual determination by the jury. *Beeler*, *supra*; *Martin v. State*, 67 Okl. Cr. 390, 94 P.2d 270 (1939).

It should be emphasized that the mere fact that a lethal weapon is wielded does not in itself establish the requisite intent to kill, although such intent may be inferred from the circumstances of the weapon's use, such as the manner and degree of viciousness with which the instrument was employed by the defendant. *Fox v. State*, 556 P.2d 1281 (Okl. Cr. 1976).

OUJI-CR 4-7. Use of means or force likely to produce death. The issue concerning the potential for deadliness of a particular implement is often somewhat academic, since perpetration of an assault and battery by means other than use of a lethal weapon or use of force calculated to inflict death is also punishable under section 652(C). The often-quoted position of the Court of Criminal Appeals is this:

> It is immaterial under the statute whether or not a deadly or dangerous weapon is used provided, of course, that the force used is likely to produce death and the intent of the defendant at the time is to kill. It then becomes a question of fact for the jury to determine whether or not the force used is such as is likely to produce death, and whether or not the defendant intends to kill by the use of such force.

Gober v. State, 25 Okl. Cr. 145, 149-50, 219 P. 173, 174 (1923). *See also Pettigrew v. State*, 430 P.2d 808 (Okl. Cr. 1967) (defendant's use of fists, hands and feet to beat complainant deemed sufficient); *Davis v. State*, 300 P.2d 1000 (Okl. Cr. 1956) (defendant's use of a claw hammer to beat his wife held sufficient); *Jones v. State*, 46 Okl. Cr. 187, 287 P. 1073 (1930).

The judge should not instruct under section 652(C) unless the facts reasonably demonstrate that the defendant's conduct constitutes both an assault and a battery.

OUJI-CR 4-8. Any other attempt to kill. Section 652(C) makes punishable any conduct whereby defendant "in any manner attempts to kill another." A literal construction of this statutory language punishes any attempt to take human life, whether or not accomplished by the defendant in conjunction with an assault and battery. Thus, the elements describing this offense have been adapted from those required by the Court of Criminal Appeals in attempt cases arising under section 42 of Title 21: "There are three elements required to be proven in order to prosecute an attempt to commit a crime. They are, the intent to commit a specified crime, performance of some overt act toward its commission, and failure of consummation." *Weimar v. State*, 556 P.2d 1020, 1024 (Okl. Cr. 1976), *citing Erwin v. State*, 351 P.2d 401 (Okl. Cr. 1960).

The attempt crime defined by section 652(C) may be committed either by an overt act or by an omission to act in circumstances where there exists a legal duty to act. W. LaFave & A. Scott, *Criminal Law* § 27, at 190 (1972).

The Commission's literal reading of section 652 as not requiring an assault and battery concededly renders the statute ungrammatical, since it is the Commission's conclusion that the other crimes defined by section 652 do require an assault and a battery by the defendant. It might be argued that this broad construction would render superfluous other statutes which prohibit the attempt to take life, such as section 651 (attempt to kill by administering poison) and section 653 (assault with intent to kill not covered by section 652). The point is not

precisely settled by Oklahoma case law; however, in *Ex parte Smith*, 95 Okl. Cr. 370, 246 P.2d 389 (1952), the court granted the habeas corpus petition of a defendant who was convicted of "attempted murder" by shooting and was sentenced to 50 years imprisonment. The court determined that this offense is specifically covered by section 652 and therefore must be prosecuted under that more precise statute, which prescribed at that time a maximum penalty of ten years, making defendant's sentence grossly excessive. Similarly, in *Minter v. State*, 75 Okl. Cr. 133, 138, 129 P.2d 210, 212 (1942), the court construed section 652 as proscribing "the offense of assault and battery with intent to kill with a deadly weapon." In *Davis v. State*, 354 P.2d 466 (Okl. Cr. 1960), the court carefully outlined the means by which a crime defined by section 652 could be committed, but omitted all reference to the "attempts to kill" language, although such language was part of the statute being construed. Thus, the court has construed the "attempts to kill" language of section 652 only in cases where an assault and battery and some type of forcible conduct actually occurred, and has not addressed the issue of whether only those attempts involving both an assault and a battery are encompassed within section 652.

OUJI-CR 4-9. Resisting the execution of any legal process. Section 652(C) literally punishes an assault and battery that is committed without any specific intent to kill and absent any lethal force or means, but occurs during the course of "resisting the execution of any legal process." Although no Oklahoma cases precisely construe this part of the statute, the court stated in *Davis v. State*, *supra*, that one of the means by which an offense defined by section 652 might be committed was "assault and battery in resisting execution of legal process" with no additional requirements of lethal force or specific intent.

The court should not instruct under section 652 unless, in resisting, the defendant perpetrates both an assault and a battery.

(2000 Supp.)

OUJI-CR 4-10

ASSAULT WITH INTENT TO KILL - ELEMENTS

No person may be convicted of assault with intent to kill unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault;

Second, upon another person;

Third, with the intent to take a human life.

Statutory Authority: 21 O.S. 1991, § 653.

Notes on Use

This instruction should be used where a charge is filed under section 653 or as a lesser included offense to a charge brought under section 652(C) when the question of battery is in issue. See OUJI-CR 4-6 through 4-9, *supra*.

OUJI-CR 4-11

ASSAULT -- DEFINITION OF TRANSFERRED INTENT

If you find that the defendant intended to **kill/injure/assault [Name of Intended Victim]**, and by mistake or accident **injured/assaulted [Name of Actual Victim]**, the element of intent is satisfied even though the defendant did not intend to ~~**kill**~~**/injure/assault [Name of Actual Victim]**. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

Notes on Use

This instruction should be given only if warranted by the evidence. The trial court should delete alternatives in the instruction that do not apply to the particular facts of the case. If used, it should be given immediately after the instruction on mens rea. For homicide prosecutions, see OUJI-CR 4-62, *infra*.

Committee Comments

For a description of the doctrine of transferred intent, see W. LaFave & A. Scott, *Criminal Law* § 3.12(d) (2d ed. 1986). The Oklahoma Court of Criminal Appeals approved a jury instruction on transferred intent in an assault case in *Jones v. State*, 1973 OK CR 151, ¶ 6, 508 P.2d 280, 282. The Oklahoma Court of Criminal Appeals ruled in *Runnels v. State*, 2018 OK CR 27, ¶ 21, 426 P.3d 614, 620, that the doctrine of transferred intent did not permit a jury to find an intent to kill the actual victim based upon an intent to injure or assault an intended victim. Instead, the intent to kill the actual victim may only be based upon an intent to kill an intended victim.

(2019 Supp.)

OUJI-CR 4-12

ASSAULT, BATTERY, OR ASSAULT AND BATTERY

WITH A DANGEROUS WEAPON - ELEMENTS

No person may be convicted of **assault/battery/(assault and battery)** with a **sharp/dangerous** weapon unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(an assault)/(a battery)/(an assault and battery)**;

Second, upon another person;

Third, with a **sharp/dangerous** weapon;

Fourth, without justifiable or excusable cause;

Fifth, with intent to do bodily harm.

OUJI-CR 4-12A

ASSAULT AND BATTERY - DOMESTIC ASSAULT/(ASSAULT AND BATTERY) WITH A DANGEROUS WEAPON - ELEMENTS

No person may be convicted of domestic **assault/(assault and battery)** with a dangerous weapon unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(an assault)/(a battery)/(an assault and battery)**;

Second, upon a **[Specify Applicable Relationship in 21 O.S. 2011, § 644(D)(1)]**;

Third, with a **sharp/dangerous** weapon;

Fourth, without justifiable or excusable cause;

Fifth, with intent to do bodily harm.

Statutory Authority: 21 O.S. 2011, § 644(D)(1).

Notes on Use

The relationships listed in 21 O.S. 2011, § 644(D)(1) are "a current or former spouse, a present spouse of a former spouse, a parent, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is in a dating relationship as defined by section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant."

2012 SUPPLEMENT

OUJI-CR 4-13

ASSAULT AND BATTERY WITH A DANGEROUS WEAPON

BY USE OF A FIREARM -- ELEMENTS

No person may be convicted of **assault/battery/(assault and battery)** with a dangerous weapon by use of a firearm unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(an assault)/(a battery)/(an assault and battery)**;

Second, upon another person;

Third, by shooting at another **(with a firearm)/(with an air gun)/ (conductive energy weapon)/(by any means)**;

Fourth, without justifiable or excusable cause;

Fifth, with intent to injure any person.

Statutory Authority: 21 O.S.2021, § 645.

Committee Comments

Section 645 of Title 21 forbids conduct which is among the lesser included offenses of section 652. *Daniels v. State*, 1978 OK CR 8, 574 P.2d 1050; *Pettigrew v. State*, 1967 OK CR 124, 430 P.2d 808; *Tharpe v. State*, 1961 OK CR 27, 358 P.2d 232. The principal distinguishing factor between the two statutes is the mental state of the defendant. Section 652 requires proof that the defendant specifically intended death as a result of his assault and battery, whereas section 645 requires proof that the defendant contemplated bodily harm or injury to his victim, but not necessarily death. *Meggett v. State*, 1979 OK CR 89, 599 P.2d 1110; *Davis v. State*, 1960 OK CR 6, 354 P.2d 466.

An assault or battery with a gun or other dangerous weapon in culpable where it is perpetrated without legal justification or excuse. *Lane v. State*, 1938 OK CR, 65 Okl. Cr. 192, 84 P.2d 807; *cf. Terhune v. State*, 1974 OK CR 233, 530 P.2d 557 (simple assault cannot be repelled with a deadly weapon where the assault is not such as to excite the assaulted person's fears, as a reasonable person, of death or great bodily harm).

Since section 645 requires that the offensive conduct be perpetrated either with a type of firearm or air gun or "other means whatever," or by means of a dangerous weapon, a definition of "other means" and "dangerous weapon" is appropriate. The Court of Criminal Appeals has invoked the rule of ejusdem generis in construing section 645, ruling that "other means whatever" refers only to weapons similar to or in the class of firearms and air guns. *Smith v. State*, 1944 OK CR 52, 79 Okl. Cr. 1, 151 P.2d 74.

In reference to those implements which might be termed "dangerous" for purposes of section 645, clearly those deemed "deadly" as a matter of law when used in the ordinary manner contemplated by their design and construction, must also be considered "dangerous" for purposes of section 645. *Beeler v. State*, 1959 OK CR 9, 334 P.2d 799, 806, *citing former* 21 O.S. 1951, § 1271 (repealed 1971). For a list of dangerous weapons, see OUJI-CR 4-28, *supra.*

If the device used by the defendant in the assault or battery is not dangerous per se, reference must be made to the manner of its use in the circumstances of the case, so that the jury can determine, as a factual matter, whether

an ordinary implement took on the character of dangerousness by the way in which the defendant wielded it. *Bourbonnais v. State*, 1912 OK CR 294, 7 Okl. Cr. 717, 122 P. 1131. The court has consistently stressed:

> The use of a dangerous weapon is what distinguishes the crime of an assault with a dangerous weapon with intent to do bodily harm from a simple assault. A dangerous weapon is one likely to produce death or great bodily injury by the use made of it, or perhaps it is more accurately described as a weapon which in the manner it is used or attempted to be used endangers life or inflicts great bodily harm.

Wilcox v. State, 1917 OK CR 137, 13 Okl. Cr. 599, 601, 166 P. 74, 75. *See also Smith, supra.* at 82-85. When appropriate proof of the use made by the defendant of the particular item in committing the offensive conduct is adduced, the court has found a variety of items sufficiently "dangerous" to warrant conviction under section 645. *See, e.g., Barnes v. State*, 1971 OK CR 445, 490 P.2d 783 (beer glass); *Hay v. State*, 1968 OK CR 209, 447 P.2d 447 (feet clad with shoes); *Bald Eagle v. State*, 1960 OK CR 73, 355 P.2d 1015 (beer bottle); *Strahan v. State*, 1955 OK CR 71, 284 P.2d 744 (automobile window crank); *Lott v. State*, 1950 OK CR, 92 Okl. Cr. 324, 223 P.2d 147 (automobile); *Tipler v. State*, 1943 OK CR, 78 Okl. Cr. 85, 143 P.2d 829 (leather strap); *Beck v. State*, 1941 OK CR, 73 Okl. Cr. 229, 119 P.2d 865 (chair, stick, clock).

Although the instruction describes the implement used to perpetrate the crime in the categorical terms of the statute, where the proof adduced shows that the assaultive means is known, the court should substitute the particular weapon involved for the broad categorical terms.

The mere fact that the defendant used a particular device in a manner likely to produce injury or great bodily harm does not alleviate the necessity of proving that the defendant specifically intended to inflict such corporal harm. For example, in *Eckhart v. State*, 1956 OK CR 6, 292 P.2d 451, the defendant fired a shot at some laborers working on the roof of the building in which the defendant lived. The events leading up to the altercation included the facts that the workmen had disconnected the defendant's air conditioning on the previous day, and that they had begun working on the room at 5:30 a.m. on the day of the shooting. The defendant was awakened when chunks of plaster were dislodged from his ceiling and struck him as he lay in bed. One of the workmen stood only a few feet from the defendant as the defendant fired the shot. The court reduced the defendant's conviction for assault with a dangerous weapon to simple assault, on the ground that the defendant's intent to injure someone was not established by these circumstances. At most, the court believed that the defendant was provoked by the incidents of the past day and fired a shot in order to scare the workmen and to demonstrate his grievance.

Intent is negated by the occurrence of an accident, so long as the accident producing the injury occurred while the defendant was acting in a lawful manner, with reasonable regard for the safety of others. *Lane v. State*, *supra.* Thus, if the defendant armed himself for purposes of assaulting the victim, rather than to ward off an attack, the fact that the gun discharged accidentally furnishes no defense. *Lane*, *supra.*

The existence of specific intent to harm or injure is a question of fact for the jury. *Hart v. State*, 1971 OK CR 258, 488 P.2d 158; *Washington v. State*, 1967 OK CR 59, 426 P.2d 372.

The instruction is set forth in alternative formulations in the interests of clarity. Where the injury is inflicted by means of a dangerous weapon, the defendant will generally be aware of the identity of the victim, so that the intent is to wound that particular person. However, where the defendant shoots with intent to injure one person, the fact that an unintended victim is assaulted does not alleviate the offense. *Jones v. State*, 1973 OK CR 151, 508 P.2d 280.

A comment regarding proof of specific intent to harm under section 645 is warranted. The Court of Criminal Appeals has held on many occasions that the particular use to which an automobile is put by the defendant may render it a dangerous weapon. *Hart*, *supra*; *Washington*, *supra*; *State v. Hollis*, 1954

OK CR 98, 273 P.2d 459. However, the court has further ruled that the defendant's culpable or wanton negligence in the operation of his automobile suffices to substitute for and to supply the requisite intent to do bodily harm under section 645. *Matin v. State*, 1958 OK CR 113, 333 P.2d 585; *Lott v. State*, *supra*; *Beck v. State*, *supra*. These cases involved gross intoxication on the part of the defendants.

However, in view of the enactment of the negligent homicide statute in 1961, section 11-903 of Title 47, and the court's interpretation of this statute in subsequent cases, a question regarding the scope of the rule articulated in the aforementioned cases is raised. Section 11-903 provides that a person who causes the death of another through operation of a vehicle in "reckless disregard for the safety of others" is culpable for negligent homicide. The court has held that all forms of behavior of the reckless driving ilk which cause death are exclusively covered by this statute. *Short v. State*, 1977 OK CR 44, 560 P.2d 219. However, where the defendant is guilty of driving while intoxicated and such conduct produces death, this conduct removes a consequent homicide from the definition of "negligent homicide," and renders a conviction for manslaughter in the first degree appropriate. *Lomahaitewa v. State*, 1978 OK CR 67, 581 P.2d 43; *White v. State*, 1971 OK CR 141, 483 P.2d 751; *Ritchie v. Raines*, 1962 OK CR 101, 374 P.2d 772.

Although the court's construction of the intent to do bodily injury element of section 645 where the defendant is intoxicated and causes injury through his vehicle is consistent with the court's interpretation of the vehicular homicide statute, it is submitted that the substitution of specific intent to harm by culpable negligence is limited to cases involving intoxication. Otherwise, a more severe punishment for reckless driving that produces injury would be possible than for reckless driving that causes death.

(2024 Supp.)

OUJI-CR 4-14

ASSAULT WITH INTENT TO COMMIT A FELONY - ELEMENTS

No person may be convicted of assault with intent to commit a felony unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault;

Second, upon another person;

Third, with the intent to commit the felony of **[Indicate Specific Felony]**;

Fourth, the elements of the **[Indicate Specific Felony]** defendant is alleged to have been in the commission of are as follows:

[Give Elements of Specific Felony].

Statutory Authority: 21 O.S. 1991, § 681.

Committee Comments

This statute, proscribing assaults perpetrated with the specific intention of committing a felony, has been utilized for the most part as a basis for prosecuting assaults with the intent to commit rape, which is a lesser included offense of the crime of attempted rape. *Easter v. State*, 74 Okl. Cr. 114, 123 P.2d 691 (1942); *Temple v. State*, 71 Okl. Cr. 301, 111 P.2d 524 (1941). However, conduct which constitutes attempted rape may be charged under section 681 or under section 44. *Jones v. State*, 341 P.2d 616 (Okl. Cr. 1959); *Mayfield v. McLeod*, 261 F.2d 850 (1Oth Cir. 1958).

Regardless of which felony underlies the charge of felonious assault, the essence of this offense is the specific intent on the part of the defendant to perpetrate a felony. An assault and battery alone, absent proof of the defendant's intent to commit some felony, is insufficient to sustain a conviction under this statute. *Vandiver v. State*, 97 Okl. Cr. 217, 261 P.2d 617 (1953), *overruled on other grounds*, *Parker v. State*, 917 P.2d 980, 986 n.4 (Okl.Cr. 1996); *Easter*, *supra*; *Cape v. State*, 61 Okl. Cr. 173, 66 P.2d 959 (1937). Where the evidence regarding the defendant's intent at the time the assaultive conduct occurred so warrants, the jurors should be instructed regarding the lesser included offenses of assault or battery. *Easter*, *supra*; *Brockman v. State*, 60 Okl. Cr. 75, 61 P.2d 273 (1936).

The sufficiency of proof of the defendant's intent to commit an independent felony remains a factual determination for the jury and may be inferred from the nature of the assault and the circumstances under which it was committed. *Harvey v. State*, 485 P.2d 251 (Okl. Cr. 1971); *Garrison v. State*, 473 P.2d 341 (Okl. Cr. 1970); *Pusley v. State*, 22 Okl. Cr. 192, 210 P. 306 (1922). Where the defendant is charged under this section, the trial judge must also instruct the jury regarding the elements of the independent felony.

OUJI-CR 4-15
AGGRAVATED ASSAULT AND BATTERY
UPON POLICE OR OTHER PEACE OFFICER - ELEMENTS

No person may be convicted of aggravated assault and battery upon a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)**;

Third, known by the **defendant(s)** to be a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)**;

Fourth, by inflicting great bodily injury;

Fifth, without justifiable or excusable cause;

Sixth, committed while the **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)** was in the performance of **his/her** duties as a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)**.

OR

First, physical contact with a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(a peace officer employed by a state/federal governmental agency to enforce state laws);**

Second, in a willful attempt to gain control;

Third, of the firearm;

Fourth, of any **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(peace officer);**

Fifth, known by the **defendant(s)** to be a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(peace officer);**

Sixth, without justifiable or excusable cause;

Seventh, committed while the **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(peace officer)** was in the performance of **his/her** duties as a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(peace officer).**

Statutory Authority: 21 O.S. Supp. 2015, § 650.

Notes on Use

The court should use the definitions of assault and battery in OUJI-CR 4-2 and 4-3 and the definition of great bodily injury in OUJI-CR 4-28 with the first alternative for this instruction, but they should not be used for the second alternative. For a statutory definition of **police officer**, see 21 O.S. 2011, § 648. For a statutory definition of

corrections personnel, see 21 O.S. Supp. 2015, § 649(C).

Committee Comments

The third element of the first alternative and the fifth element of the second alternative in this instruction are included because 21 O.S. Supp. 2015, § 650 requires the aggravated assault and battery upon the peace officer to have been committed "knowingly".

(2016 Supp.)

OUJI-CR 4-15A

AGGRAVATED ASSAULT AND BATTERY

UPON POLICE OR OTHER STATE PEACE OFFICER THAT RESULTS IN MAIMING - ELEMENTS

No person may be convicted of aggravated assault and battery upon a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)** that results in maiming unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)**;

Third, that the **defendant(s) knew/(reasonably should have known)** was a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)**;

Fourth, by inflicting great bodily injury;

Fifth, that **disfigured/disabled/(seriously diminished physical vigor)**;

Sixth, without justifiable or excusable cause;

Seventh, committed while the **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)** was in the performance of **his/her** duties as a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/ (State peace officer)**.

Statutory Authority: 21 O.S. 2011, § 650(B).

Notes on Use

For definitions of "disfigures" and "disables", see OUJI-CR 4-118, *infra*.

2012 SUPPLEMENT

OUJI-CR 4-16

ASSAULT OR BATTERY UPON POLICE OR OTHER PEACE OFFICER - ELEMENTS

No person may be convicted of **assault/battery/(assault and battery)** upon a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(an assault)/(a battery)/(an assault and battery)**;

Second, upon a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)**;

Third, known by the **defendant(s)** to be a **(police officer)/ sheriff/(deputy sheriff)/(highway patrolman)/ (corrections personnel)/(State peace officer)**;

Fourth, without justifiable or excusable cause;

Fifth, committed while the **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)** was in the performance of **his/her** duties as a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(State peace officer)**.

OR

First, a willful attempt to **(reach for)/(gain control);**

Second, of the firearm;

Third, of any **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(a peace officer employed by a state/federal governmental agency to enforce state laws);**

Fourth, known by the **defendant(s)** to be a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(peace officer);**

Fifth, without justifiable or excusable cause;

Sixth, committed while the **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(peace officer)** was in the performance of **his/her** duties as a **(police officer)/sheriff/(deputy sheriff)/(highway patrolman)/(corrections personnel)/(peace officer).**

Statutory Authority: 21 O.S. 2011,§ 648, 21 O.S. 2015, § 649.

Notes on Use

The court should use the definitions of assault and/or battery in OUJI-CR 4-2 and 4-3 with the first alternative for this instruction, but they should not be used for the second alternative. For a statutory definition of **police officer**, see 21 O.S. 2011, § 648. For a statutory definition of **corrections personnel**, see 21 O.S. 2015, § 649(C).

Committee Comments

Section 649 of Title 21 singles out a particular type of simple assault or battery for enhanced punishment: wrongful attack upon a police officer or other officer in the performance of his/her duties. Such an attack is wrongful unless it

occurs during the course of reasonable resistance by the defendant to an unlawful arrest. *Sandersfield v. State*, 1977 OK CR 242, 568 P.2d 313; Cantrell v. State, 1977 OK CR 100, 561 P.2d 973; *Morrison v. State*, 1974 OK CR 223, 529 P.2d 518; *Davis v. State*, 1932 OK CR, 53 Okl. Cr. 411, 12 P.2d 555. Section 648 defines which officers are protected by section 649.

The court's construction of the phrase "while in the performance of his duties" may be perceived by contrasting two cases. In *Stewart v. State*, 1974 OK CR 173, 527 P.2d 22, the complainant was an off-duty Norman police officer employed as a security guard at an apartment complex. At the time the altercation occurred, the officer was at his place of private employment, without a gun or a uniform. The court reversed the defendant's conviction under section 649, and held:

> We believe that when an off-duty police officer accepts private employment and is receiving compensation from his private employer he changes hats from a police officer to a private citizen when engaged in this employment and he is therefore representing his private employer's interest and not the public's interest....
>
> We therefore hold that as a matter of law when an off-duty police officer accepts private employment ... he becomes a private citizen. Therefore, to make a valid arrest he must comply with the law applicable to a citizen's arrest.

Id. at ¶ ¶ 7, 8, 527 P.2d at 24.

This holding was distinguished by the court in *Brooks v. State*, 1977 OK CR 96, 561 P.2d 137. The complaining officer in *Brooks* was not in uniform and was off-duty at the time he attempted to investigate rowdy conduct on the part of the defendants, and he became involved in a fracas with the defendants. In holding *Stewart* inapplicable because the officer in that case was performing his own private, rather than public, functions the court held:

> [A]ny time a police officer, whether in uniform or not, takes it upon himself to enforce the law in order to maintain peace and order for the general benefit of the public, he is acting in the performance of his duties as a police officer
>
> Officer Christian, although off duty, was not acting under the employ of a private enterprise but was acting for the benefit of the public in general with the aim of maintaining peace and order.

Id. at 140.

Section 650 of Title 21 denominates as a felony any unlawful aggravated assault and battery perpetrated upon a police officer or other officer in the performance of duties. The Commission has incorporated only the aggravated assault and battery element of infliction of great bodily injury in the instruction, since officers on active duty are unlikely to be aged or decrepit. *See* 21 O.S. 2011, § 646.

The third element of the first alternative and the fourth element of the second alternative in this instruction are included because 21 O.S. 2011, § 649 requires the assault and battery upon the peace officer to have been committed knowingly.

(2016 Supp.)

OUJI-CR 4-17

ASSAULT AND BATTERY UPON REFEREE, ETC. - ELEMENTS

No person may be convicted of **assault/battery/(assault and battery)** upon a **referee/umpire/timekeeper/coach/(athletic official)/(person with authority in connection with any amateur or professional athletic contest)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(an assault)/(a battery)/(an assault and battery)**;

Second, upon a **referee/umpire/timekeeper/coach/(athle tic official)/(person with authority in connection with any amateur or professional athletic contest)**;

Third, without justifiable or excusable cause;

Fourth, with intent to do bodily harm;

Fifth, while the **referee/umpire/timekeeper/coach/(athle tic official)/(person with authority in connection with any amateur or professional athletic contest)** was in the performance of **his/her** duties as a **referee/umpire/ timekeeper/coach/(athletic official)/(person with authority in connection with any amateur or professional athletic contest)**.

Statutory Authority: 21 O.S. 2001, § 650.1.

Notes on Use

The court should use the definitions of assault and/or battery in OUJI-CR 4-2 and 4-3 with this instruction.

Committee Comments

This instruction previously included an element that the defendant must have known the victim was a referee, etc. The Committee has concluded, however, that this element is not required by 21 O.S. 2001, § 650.1, since there is no requirement in the statute that the assault or battery was committed knowingly.

2006 SUPPLEMENT

OUJI-CR 4-17A

ASSAULT AND BATTERY UPON **(SCHOOL EMPLOYEE)/STUDENT**- ELEMENTS

No person may be convicted of **assault/battery/(assault and battery)** upon a **(School Employee)/Student** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(an assault)/(a battery)/(an assault and battery)**;

Second, without justifiable or excusable cause:

[Third, upon a **teacher/principal/(duly appointed person employed by a school system)/(employee of a firm contracting with a school system);**

Fourth, while the **teacher/principal/(duly appointed person employed by a school system)/(employee of a firm contracting with a school system)** was in the performance of **his/her** duties as a school employee; **]**

OR

[Third, upon a student;

Fourth, while the student was **(participating in any school activity)/(attending classes on school property during school hours)]**

Statutory Authority: 21 O.S. 2001, § 650.7(B)

Notes on Use

The court should use the definitions of assault and/or battery in OUJI-CR 4-2 and 4-3 with this instruction.

Committee Comments

Since there is no requirement in 21 O.S. 2001 § 650.7(B) that the assault or battery must have been committed knowingly, the instruction does not include an element that the defendant must have known that the victim was a school employee or student.

2006 SUPPLEMENT

OUJI-CR 4-17B

AGGRAVATED BATTERY UPON SCHOOL EMPLOYEE - ELEMENTS

No person may be convicted of aggravated **battery/(assault and battery)** upon a school employee unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(a battery)/(an assault and battery)**;

Second, by inflicting great bodily injury;

Third, without justifiable or excusable cause;

Fourth, upon a **teacher/principal/(duly appointed person employed by a school system)/(employee of a firm contracting with a school system);**

Fifth, while the **teacher/principal/(duly appointed person employed by a school system)/(employee of a firm contracting with a school system)** was in the performance of **his/her** duties as a school employee.

Statutory Authority: 21 O.S. 2001, § 650.7(C).

Notes on Use

The court should use the definitions of assault and/or battery in OUJI-CR 4-2 and 4-3 with this instruction. For a definition of great bodily injury, see OUJI-CR 4-28.

Committee Comments

Since there is no requirement in 21 O.S. 2001, § 650.7(C) that the aggravated battery must have been committed knowingly, the instruction does not include an element that the defendant must have known that the victim was a school employee.

2006 SUPPLEMENT

OUJI-CR 4-18

AGGRAVATED ASSAULT AND BATTERY UPON DEPARTMENT OF (HUMAN SERVICES) EMPLOYEE - ELEMENTS

No person may be convicted of aggravated assault and battery upon a Department of **(Human Services)** employee unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, by a person in the custody of the Department of **Corrections/(Human Services)**;

Third, upon a Department of **(Human Services)** employee;

Fourth, known by the **defendant(s)** to be a Department of **(Human Services)** employee;

Fifth, by inflicting great bodily injury;

Sixth, without justifiable or excusable cause;

Seventh, committed while the Department of **(Human Services)** employee was in the performance of **his/her** duties as a Department of **(Human Services)** employee.

Statutory Authority: 21 O.S. 2001, § 650.2(C).

Notes on Use

The court should use the definitions of assault and battery in OUJI-CR 4-2 and 4-3 with this instruction. For a definition of great bodily injury, see OUJI-CR 4-28.

Committee Comments

The fourth element in this instruction is included because 21 O.S. 2001, § 650.2(C) requires the aggravated assault and battery upon the Department of Human Services employee to have been committed knowingly.

2006 SUPPLEMENT

THROWING/TRANSFERRING/PLACING BODY **WASTES/FLUIDS** UPON GOVERNMENT **EMPLOYEE/CONTRACTOR** - ELEMENTS

No person may be convicted of **throwing/transferring/placing** body **wastes/fluids** upon a government **employee/contractor** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, while in the custody of **(the state/county/city)/(a contractor of the state/county/city);**

Second, intentional;

Third, **(throwing/transferring/placing)** of **(feces/urine/semen/saliva/blood);**

Fourth, upon the person of an employee of **(the state/county/city)/(a contractor of the state/county/city).**

Statutory Authority: 21 O.S. 2001, § 650.9.

2006 SUPPLEMENT

OUJI-CR 4-19

ASSAULT AND BATTERY UPON COURT OFFICER, ETC. - ELEMENTS

No person may be convicted of **assault/battery/(assault and battery)** upon a **judge/bailiff/(court reporter)/(court clerk)/(deputy court clerk)/officer/ juror/witness** of **(a State district/appellate)/(the Workers' Compensation)** court unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(an assault)/(a battery)/(an assault and battery)**;

Second, upon a **judge/bailiff/(court reporter)/(court clerk)/(deputy court clerk)/officer/juror/witness** of **(a State district/appellate)/(the Workers' Compensation) court**;

Third, because of the **[judge/bailiff/(court reporter)/(court clerk)/(deputy court clerk)/officer/juror/witness]'s** service in that capacity.

Statutory Authority: 21 O.S. 2001, § 650.6.

Notes on Use

The court should use the definitions of assault and/or battery in OUJI-CR 4-2 and 4-3 with this instruction.

Committee Comments

The Committee has concluded that the assault or battery must have been as a result of the court officer's service in order to be in violation of the statute, even if the assault or battery occurred within 6 months of the court officer's service. *See* 21 O.S. 2001, § 650.6. Accordingly, the Committee has omitted any reference to the time when the assault or battery occurred.

This instruction previously included an element that the defendant must have known the victim was an officer of a court. The Committee has concluded, however, that this element is not required by 21 O.S. 2001, § 650.6, since there is no requirement in the statute that the assault or battery was committed knowingly.

2006 SUPPLEMENT

OUJI-CR 4-20

ASSAULT AND BATTERY UPON EMERGENCY MEDICAL CARE PROVIDER - ELEMENTS

No person may be convicted of **assault/battery/(assault and battery)** upon an emergency medical care provider unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(an assault)/(a battery)/(an assault and battery)**;

Second, upon an emergency medical care provider;

Third, without justifiable or excusable cause;

Fourth, with intent to do bodily harm;

Fifth, while the emergency medical care provider was performing medical care duties.

Statutory Authority: 21 O.S. 2001, § 650.4.

Notes on Use

The court should use the definitions of assault and/or battery in OUJI-CR 4-2 and 4-3 with this instruction.

Committee Comments

This instruction previously included an element that the defendant must have known the victim was an emergency medical care provider. The Committee has concluded, hwoever, that this element is not required by 21 O.S. 2001, § 650.4, since there is no requirement in the statute that the assault or battery was committed knowingly.

2006 SUPPLEMENT

OUJI-CR 4-21

AGGRAVATED ASSAULT AND BATTERY UPON EMERGENCY MEDICAL CARE PROVIDER - ELEMENTS

No person may be convicted of aggravated assault and battery upon an emergency medical technician/(care provider) unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an **(assault and battery)/(assault with a firearm/(deadly weapon))**;

Second, upon an emergency medical **technician/(care provider)**;

Third, **by inflicting great bodily injury;**

[Fourth, with intent to do bodily harm;

Fifth, without justifiable or excusable cause;

Sixth, committed while the **technician/(care provider)** was in the performance of **his/her** duties as an emergency medical **technician/(care provider)**.

Statutory Authority: 21 O.S. 2001, § 650.5.

Notes on Use

The court should use the definitions of assault and battery in OUJI-CR 4-2 and 4-3 with this instruction. The third paragraph should be omitted if the crime charged is an assault with a firearm or other deadly weapon.

Committee Comments

This instruction previously included an element that the defendant must have known the victim was an emergency medical technician. The Committee has concluded, however, that this element is not required by 21 O.S. 2001, § 650.6, since there is no requirement in the statute that the aggravated assault and battery was committed knowlingly.

2006 SUPPLEMENT

OUJI-CR 4-22

INTERFERING WITH AN EMERGENCY MEDICAL CARE PROVIDER - ELEMENTS

No person may be convicted of interfering with an emergency medical **technician/(care provider)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **delaying/obstructing/(in any way interfering with)**;

Third, an emergency medical **technician/(care provider)**;

Fourth, **[in (the performance of)/(the attempt to perform) emergency medical care and treatment]/[in (going to)/(returning from) the scene of a medical emergency]**.

Statutory Authority: 21 O.S. 2001, § 650.3.

Committee Comments

This instruction previously included a element that the defendant must have known the victim was an emergency medical technician or emergency medical care provider. The committee has concluded, however, that this element is not required by 21 O.S. 2001, § 650.3, since there is no requirement in the statute that the interference with the emergency medical technician or emergency medical care provider was committed knowingly.

2006 SUPPLEMENT

OUJI-CR 4-23

AGGRAVATED ASSAULT AND BATTERY

GREAT BODILY INJURY INFLICTED - ELEMENTS

No person may be convicted of aggravated assault and battery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon another person;

Third, by inflicting great bodily injury.

Notes on Use

For the definition of great bodily injury, see OUJI-CR 4-28, *infra*.

(2003 Supp.)

OUJI-CR 4-24

AGGRAVATED ASSAULT AND BATTERY

AGED OR DECREPIT VICTIM - ELEMENTS

No person may be convicted of aggravated assault and battery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon another person who is aged, decrepit, or incapacitated;

Third, by **[a] person(s)** of robust health or strength.

Statutory Authority: 21 O.S. 1991, § 646.

Committee Comments

Simple assault and battery take on an aggravated character in two circumstances: infliction of "great bodily injury" or victimization of an "aged or decrepit" person. Thus, separate instructions are necessary to cover each of these situations. Specific intent on the part of the defendant to achieve the results forbidden by section 646 of Title 21 is not an element which must be proved to establish the crime of aggravated assault and battery. Rather, only the elements of the substantive offense themselves, e.g., an assault and battery that causes grievous corporal harm or that is inflicted upon an aged or decrepit person by one who enjoys robust health or strength, must be proved. General intent to perpetrate the crime may be inferred from the criminal act itself. *State v. Madden*, 562 P.2d 1177 (Okl. Cr. 1977); *Morris v. State*, 515 P.2d 266 (Okl. Cr. 1973); *Quinn v. State*, 485 P.2d 474 (Okl. Cr. 1971); *Ryans v. State*, 420 P.2d 556 (Okl. Cr. 1966).

In delineating the nature of the wounds contemplated by the statutory phrase "great bodily injury," the Court of Criminal Appeals has consistently declared: "The term 'great bodily injury,' as employed in the Criminal Code is not susceptible of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery." *Herrington v. State*, 352 P.2d 931, 933 (Okl. Cr. 1960), *quoting Hallett v. State*, 109 Neb. 311, 190 N.W. 862, 863 (1920). In *Herrington*, the defendant's conviction for aggravated assault and battery was reduced to simple assault and battery where the injuries inflicted consisted of nonpermanent bruising, discoloration and swelling of the victim's face, even though the victim was a seven-month-old infant. Injuries were similarly found insufficient to constitute "great bodily injury" in *Cox v. State*, 361 P.2d 506 (Okl. Cr. 1961) (healthy woman experienced bruised, discolored, swollen face and difficulty in breathing), and *Minnix v. State*, 282 P.2d 772 (Okl. Cr. 1955) (victim suffered split lip).

On the other hand, a broken jaw, a puncture in the head, and a hospital stay of several days' duration, *Morris v. State*, supra, or injuries produced when the defendant stomped on the victim on the floor with his feet while wearing heavy driller's boots, *Ryans v. State*, 392 P.2d 501 (Okl. Cr. 1964), have been found sufficient to warrant conviction for aggravated assault and battery under section 646.

It should be noted that the court addressed the imprecision of the statutory standard, "great bodily injury," in *State v. Madden, supra*, and held it to be not so vague and indefinite as to deprive a defendant, charged under section 646, of due process. The court observed:

> Certainly the phrase "great bodily injury" need not be precisely defined since the phrase is one of common acceptance.... "We think the better practice is for the courts not to attempt to define the

> words 'great personal injury' as used in the statute.... These words and phrases define themselves and are used in their ordinary sense in common acceptance among people, and need no explanation from the court in its charge to the jury."

562 P.2d at 1180, *quoting Roddie v. State*, 19 Okl. Cr. 63, 198 P. 342 (1921).

Only one case has been discovered in which the breadth of the term "decrepit" is addressed. In *Herrington v. State*, *supra*, the court held that the word "decrepit" does not encompass the natural frailty and incapacity of an infant or a child. Rather, the court noted:

> Webster defines "decrepit" as "broken down with age, wasted and enfeebled by the infirmities of old age, feeble, worn out." The Latin origin is the word "crepose" meaning to rattle or crackle; stemming from the same origin is the English word "crepitate" denoting "cracking sounds." It is readily observed that these words are commonly associated with infirmities brought on by age and wear. Unquestionably, they are representatives and denote the legislative intent. It would require absurd reasoning to place an infant of seven months in the same category by declaring their [sic] natural incapability by virtue of tender age as decrepit.

352 P.2d at 934.

OUJI-CR 4-25

ASSAULT - ELEMENTS

No person may be convicted of assault unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, unlawful;

Third, **attempt/offer** with force or violence to do bodily harm;

Fourth, to another person.

OUJI-CR 4-26

ASSAULT AND BATTERY - ELEMENTS

No person may be convicted of assault and battery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, unlawful;

Third, use of force or violence;

Fourth, upon another person.

Statutory Authority: 21 O.S. 2011, §§ 641, 642.

Committee Comments

Simple assault, simple battery, and simple assault and battery are misdemeanor crimes in Oklahoma. Oklahoma defines an assault in accordance with both of the common law definitions: an attempt to commit a battery, or the intentional placing of another in apprehension of receiving an immediate battery. *Minnix v. State*, 1955 OK CR 37, 282 P.2d 772; *Dunbar v. State*, 1942 OK CR 150, 131 P.2d 116, 75 Okl. Cr. 275, *overruled on other grounds*, *Parker v. State*, 1996 OK CR 19, ¶ 23, n.4, 917 P.2d 980, 986 n.4; *Tyner v. United States*, 1909 OK CR 108, 103 P. 1057, 2 Okl. Cr. 689.*See generally* R. Perkins, *Criminal Law* 114-27 (2d ed. 1969).

Simple battery is also defined in Oklahoma in accordance with the common law concept. It is an unlawful beating, or use of wrongful physical violence or constraint upon the person of another, without that person's consent. *Minnix v. State*, *supra*. *See generally* R. Perkins, Criminal Law 107-13 (2d ed. 1969).

Every battery, by definition, includes an assault, although an assault can be perpetrated without a battery. The Court of Criminal Appeals has held that, when an assault culminates in a battery, the offense is assault and battery, and prosecution should be commenced for that grade of assault and battery which is reasonably supported by the State's proof of the facts. *Hall v. State*, 1957 OK CR 34, 309 P.2d 1096.

Specific intent is not an element of simple assault, simple battery, or simple assault and battery. *Hainta v. State*, 1979 OK CR 61, 596 P.2d 906; *Morris v. State*, 1973 OK CR 421, 515 P.2d 266.

In *Steele v. State*, 1989 OK CR 48, ¶12, 778 P.2d 929, 931, the Court of Criminal Appeals held that only the slightest force or touching is necessary to constitute the force required for battery. This degree of force is reflected by the definition of force in OUJI-CR 4-28.

(2018 Supp.)

OUJI-CR 4-26A

ASSAULT AND BATTERY - DOMESTIC ABUSE - ELEMENTS

No person may be convicted of domestic abuse unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, unlawful;

Third, attempting or offering to use force or violence; and

Fourth, the use of force or violence;

Fifth, was against the person of a **[Specify Applicable Relationship in 21 O.S. Supp. 2000, § 644(C)]**.

Statutory Authority: 21 O.S. 2011, § 644(C).

Notes on Use

The relationships listed in 21 O.S. 2011, § 644(C) are "a current or former spouse, a present spouse of a former spouse, a former spouse of a present spouse, parents, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is or was in a dating relationship as defined by section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant."

2012 SUPPLEMENT

OUJI-CR 4-26B

ASSAULT AND BATTERY - DOMESTIC ABUSE - WITH GREAT BODILY INJURY - ELEMENTS

No person may be convicted of domestic abuse with great bodily injury unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, unlawful;

Third, attempting or offering to use force or violence; and

Fourth, the use of force or violence;

Fifth, was against the person of a **[Specify Applicable Relationship in 21 O.S. Supp. 2011, § 644(C)]**.

Sixth, resulting in great bodily injury.

Statutory Authority: 21 O.S. 2011, § 644(C).

Notes on Use

The relationships listed in 21 O.S. 2011, § 644(C) are "a current or former spouse, a present spouse of a former spouse, a former spouse of a present spouse, parents, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is or was in a dating relationship as defined by section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant."

2012 SUPPLEMENT

OUJI-CR 4-26C

ASSAULT AND BATTERY - DOMESTIC ABUSE- IN PRESENCE OF CHILD - ELEMENTS

No person may be convicted of domestic abuse in the presence of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, unlawful;

Third, attempting or offering to use force or violence; and

Fourth, the use of force or violence;

Fifth, was against the person of a **[Specify Applicable Relationship in 21 O.S. Supp. 2011, § 644(C)]**.

Sixth, was committed in the presence of a child.

A child is any child whether or not related to the victim or the defendant. In the presence of a child means in the child's physical presence or the defendant knows a child is present and may see or hear an act of domestic violence.

Statutory Authority: 21 O.S. 2011, § 644(C),(G),(H).

Notes on Use

The relationships listed in 21 O.S. 2011, § 644(C) are "a current or former spouse, a present spouse of a former spouse, a former spouse of a present spouse, parents, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is or was in a dating relationship as defined by section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant."

2012 SUPPLEMENT

OUJI-CR 4-26D
ASSAULT AND BATTERY -- DOMESTIC ABUSE
- STRANGULATION - ELEMENTS

No person may be convicted of domestic abuse by strangulation unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, unlawful;

Third, attempting or offering to use force or violence; and

Fourth, the use of force or violence;

Fifth, was against the person of a **[Specify Applicable Relationship in 21 O.S.2011, § 644(J)]**;

Sixth, by **strangulation/(attempted strangulation)**.

Strangulation means any kind of asphyxia, including but not limited to, closure of the **(blood vessels)/air passages)/nostrils/mouth** as a result of external pressure on the **head/neck**.

Statutory Authority: 21 O.S.Supp.2023, § 644(J).

Committee Comments

The relationships listed in 21 O.S. 2011, § 644(J) are "a current or former spouse, a present spouse of a former spouse, a former spouse of a present spouse, parents, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is or was in a dating relationship as defined by section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant."

(2024 Supp.)

OUJI-CR 4-26E

ASSAULT AND BATTERY - DOMESTIC ABUSE AGAINST PREGNANT WOMAN- ELEMENTS

No person may be convicted of domestic abuse against a pregnant woman unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, unlawful;

Third, attempting or offering to use force or violence; and

Fourth, the use of force or violence;

Fifth, was against a pregnant woman;

Sixth, who was a **[Specify Applicable Relationship in 21 O.S. 2011, § 644(C)]**; and

Seventh, the defendant knew the woman was pregnant.

[Eighth, a **miscarriage/(injury to the unborn child)** occurred.]

Statutory Authority: 21 O.S. 2011, § 644(C),(E).

Notes on Use

The Eighth Element should be used if it is supported by the evidence and the prosecution is seeking enhanced punishment under 21 O.S. 2011, § 644(E).

The relationships listed in 21 O.S. 2011, § 644(C) are "a current or former spouse, a present spouse of a former spouse, a former spouse of a present spouse, parents, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is or was in a dating relationship as defined by section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant."

2012 SUPPLEMENT

OUJI-CR 4-27

ASSAULT AND BATTERY - DEFENSE OF CONSENT

When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if:

[the bodily harm consented to or threatened by the conduct consented to is not serious]

[the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport].

Committee Comments

The Commission has discovered no Oklahoma cases addressing the availability of consent as a defense to a charge of assault and battery. The instruction accords with the provision of the Model Penal Code § 2.11(2).

(2000 Supp.)

OUJI-CR 4-28

ASSAULT, BATTERY, ASSAULT AND BATTERY - DEFINITIONS

Dangerous Weapon - Any **pistol/revolver/shotgun/rifle/ /blackjack/(loaded cane)/(hand chain)/(metal knuckles)/(implement likely to produce death or great bodily harm in the manner it is used or attempted to be used)**.

References: Wilcox v. State, 13 Okl. Cr. 599, 166 P. 74 (1917); 21 O.S. Supp. 2021, § 1272.

Deadly Weapon - Any instrument designed or constructed to cause death or great bodily injury. A **pistol/revolver/blackjack/(loaded cane)/(hand chain)/(metal knuckles)** is a deadly weapon.

References: Beeler v. State, 1959 OK CR 9, 334 P.2d 799; 21 O.S. 2021, § 1272.

Decrepit - Physically impaired by old age, physical defects, or infirmities.

Reference: *Herrington v. State*, 1960 OK CR 45, 352 P.2d 931.

Execution of Legal Process - Carrying out or enforcement of a judgment, decision, or order of a court.

References: Black's Law Dictionary 510 (5th ed. 1979); 15A Words and Phrases 265; 34 Words and Phrases 245.

Firearm - Weapon from which a shot or projectile is discharged by force of a chemical explosive such as gunpowder. An airgun, such as a carbon dioxide gas-powered air pistol, is not a firearm within the meaning of the definition.

References: 21 O.S. 2021, §§ 1289.3 et seq.; Black's Law Dictionary 570 (5th ed. 1979); *Thompson v. State*, 1971 OK CR 328, ¶ 8, 488 P.2d 944, 947, *overruled on other grounds*, *Dolph v. State*, 1974 OK CR 46, ¶ 10, 520 P.2d 378, 380-81.

Force - Any touching of a person regardless of how slight may be sufficient to constitute force. Such touching may be brought about directly or indirectly by defendant.

Reference: R. Perkins, Criminal Law 80 (2d ed. 1969).

Great Bodily Injury - (Bone fracture)/(protracted and obvious disfigurement)/(protracted loss/impairment of the function of a (body part)/organ/ (mental faculty)/(substantial risk of death).

Reference: 21 O.S. Supp. 2002, § 646.

Intentional - Deliberate; with knowledge of the natural and probable consequences.

References: *Davis v. State*, 1960 OK CR 6, 354 P.2d 466; *Tyner v. United States*, 2 Okl. Cr. 689, 103 P. 1057 (1909).

Knowingly - Personally aware of the facts.

Reference: 21 O.S. 2001, § 96.

Known - With personal awareness of the facts.

Reference: 21 O.S. 2001, § 96.

Maiming - Note: see maiming instruction, OUJI-CR 4-113.

Malicious - The term imports a wish to vex, annoy or injure another person.

Reference: 21 O.S. 2001, § 95.

Procured - Brought about or obtained.

Reference: Black's Law Dictionary 1087 (5th Ed. 1979).

Robust - Having strength or vigorous health.

Reference: Webster's Third New International Dictionary 1964 (1961).

Unlawful - Without legal justification.

Reference: 91 C.J.S. Unlawful 491.

While in the Performance of His/Her Duties - While acting in relation to law enforcement for the benefit of the general public, regardless of whether or not those acts are performed while "off duty" from the actor's regular police department or law enforcement employment; not including, however, those acts performed off duty for a private employer.

References: *Brooks v. State*, 1977 OK CR 96, 561 P.2d 137; *Stewart v. State*, 1974 OK CR 173, 527 P.2d 22.

Willful - Purposeful. "Willful" does not require any intent to violate the law, or to injure another, or to acquire any advantage.

Reference: 21 O.S. 2001, § 92.

Wrongful - Without justification or excuse.

Reference: *Bartell v. State*, 4 Okl. Cr. 135, 111 P. 669 (1910).

(2024 Supp.)

OUJI-CR 4-29

STALKING - ELEMENTS

No person may be convicted of stalking unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, maliciously;

Third, repeatedly;

Fourth, **followed/harassed** another person;

Fifth, in a manner that would cause a reasonable person **[or member of that person's immediate family]**;

Sixth, to feel **frightened/intimidated/threatened/harassed/ molested**; and

Seventh, actually caused the person being **followed/harassed** to feel **terrorized/frightened/intimidated/threatened/ harassed/molested.**

Statutory Authority: 21 O.S. Supp. 2000, § 1173(A).

Committee Comments

The Oklahoma Court of Criminal Appeals decided that 21 O.S. 1991, § 1173 was not unconstitutionally vague in *State v. Saunders*, 1994 OK CR 76, 886 P.2d 496.

(2000 Supp.)

OUJI-CR 4-30

STALKING IN VIOLATION OF COURT ORDER - ELEMENTS

No person may be convicted of stalking in violation of a court order unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, maliciously;

Third, repeatedly;

Fourth, **followed/harassed** another person;

Fifth, in a manner that would cause a reasonable person [or member of that person's immediate family];

Sixth, to feel **frightened/intimidated/threatened/harassed/ molested**;

Seventh, actually caused the person being **followed/harassed** to feel **terrorized/frightened/intimidated/threatened/ harassed/molested**;

[Eighth, **a/an (temporary/permanent restraining order)/(protective order)/(emergency ex parte protective order)/injunction** prohibited the defendant's actions; and

Ninth, the defendant had actual notice of the issuance of the **order/injunction**.]

OR

[Eighth, the defendant was on **probation/parole**; and

Ninth, a condition of the **probation/parole** prohibited the defendant's actions.]

OR

[Eighth, the defendant completed a **sentence/conviction** of a crime involving the **use/threat** of violence against the same person, or against a member of that person's immediate family; and

Ninth, within ten years of the defendant's actions.]

Statutory Authority: 21 O.S. Supp. 2000, § 1173(B).

Notes on Use

The appropriate eighth and ninth paragraphs of the instruction should be selected from those listed above.

Committee Comments

Increased punishment for subsequent stalking offenses is provided for in 21 O.S. Supp. 2000, § 1173(C), (D).

The Committee has concluded that the trial court should not instruct on the presumption in 21 O.S. Supp. 2000, § 1173(E).

(2000 Supp.)

OUJI-CR 4-31

STALKING - DEFINITIONS

Emotional Distress - Significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling.

Reference: 21 O.S. Supp. 2000, § 1173(F)(3).

Harass - A pattern or course of conduct directed toward a person that would cause a reasonable person to suffer emotional distress and that actually causes emotional distress to the victim.

Reference: 21 O.S. Supp. 2000, § 1173(F)(1).

Member of the Immediate Family - Any **spouse/parent/child/brother/sister/ grandparent/grandchild/uncle/aunt/niece/nephew/cousin/(person who regularly resides in the household)/(person who regularly resided in the household within the prior six months)**.

Reference: 21 O.S. Supp. 2000, § 1173(F)(5).

(2000 Supp.)

OUJI-CR 4-32

MALICIOUS INTIMIDATION OR HARASSMENT - ELEMENTS

No person may be convicted of malicious intimidation or harassment unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, maliciously;

Second, **[assaulted/battered another person]**

[damaged/destroyed/vandalized/defaced any real/personal property of another person)]

[threatened to assault/batter another person if there was reasonable cause to believe the assault/battery would occur]

[threatened to damage/destroy/vandalize/deface any real/personal property of another person if there was reasonable cause to believe that the harm to the property would occur];

Third, with the specific intent to intimidate or harass another person because of that person's **race/color/religion/ancestry/(national origin)/disability**.

Statutory Authority: 21 O.S. Supp. 2000, § 850(A).

Notes on Use

The trial court should select the language for the second paragraph that is appropriate to the facts of the case.

Committee Comments

The United States Supreme Court has held that the First Amendment limits a state's power to prohibit speech on the basis of its content. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (statute prohibiting burning crosses that arouse anger in others on the basis of race, color, creed, religion or gender was unconstitutional on it face).

(2000 Supp.)

OUJI-CR 4-32A

OBSCENE, THREATENING, OR HARASSING ELECTRONIC COMMUNICATIONS - ELEMENTS

No person may be convicted of making obscene, threatening, or harassing electronic communications unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, by means of an electronic communicaton device;

Third, making a **comment/request/suggestion/proposal** which is obscene as opposed to merely ungenteel or vulgar.

A **comment/request/suggestion/proposal** is obscene if: 1) the average person applying contemporary community standards would find that the **comment/request/suggestion/proposal**, taken as a whole, appeals to the prurient interest, 2) it depicts or describes sexual conduct in a patently offensive way, and 3) taken as a whole, it lacks serious literary, artistic, political or scientific value. For a definition of Sexual Conduct see OUJI-CR 4-139.

OR

Third, making an electronic communication with intent to **terrify/intimidate/harass/threaten** to inflict **injury/(physical harm)** to any **person/(property of a person)**.

OR

Third, making an electronic communication with the intent to put the party called in fear of **(physical harm)/death**.

OR

Third, making an electronic communication without disclosing the identity of the caller/sender;

Fourth, with the intent to **annoy/ abuse/ threaten/ harass** any person at the location receiving the electronic communication.

An electronic communication includes any type of telephone, electronic, or radio communication, or transmission of signals or data by telephone, cellular telephone, wire, cable, or wireless means, including the Internet, electronic mail, instant message, network call, facsimile machine, or communication to a pager.

Statutory Authority: 21 O.S. Supp. 2005, § 1172.

Notes on Use

Section 1172 also prohibits knowlingly permitting an electronic communication under the control of a person to be used for a purpose prohibited by the section and making repeated electronic communications in a conspiracy with other persons solely to harass a person at the called number. This Instruction should be appropriately modified if

the defendant is charged with these types of criminal conduct. For a definition of harass, see OUJI-CR 4-31

Committee Comments

Section 1172(A)(1) prohibits the making of any statement which is obscene, lewd, lascivious, filthy, or indecent. The Oklahoma Court of Criminal Appeals decided in *Lenz v. State*, 1987 OK CR 111, 738 P.2d 184, (Parks, J., specially concurring), that the statue did not prohibit mere ungenteel or vulgar language. Similarly, the United States Court of Appeals for the Sixth Circuit held in *United States v. Landham*, 251 F. 3d 1072, 1085-87 (6th Cir. 2001), that 42 U.S.C. § 223 (2000), a federal statute containing identical language had to belimited to prohibiting only obscene communications on account of the First Amendment to the United States Constitution. Accordingly, the first alternative in the Instruction is limitied to obscene statements, as opposed to merely ungenteel or vulgar statements. The definition of obscenity in the first alternative in the Instruction is based on the United States Supreme Court's test in *Miller v. California*, 413 U.S. 15, 24 (1973).

2006 SUPPLEMENT

OUJI-CR 4-33

INCITING IMMINENT VIOLENCE - ELEMENTS

No person may be convicted of inciting imminent violence unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, maliciously;

[Second, **made/transmitted/(caused/allowed to be transmitted)**;

Third, any **telephone/electronic** message likely to incite or produce imminent violence;]

OR

[Second, **broadcasted/published/distributed/(caused/allowed to be broadcast/ published/distributed)**;

Third, any **message/material** likely to incite or produce imminent violence;]

Fourth, with the specific intent to incite or produce imminent violence against another person because of that person's **race/color/religion/ancestry/ (national origin)/disability**.

Statutory Authority: 21 O.S. Supp. 2000, § 850(B),(C).

Notes on Use

The trial court should select the second and third paragraphs of the instruction that are most appropriate.

Committee Comments

The "imminent violence" standard is based on the United States Supreme Court's analysis of the First Amendment in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See also Price v. State*, 1994 OK CR 26, 873 P.2d 1049 (requiring instruction on clear and present danger standard in prosecution for incitement to riot).

(2000 Supp.)

OUJI-CR 4-34

CRIMES AGAINST CHILDREN - INTRODUCTION

The **defendant(s) is/are** charged with

[the (abuse/neglect/(sexual abuse/exploitation) of a child]

[enabling the (abuse/neglect/(sexual abuse/exploitation) of a child]

[omission to provide for child]

[(failure to pay)/(leaving the State to avoid) child support]

[neglect of a drug/alcohol dependent child]

[violating a child custody order]

[contributing to the (delinquency of)/(commission of a felony) by a minor]

[encouraging street gang activity]

[encouraging a minor to (commit a drug-related crime]/[be in need of supervision)]

[procuring/keeping/(permitting the procuring/keeping of) a minor for prostitution]

on **[Date]** in **[Name of County]** County, Oklahoma.

(2000 Supp.)

OUJI-CR 4-35

CHILD ABUSE - ELEMENTS

No person may be convicted of child abuse unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person responsible for a child's health, safety, or welfare;

Second, **willfully/maliciously**;

Third, **harmed/(threatened harm)/(failed to protect from harm/(threatened harm))** to the health, safety, or welfare;

Fourth, of a child under the age of eighteen.

OR

First, a person **willfully/maliciously**;

Second, **injured/tortured/maimed**;

Third, a child under the age of eighteen;

Statutory Authority: 21 O.S. 2021, § 843.5(A), (O)(1).

Notes on Use

OUJI-CR 4-36 should be used if the defendant is charged with enabling abuse of a child. OUJI-CR 4-37 should be used if the defendant is charged with child neglect, OUJI-CR 4-39 should be used if the defendant is charged with child sexual abuse, and OUJI-CR 4-41 should be used if the defendant is charged with child sexual exploitation. Definitions are found in OUJI-CR 4-40D, *infra*.

Committee Comments

Section 843.5 was designed to protect a designated group of persons, children under the age of 18. Therefore, the age of the child is an element to be proved by the State. *Holder v. State*, 1976 OK CR 288, ¶ 18, 556 P.2d 1049, 1053.

The statute requires proof of a mental state of maliciousness or willfulness on the part of the defendant while in the performance of the proscribed conduct. Generally, however, intentional infliction of severe injuries upon a child will be sufficient to establish a prima facie case, reserving the issue of the sufficiency of the proof regarding the defendant's mental state to the jury. *Smith v. State*, 1979 OK CR 30, ¶ 8, 594 P.2d 784, 786.

In *Fairchild v. State*, 1999 OK CR 49, ¶ 51, 998 P.2d 611, 622-23, the Oklahoma Court of Criminal Appeals decided that the mens rea for felony murder of a child under 21 O.S. Supp. 1999, § 701.7(C) was a general intent to commit the act which causes the injury, rather than a specific intent, and that the general intent was included within the terms "willfully" or "maliciously."

(2022 Supp.)

OUJI-CR 4-35A

CHILD ABUSE - USE OF ORDINARY FORCE BY PARENT FOR DISCIPLINE

It is not child abuse for a **parent/teacher/person** to use reasonable and ordinary force to discipline a child, including, but not limited to, spanking, switching, or paddling, so long as the force is reasonable in manner and moderate in degree.

Statutory Authority: 21 O.S. 2021, § 643(4); 21 O.S. 2021, § 843.5(L); 21 O.S. 2021, § 844.

(2022 Supp.)

OUJI-CR 4-35B

CHILD ABUSE/NEGLECT - AFFIRMATIVE DEFENSE - USE OF PRAYER FOR TREATMENT OF CHILD

Evidence has been introduced in this case that the defendant, in good faith, selected and depended upon spiritual means alone through prayer, and according to the tenets and practice of a recognized **church/(religious denomination)**, for the **(treatment/cure of a disease)/(remedial care)** of a child. It is the burden of the State to prove beyond a reasonable doubt that the defendant did not, in good faith, select and depend upon spiritual means alone through prayer, and according to the tenets and practice of a recognized **church/(religious denomination)**, for the **(treatment/cure of a disease)/(remedial care)** of the child. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Statutory Authority: 10A O.S. 2021, § 1-1-105(21).

Notes on Use

The affirmative defense of the use of prayer for the treatment of a child is found in 10A O.S. 2011, § 1-1-105(46) and applies to child abuse and neglect. Similar affirmative defenses are found in 21 O.S. 2011, § 852(C), which applies to the crime of omission to provide for a child, and in 21 O.S. 2011, § 852.1(B), which applies to child endangerment. This affirmative defense should be modified appropriately for omission to provide for a child or for child endangerment, because the requirements for the affirmative defenses for these other crimes differ from the requirements for this affirmative defense.

(2022 SUPP.)

OUJI-CR 4-36

ENABLING CHILD ABUSE - ELEMENTS

No person may be convicted of enabling the abuse of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person responsible for a child's health, safety, or welfare;

Second, **willfully/maliciously caused/procured/permitted**;

Third, a **willful/malicious** act of **harm/(threatened harm)**;

Fourth, to the health, safety, or welfare;

Fifth, of a child under the age of eighteen;

Sixth, by another person responsible for a child's health, safety, or welfare..

OR

First, a person responsible for a child's health, safety, or welfare;

Second, **willfully/maliciously caused/procured/permitted;**

Third, another person responsible for a child's health, safety, or welfare;

Fourth, to **willfully/maliciously** fail to protect from **harm/(threatened harm)** to the health, safety, or welfare;

Fifth, of a child under the age of eighteen;

OR

First, a person responsible for a child's health, safety, or welfare;

Second, **willfully/maliciously caused/procured/permitted**;

Third, another person**;**

Fourth, to **willfully/maliciously injure/torture/maim**;

Fifth, a child under the age of eighteen.

Statutory Authority: 21 O.S. Supp. 2021, § 843.5(B), (O)(1), (O)(5).

Notes On Use

A definition of "procured" is found in OUJI-CR 4-40D, *infra.*

Committee Comments

What distinguishes the crime of child abuse from the crime of enabling child abuse under 21 O.S. Supp. 2021, § 843.5(B) is that enabling child abuse involves the "causing, procuring or permitting" of the willful or malicious harm or threatened harm

or failure to protect from harm or threatened harm to the health, safety, or welfare of a child. A person who caused or procured child abuse would be guilty of child abuse as a principal. *See* OUJI-CR 2-5,*supra*. However, a person who permitted child abuse would not necessarily be guilty of child abuse. In order to be guilty of enabling child abuse by permitting it under 21 O.S. Supp. 2021, § 843.5(B), a person must 1) authorize or allow for the child's care, and 2) know or reasonably should know that the child is being placed at risk of abuse. Under 21 O.S. Supp. 2021, § 843.5(B), enabling child abuse includes both the causing, procuring or permitting a willful or malicious act of harm or threatened harm or failure to protect from harm or threatened harm to the healt, safety, or welfare of a child, and causing, procuring or permitting the willful or malicious injury, torture or maiming of a child.

In *Fairchild v. State*, 1999 OK CR 49, ¶ 51, 998 P.2d 611, 622-23, the Oklahoma Court of Criminal Appeals decided that the *mens rea* for felony murder of a child under 21 O.S. Supp. 1999, § 701.7(C) was a general intent to commit the act which causes the injury, rather than a specific intent, and that the general intent was included within the terms "willfully" or "maliciously."

(2022 Supp.)

OUJI-CR 4-37

NEGLECT OF CHILD - ELEMENTS

No person may be convicted of neglect of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person responsible for the child's health, safety, or welfare;

Second, **willfully/maliciously;**

[Third, **failed/omitted** to provide;

Fourth**, [adequate (nurturance and affection)/food/clothing/shelter/ sanitation/hygiene)/(appropriate education)]/(medical/dental/(behavioral health) care/ [supervision/(appropriate caretakers) to protect the child from harm/(threatened harm) of which any reasonable and prudent person responsible for the child's health, safety or welfare would be aware]/(special care made necessary for the child's health and safety by the physical/mental condition of the child);**

Fifth, for a child under the age of eighteen.]

OR

[Third, **failed/omitted** to protect;

Fourth, a child under the age of eighteen from exposure to;

Fifth, (the **use/possession/sale/manufacture of illegal drugs)/(illegal activities)/(sexual acts or materials that are not age-appropriate).]**

OR

[Third, abandoned;

Fourth, a child under the age of eighteen.]

Statutory Authority: 21 O.S. 2021, § 843.5(C), (O)(2), 10A O.S. 2021, § 1-1-105(49).

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Notes on Use

Activities that might not constitute neglect are set out in OUJI-CR 4-35B, *supra*, and 4-37A, *infra*

Committee Comments

The crime of omission to provide for a child is governed by 21 O.S. 2011, § 852(A). *See* OUJI-CR 4-40A, *infra*. Its elements are similar to the elements for child neglect, but in contrast to child neglect, omission to provide for a child is a misdemeanor. Unlike child neglect, omission to provide for a child includes willful omission to furnish monetary child support or the payment of court-ordered day care or medical insurance costs.

In *Fairchild v. State*, 1999 OK CR 49, ¶ 51, 998 P.2d 611, 622-23, the Oklahoma Court of Criminal Appeals decided that the *mens rea* for felony murder of a child under 21 O.S. Supp. 1999, § 701.7(C) was a

general intent to commit the act which causes the injury, rather than a specific intent, and that the general intent was included within the terms "willfully" or "maliciously."

(2022 Supp.)

OUJI-CR 4-37A
NEGLECT OF CHILD - ACTIVITIES
NOT CONSTITUTING NEGLECT

"Neglect" shall not mean a child who engages in independent activities, except if the person responsible for the child's health, safety or welfare willfully disregards any **(harm/(threatened harm)** to the child, given the child's level of **maturity/(physical condition)/(mental abilities)**. Such independent activities include but are not limited to:

(1) traveling to and from school including by walking/running/ bicycling,

(2) traveling to and from nearby commercial or recreational facilities,

(3) engaging in outdoor play,

(4) remaining at home unattended for a reasonable amount of time,

(5) remaining in a vehicle if the temperature inside the vehicle (is not)/(will not) become dangerously hot/cold, except if [describe applicable conditions in Section 11--1119 of Title 47 of the Oklahoma Statutes, such as that the child is accompanied by a person who is at least twelve years of age], or

(6) engaging in similar activities (alone/(with other children).

Statutory Authority: 10A O.S. 2021, § 1-1-105(49).

Notes on Use

This Instruction lists independent activities that might not constitute "neglect." This should be given only if applicable, and it should include only those activities that are pertinent to the case. 10A O.S. 2021, § 1-1-105(49)(b).

(2022 Supp.)

OUJI-CR 4-38

ENABLING CHILD NEGLECT - ELEMENTS

No person may be convicted of enabling the neglect of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person responsible for a child's health, safety, or welfare;

Second, **willfully/maliciously caused/procured/permitted**;

Third, another person responsible for a child's health, safety or welfare to **willfully/maliciously fail/omit** to provide;

Fourth, **[adequate (nurturance and affection)/food /clothing/shelter/ sanitation/hygiene)/(appropriate education)]/ (medical/dental/ (behavioral health) care/ [supervision/(appropriate caretakers) to protect the child from harm/(threatened harm) of which any reasonable and prudent person responsible for the child's health, safety or welfare would be aware]/(special care made necessary for the child's health and safety by the physical/mental condition of the child)**;

Fifth, for a child under the age of eighteen.]

OR

Third, another person responsible for a child's health, safety or welfare to **willfully/maliciously fail/omit**;

Fourth, to protect a child under the age of eighteen from exposure to;

Fifth, **(the use/possession/sale/manufacture of illegal drugs)/ (illegal activities)/(sexual acts or materials that are not age-appropriate)**.]

OR

Third, another person responsible for a child's health, safety or welfare to **willfully/maliciously** abandon;

Fourth, a child under the age of eighteen.]

Statutory Authority: 21 O.S. 2021, § 843.5(D), (O)(2), (O)(6), 10A O.S. 2021, § 1-1-105(49)

Notes on Use

OUJI-CR 4-36, *supra*, should be used if the defendant is charged with enabling child abuse. Activities that might not constitute neglect are set out in OUJI-CR 4-35B and 4-37A, *supra*. Definitions are found in OUJI-CR 4-40D, *infra*.

Committee Comments

In *Fairchild v. State*, 1999 OK CR 49, ¶ 51, 998 P.2d 611, 622-23, the Oklahoma Court of Criminal Appeals decided that the *mens rea* for felony murder of a child under 21 O.S. Supp. 1999, § 701.7(C) was a general intent to commit the act which causes the injury, rather than a specific intent, and that the general intent was included within the terms "willfully" or "maliciously."

(2022 SUPP.)

OUJI-CR 4-39

SEXUAL ABUSE/ OF CHILDREN - ELEMENTS

No person may be convicted of the sexual **abuse/** of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person responsible for a child's health, safety or welfare;

Second, **willfully/maliciously**;

Third, engaged in **(sexual intercourse)/(penetration of the vagina or anus, however slight, by an inanimate object or any part of the human body not amounting to sexual intercourse)/sodomy/incest/(a lewd act/proposal)/(specify other sexual abuse)];**

Fourth, **of/with/to** a child under the age of eighteen/.

Statutory Authority: 21 O.S. 2021, § 843.5(E), (F), (O)(3),

Notes on Use

The various types of child sexual abuse and child sexual exploitation are listed in 21 O.S. 2021, § 843.5(O)(3), (4). In prosecutions for child sexual abuse, the trial court should instruct the jury using the definitions found in 21 O.S. 2021, § 843.5(O)(3), rather than from other statutes, which may be different. For example, the definition of "lewd act or proposal" in 21 O.S. 2021, § 843.5(O)(10) differs from the elements of lewd molestation in 21 O.S. 2021, § 1123(A)(5) because the § 843.5(O)(10) definition does not contain the requirement that the victim be under sixteen (16) years of age.

If evidence is presented that the victim was under the age of twelve at the time of the alleged crime, OUJI-CR 10-13D and verdict form 10-14A should be used. *See Chadwell v. State,* 2019 OK CR 14, 446 P.3d 1244, and *Williams v. State,* 2021 OK CR 19, 496 P.3d 621.

OUJI-CR 4-35, *supra,* should be used if the defendant is charged with child abuse.

Committee Comments

The decision of the Oklahoma Court of Criminal Appeals in *A.O. v. State,* 2019 OK CR 18, 447 P.3d 1179, has been superseded in part by the 2021 amendments to 21 O.S. 2021 § 843.5 involving child sexual abuse. *In A.O. v. State*, the Oklahoma Court of Criminal Appeals decided that the State was required to prove the elements of the underlying crime involving child sexual abuse beyond a reasonable doubt. *Id.* at ¶ 9, 447 P.3d at 1182. The defendant in *A.O.* was originally charged with sexual battery under 21 O.S. Supp. 2019, § 1123(B), but the State was unable to prove the necessary elements under § 1123, because of the ages of the defendant and the victim.

The Oklahoma Court of Criminal Appeals directed the use of a differently worded instruction for cases under 10 O.S. Supp. 1995, § 7115 in *Huskey v. State,* 1999 OK CR 3, ¶ 12, 989 P.2d 1, 7. *A.O. v. State* overruled *Huskey*, 2019 OK CR 18, ¶ 10, 447 P.3d 1179, 1182.

Enhanced punishment for sexual abuse and sexual exploitation of children under the age of twelve was added in 2007.

(2024 Supp.)

OUJI-CR 4-39A

SEXUAL EXPLOITATION OF CHILDREN - ELEMENTS

No person may be convicted of the sexual exploitation of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person **willfully/maliciously;**

Second, committed **[specify underlying crime listed in 21 O.S. § 843.5(O)(4)];**

Third, the elements of **[specify underlying crime listed in 21 O.S. § 843.5(O)(4)]** are: **[specify the elements for the underlying crimes listed in 21 O.S. § 843.5(O)(4)];**

Fourth, **of/with/to** a child under the age of eighteen.

Statutory Authority: 21 O.S. 2021, § 843.5(H), (I), (O)(4).

Notes on Use

The various types of child sexual exploitation are listed in 21 O.S. 2021, § 843.5(O)(4). In prosecutions for child sexual exploitation the court should use the elements from the underlying statute listed in 21 O.S. 2021, § 843.5(O)(4). In prosecutions for child sexual exploitation the court should use the elements from the underlying statute listed in 21 O.S. 2021, § 843.5(O)4.

If evidence is presented that the victim was under the age of twelve at the time of the alleged crime, OUJI-CR 10-13D and verdict form 10-14A should be given. *See Chadwell v. State,* 2019 OK CR 14, 446 P.3d 1244, and *Williams v. State,* 2021 OK CR 19, 496 P.3d 621.

Committee Comments

The decision of the Oklahoma Court of Criminal Appeals in *A.O. v. State,* 2019 OK CR 18, 447 P.3d 1179, has been superseded in part by the 2021 amendments to 21 O.S. 2021 § 843.5 involving child sexual abuse. In *A.O. v. State,* the Oklahoma Court of Criminal Appeals decided that the State was required to prove the elements of the underlying crime involving child sexual abuse beyond a reasonable doubt. *Id.* at ¶ 19, 447 P.3d at 1182. The defendant in *A.O.* was originally charged with sexual battery under 21 O.S. Supp. 2019, § 1123(B), but the State was unable to prove the necessary elements under § 1123, because of the ages of the defendant and the victim. The reasoning in *A.O.* applies to child sexual exploitation.

Enhanced punishment for sexual exploitation of children under the age of twelve was added in 2007.

(2024 Supp.)

OUJI-CR 4-40

ENABLING THE SEXUAL ABUSE/EXPLOITATION

OF CHILDREN - ELEMENTS

No person may be convicted of enabling the sexual **abuse/exploitation** of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person **willfully/maliciously ;**

Second**, caused/procured/permitted**;

Third, another person who was responsible for the child's health, safety or welfare;

Fourth to **willfully/maliciously** engage in;

Fifth, **(sexual intercourse)/(penetration of the vagina or anus, however slight, by an inanimate object or any part of the human body not amounting to sexual intercourse/sodomy/incest/(a lewd/indecent act/proposal)/(specify other sexual abuse)**;

Sixth, **of/with/to** a child under the age of eighteen.

First, a person responsible for the child's health, safety or welfare;

Second, **willfully/maliciously ;**

Third, **caused/procured/permitted**;

Fourth, a **willful/malicious**;

Fifth, **[specify particular allegation of sexual exploitation enumerated in 21 O.S. 2021, § 843.5 (O)(4)]**;

Sixth, **of/to/with** a child under the age of eighteen;

Seventh, by **(another person)**.

_____

Statutory Authority: 21 O.S. 2021, § 843.5 (G), (J), (O)(3), (O)(4), and (O)(8).

Notes on Use

The trial court should give a separate instruction on the elements of the particular sexual abuse or sexual exploitation that has been alleged. The various types of child sexual abuse and child sexual exploitation are listed in 21 O.S. 2021, § 843.5(O)(3), (4). Definitions are found in OUJI-CR 4-40D, *infra*.

Committee Comments

In *Fairchild v. State*, 1999 OK CR 49, ¶ 51, 998 P.2d 611, 622-23, the Oklahoma Court of Criminal Appeals decided that the *mens rea* for felony murder of a child under 21 O.S. Supp. 1999, § 701.7(C) was a general intent to commit the act which causes the injury, rather than a specific intent, and that the general intent was included within the terms "willfully" or "maliciously."

(2022 Supp.)

OUJI-CR 4-40A

OMISSION TO PROVIDE FOR CHILD - ELEMENTS

No person may be convicted of omission to provide for a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a **parent/guardian/(person having custody/control)** of a child under 18 years of age;

Second, willfully;

Third, without lawful excuse;

Fourth, omitted to furnish necessary **food/clothing/shelter/(monetary child support)/(medical attention)/(payment of court-ordered day care/ [medical insurance])** for that child;

Fifth, as imposed by law upon the **parent/guardian/(person having custody/control)** of the child.

[The duty to provide medical attention means that the **parent/guardian/(person having custody/control of a child)** must provide medical treatment in the manner and on the occasions that an ordinarily prudent person, who is concerned for the welfare of a child, would provide. A **parent/guardian/(person having custody/control of a child)** is not liable for failing to provide medical attention for every minor or trivial complaint that a child may have.]

Statutory Authority: 21 O.S. 2011, § 852(A).

Notes on Use

Section 852(C) provides for an affirmative defense if the defendant depends on spiritual means and prayer for care for a child. If evidence is introduced to support this defense, the court should modify the affirmative defense in OUJI-CR 4-35C appropriately, because the requirements for the analogous affirmative defenses for child abuse and neglect differ from some of the requirements for the affirmative defense with respect to the omission to provide for a child.

Committee Comments

The term "child" is defined in 10A O.S. 2011, § 1-1-105(7) as “any unmarried person under eighteen (18) years of age.”

2012 SUPPLEMENT

OUJI-CR 4-40B

CHILD ENDANGERMENT - ELEMENTS

No person may be convicted of child endangerment unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a **parent/guardian/(person having custody/control)** of a child under 18 years of age;

Second, knowingly;

Third, permitted;

[Fourth, **physical/sexual** abuse;

Fifth, of the child.]

OR

First, a **parent/guardian/(person having custody/control)** of a child under 18 years of age;

Second, knowingly;

Third, permitted;

Fourth, the child to be present in a place where [Specify Controlled Dangerous Substance] a controlled dangerous substance was (being manufactured)/(attempted to be manufactured);

[Specify Controlled Dangerous Substance] is a controlled dangerous substance.

OR

First, a **parent/guardian/(person having custody/control)** of a child under 18 years of age;

Second, knowingly;

Third, permitted;

Fourth, the child to be present in a vehicle operated by a person who was impaired by or under the influence of alcohol/(an intoxicating substance);

Fifth, and the **parent/guardian/(person having custody/control)** of the child knew or reasonably should have known that the operator of the vehicle was impaired by or under the influence of alcohol/(an intoxicating substance).

OR

First, a **parent/guardian/(person having custody/control)** of a child under 18 years of age;

[Second, was the **driver/operator/(person in actual physical control of a vehicle)**;

Third, who **[specify violation of 47 O.S. 2011, 11-902, *e.g.*, was under the influence of alcohol or an intoxicating substance]**;

Fourth, while **(transporting the child/children)/(having the child/children in the vehicle)**].

Statutory Authority: 21 O.S. 2011, § 852.1, 10A O.S. 2011, § 1-1-105(2).

Notes on Use

For a definition of child abuse, see OUJI-CR 4-40D, *infra*. For a definition of manufacturing a controlled dangerous substance, see OUJI-CR 6-16, *infra*. For jury instructions and definitions concerning driving while impaired and driving under the influence of alcohol and intoxicating substances, see OUJI-CR 6-17 through 6-24 and 6-35, *infra*.

Section 852.1(B) provides for an affirmative defense if the defendant depends on spiritual means and prayer for care for a child. If evidence is introduced to support this defense, the court should modify the affirmative defense in OUJI-CR 4-35C appropriately, because the requirements for the analogous affirmative defenses for child abuse and neglect differ from some of the requirements for the affirmative defense with respect to child endangerment.

Committee Comments

An affirmative defense is provided if the defendant had a reasonable apprehension that any action to stop the abuse would result in substantial bodily harm to the defendant or the child. 21 O.S. 2011, § 852.1. For instructions on child abuse and child sexual abuse, see OUJI-CR 4-35 and 4-39, *supra*. *See also Huskey v. State*, 2002 OK CR 3, ¶ 11, 989 P.2d 1, 6 (summarizing the elements of the crime of child abuse).

2012 SUPPLEMENT

OUJI-CR 4-40C

CHILD ENDANGERMENT - STATUTORY AFFIRMATIVE DEFENSE

No person may be convicted of child endangerment if that person had a reasonable apprehension that any action to **(stop the physical/sexual abuse)/(deny permission for the child to be in the vehicle with an intoxicated person)** would result in substantial bodily harm to the person or the child.

It is the burden of the State to prove beyond a reasonable doubt that the defendant did not have such reasonable apprehension. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

_____

Statutory Authority: 21 O.S. 2011, § 852.1.

2012 SUPPLEMENT

OUJI-CR 4-40D

CRIMES AGAINST CHILDREN - DEFINITIONS

Abandonment of a child -

A willful refusal or failure to adequately provide for a child, and not a mere failure on account of inability.

References: 21 O.S. 2021, § 853; *Bingham v. State,* 1971 OK CR 322, ¶ 9, 488 P.2d 603, 604; *Rowden v. State,* 1964 OK CR 120, ¶ 11, 397 P.2d 515, 517.

Committee Comments

A different definition of abandonment is found in the Oklahoma Children's Code at l0A O.S. 2021, § 1-1-105(1). The above definition is more appropriate for the criminal context than the definition in the Oklahoma Children's Code, which applies to termination of parental rights.

Child -

Any person under eighteen years of age.

Committee Comments

Although l0A O.S. 2021, § 1-1-105(8) defines a child as an unmarried person under the age of 18, the Committee has concluded this definition should not be applied to limit the scope of 21 O.S. 2021, § 843.5 to unmarried persons because the plain language of section 843.5 specifies that it applies to a child under the age of eighteen without any limitation that the child must be unmarried.

The Oklahoma Court of Criminal Appeals has decided that the child neglect statute, 21 O.S. 2021, § 843.5, includes protection for an unborn child. *State v. Allen,* 2021 OK CR 14, ¶ 7, 492 P.3d 27, 29; *State v. Green,* 2020 OK CR 18, ¶ 12, 474 P.3d 886, 891.

Child Abuse -

Willful/Malicious (harm)/(threatened harm)/(failure to protect from (harm)/(threatened harm)) to the health, safety, or welfare of a child by a person responsible for the child's health, safety, or welfare.

OR

Willfully/Maliciously injuring/torturing/maiming a child under the age of eighteen.

Reference: 21 O.S. 2021, § 843.5(O)(1)

Notes on Use

This definition is to be used with OUJI-CR 4-40B *supra* for child endangerment.

Child Neglect -

The **willful/malicious** neglect of a child under eighteen (18) years of age by a person responsible for a child's health, safety or welfare.

Reference: 21 O.S. 2021, § 843.5(O)(2).

Child Sexual Abuse -

The **willful/malicious** sexual abuse of a child under eighteen (18) years of age by a person responsible for a child's health, safety or welfare and includes, but is not limited to: **(sexual intercourse)/(penetration of the vagina or anus, however slight, by an inanimate object or any part of the human body not amounting to sexual intercourse)/sodomy/incest/(a lewd act/proposal).**

Reference: 21 O.S. 2021, § 843.5(O)(3).

Child Sexual Exploitation -

The **willful/malicious** sexual exploitation of a child under eighteen (18) years of age and includes, but is not limited to: **(human trafficking that involved child trafficking for commercial sex)/(trafficking in children, if the offense was committed for the sexual gratification of any person)/(procuring/causing the participation of a minor in child pornography)/(purchase/procurement/ possession of child pornography)/((engaging in)/soliciting prostitution, if the offense involved child prostitution)/(publication/distribution/participation in the preparation of obscene material, if the offense involved child pornography)/(aggravated possession of child pornography)/(sale/ distribution of obscene material)/(soliciting sexual conduct/communication with a minor by use of technology)/(offering/transporting a child for purposes of prostitution/(child prostitution).**

Reference: 21 O.S. 2021, § 843.5(O)(4).

Enabling Child Abuse -

The **causing/procuring/permitting** of child abuse by a person responsible for a child's health, safety or welfare.

Reference: 21 O.S. 2021, § 843.5(O)(5).

Enabling Child Neglect -

The **causing/procuring/permitting** of child neglect by a person responsible for a child's health, safety or welfare.

Reference: 21 O.S. 2021, § 843.5(O)(6).

Enabling Child Sexual Abuse -

The **causing/procuring/permitting** of child sexual abuse by a person responsible for a child's health, safety or welfare.

Reference: 21 O.S. 2021, § 843.5(O)(7).

Enabling Child Sexual Exploitation -

The **causing/procuring/permitting** of child sexual exploitation by a person responsible for a child's health, safety or welfare.

Reference: 21 O.S. 2021, § 843.5(O)(8).

Harm/(Threatened Harm) to the Health or Safety of a Child -

Any **real/threatened physical/mental/emotional injury/damage** to the **body/mind** that is not accidental.

Reference: 10A O.S. 2021, § 1-1-105(2)(a).

Committee Comments

The definition of "abuse" in 10A O.S. 2021, § 1-1-105(2) states that it involves harm or threatened harm to the health, safety, or welfare of a child, and then the statute defines "harm or threatened harm to the health or safety of a child." The statutes, however, do not provide a definition of harm or threatened harm to the welfare of a

child.

Incest -

Marrying/(Committing adultery)/Fornicating with a child by a person responsible for the health, safety or welfare of a child.

Reference: 21 O.S. 2021, § 843.5(O)(9).

Knowingly-

With personal awareness of the facts.

Reference: 21 O.S. 2021, § 96.

Lewd Act or Proposal -

(Making any oral/written/electronic/computer-generated lewd/indecent proposal to a child for the child to have unlawful sexual relations/intercourse with any person)/((Looking upon)/Touching/Mauling/Feeling the body/(private parts of a child) (in a lewd/lascivious manner)/(for the purpose of sexual gratification)/(Asking/Inviting/Enticing/Persuading any child to go alone with any person to a secluded/remote/secret place for a lewd/lascivious purpose)/(Urinating/Defecating upon a child)/(Causing/Forcing/Requiring a child to defecate/urinate upon the body/(private parts) of another person for the purpose of sexual gratification)/(Ejaculating upon/(in the presence of) a child/(Causing/Exposing/Forcing/Requiring a child to look upon the body/(private parts of another person) for the purpose of sexual gratification)/(Causing/Forcing/Requiring any child to view any (obscene materials)/(child pornography)/(materials deemed harmful to minors)/(Causing/Exposing/Forcing/Requiring a child to look upon sexual acts performed in the presence of the child for the purpose of sexual gratification)/(Causing/Forcing/Requiring a child to touch/feel the body/(private parts) of the child/(another person) for the purpose of sexual gratification).

Reference: 21 O.S. 2021, § 843.5(O)(10).

Maiming -

Infliction on another of a physical injury that disables or disfigures or seriously diminishes physical vigor, performed with the intent to cause any injury.

Malicious -

The term imports a wish to vex, annoy or injure another person.

Reference: 21 O.S. 2021, § 95.

Neglect -

Failure or omission to provide a child under the age of eighteen with **[select from the following: adequate (nurture and affection)/food/clothing/shelter/ sanitation/hygiene/(appropriate education)/(medical/dental/(behavioral health) care/supervision/(appropriate caretakers) to protect the child from harm/(threatened harm) of which any reasonable and prudent person responsible for the child's health, safety or welfare would be aware]/(special care made necessary for the child's health and safety by the physical/mental condition of the child)].**

OR

Failure or omission to protect a child under the age of eighteen from exposure to: **[select from the following: the**

use/possession/sale/manufacture of illegal drugs)/(illegal activities)/(sexual acts or materials that are not age-appropriate).]

OR

Abandonment of a child under the age of eighteen.

Reference: 10A O.S. 2021, § 1-1-105(49).

Person Responsible for a Child's Health, Safety or Welfare -

A parent/(legal guardian)/custodian/(foster parent)/(a person eighteen (18) years of age or older with whom the child's parent cohabitates, who is at least three (3) years older than the child)/(a person eighteen (18) years of age or older residing in the home of the child, who is at least three (3) years older than the child)/(an owner/operator/agent/employee/volunteer of a public/private [residential home/institution/facility]/[day treatment program] that the child attended)/(an owner/operator/employee/volunteer of a child care facility that the child attended)/(an intimate partner of the parent of the child)/(a person who has voluntarily accepted responsibility for the care or supervision of the child).

Reference: 21 O.S. 2021, § 843.5(O)(12).

Permit-

To authorize or allow for the care of the child by an individual when the person authorizing or allowing such care knew or reasonably should have known that the child would be placed at risk of abuse/neglect/(sexual abuse)/(sexual exploitation).

Reference: 21 O.S. 2021, § 843.5(O)(11).

Procure -

To induce or bring about.

References: Webster's Third New International Dictionary 1809 (2002); Black's Law Dictionary 1327 (9th ed. 2009).

Sexual Intercourse -

The actual penetration, however slight, of the vagina or anus by the penis.

Reference: 21 O.S. 2021, § 843.5(O)(13).

Sodomy-

Penetration, however slight, of the (mouth of the child by a penis)/(vagina of a person responsible for a child's health, safety or welfare, by the mouth of a child)/(mouth of the person responsible for a child's health, safety or welfare by the penis of the child)/(vagina of the child by the mouth of the person responsible for a child's health, safety or welfare).

Reference: 21 O.S. 2021, § 843.5(O)(13)).

Torture -

Infliction of either great physical pain or extreme mental cruelty.

Reference: *Berget v. State,* 1991 OK CR 121, ¶ 31, 824 P.2d 364, 373; The Random House Dictionary (2d ed. 1988). *But see Atterberry v. State,* 1986 OK CR 186, ¶ 9, 731 P.2d 420, 423 (child abuse statute did not prohibit "threatened harm" or infliction of a "mental injury").

Unreasonable Force -

More than that ordinarily used as a means of discipline.

Reference: 21 O.S. 2021, § 844.

Willful -

Purposeful. "Willful" is a willingness to commit the act or omission referred to, but does not require any intent to violate the law or to acquire any advantage.

References: 21 O.S. 2021, § 92. *Tarver v. State,* 1982 OK CR 156, ¶¶ 12, 13, 651 P.2d 1332, 1334.

Committee Comments

Unlike other definitions of "willful" in these Uniform Jury Instructions, the definition of "willful" in OUJI-CR 4-40D deletes the phrase "or to injure another" in 21 O.S. 2021, § 92. The Oklahoma Court of Criminal Appeals decided in *Hockersmith v. State,* 1996 OK CR 51, ¶ 12, 926 P.2d 793, 795, and *Bannister v. State,* 1996 OK CR 60, ¶¶ 5-6, 930 P.2d 1176, 1178, that the definition of "willful" in the context of a prosecution for the felony murder of a child under 21 O.S. Supp. 1999, § 701.7(C), should not have eliminated the requirement of an intent to injure. The above definition of "willful" conforms to the *Hockersmith* and *Bannister* cases. In *Fairchild v. State,* 1999 OK CR 49, ¶¶ 32, 45, 998 P.2d 611, 619, 621-22, the Court of Criminal Appeals overruled the *Hockersmith* and *Bannister* cases, but the Court also directed that the above definition of "willful" should continue to be used in prosecutions for the felony murder of a child under 21 O.S. Supp. 1999, § 701.7(C). *Fairchild v. State,* 1999 OK CR 49, ¶ 75, 998 P.2d at 626.

(2024 Supp.)

OUJI-CR 4-41

FAILURE TO PAY CHILD SUPPORT - ELEMENTS

No person may be convicted of failure to pay child support unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, without lawful excuse;

Third, delinquent in child support payments;

Fourth, for **(more than $5,000)/(one year or more)**;

Fifth, that **he/she** was obligated by lawful order to make.

Statutory Authority: 21 O.S. Supp. 2000, § 852(A).

Committee Comments

The statute refers to delinquencies after September 1, 1993. The Committee has concluded that the obligation must be based on a lawful Order by a court or administrative agency.

(2000 Supp.)

OUJI-CR 4-42

LEAVING STATE TO AVOID CHILD SUPPORT - ELEMENTS

No person may be convicted of leaving the State to avoid child support unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant left the State of Oklahoma;

Second, to avoid providing necessary **food/clothing/ shelter/(court-ordered monetary child support)/(medical attention)** for a child;

Third, for whom the defendant owes a duty to provide.

[The duty to provide medical attention means that the person must provide medical treatment in the manner and on the occasions that an ordinarily prudent person, who is concerned for the welfare of a child, would provide. A person is not liable for failing to provide medical attention for every minor or trivial complaint that a child may have.]

Statutory Authority: 21 O.S. Supp. 2000, § 852(B).

(2000 Supp.)

OUJI-CR 4-43

NEGLECT OF DRUG (ALCOHOL) DEPENDENT CHILD - ELEMENTS

No person may be convicted of neglect of a drug/alcohol dependent child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a parent with legal custody of a **drug/alcohol** dependent child;

Second, **(willfully omitted)/(without having made a reasonable effort failed)**;

Third, to provide for the treatment of the child in the manner and on the occasions that an ordinarily prudent person, who was concerned for the welfare of a child, would have provided.

Statutory Authority: 21 O.S. Supp. 2000, § 852(G).

(2000 Supp.)

OUJI-CR 4-44

VIOLATION OF CHILD CUSTODY ORDER - ELEMENTS

No person may be convicted of violating a child custody order unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a **parent/person**;

Second, knowingly;

Third, violated an order of an Oklahoma court granting custody of a child under the age of eighteen years to any **person/agency/institution**;

Fourth, with the intent to deprive that **person/agency/institution** of the custody of the child.

Statutory Authority: 21 O.S. Supp. 2000, 567A(A) (formerly 43 O.S. Supp. 1997, § 527(A)).

Notes on Use

For an Instruction on the affirmative defense set forth in 21 O.S. Supp. 2000, 567A(B), see OUJI-CR 4-45 *infra*.

(2000 Supp.)

OUJI-CR 4-45

VIOLATION OF CHILD CUSTODY ORDER -

DEFENSES - BURDEN OF PROOF

A person is justified in violating a child custody order if:

First, **he/she** reasonably believed that doing so was necessary to protect the child from physical, mental, or emotional danger to the child; and

Second, **he/she** notified the local law enforcement agency nearest to the location where the custodian of the child resided.

It is the burden of the State to prove beyond a reasonable doubt that the defendant was not justified in violating a child custody order. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Statutory Authority: 21 O.S. Supp. 2000, § 567A(B).

Notes on Use

The trial court should instruct on the affirmative defense if the defendant has come forward with sufficient evidence to raise the defense as an issue, or the issue has been raised by the prosecution's evidence.

(2000 Supp.)

OUJI-CR 4-46

CONTRIBUTING TO DELINQUENCY

OF A MINOR - ELEMENTS

No person may be convicted of contributing to the delinquency of a minor unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/willfully**;

Second, **caused/aided/abetted/encouraged**;

Third, a child under eighteen (18) years old;

Fourth, to **be/become/remain** a **delinquent/runaway** child.

Statutory Authority: 21 O.S. Supp. 2000, § 856(A).

(2000 Supp.)

OUJI-CR 4-47

CONTRIBUTING TO COMMISSION

OF FELONY BY A MINOR - ELEMENTS

No person may be convicted of contributing to the commission of a felony by a minor unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/willfully**;

Second, **caused/aided/abetted/encouraged**;

Third, a child under eighteen (18) years old;

Fourth, to **commit/(participate in committing)** the following **act(s)** that would be a felony if committed by an adult: **[Specify Felony]**.

Statutory Authority: 21 O.S. Supp. 2000, § 856(C).

Notes on Use

The court should give a separate instruction on the elements of the particular felony alleged.

(2000 Supp.)

OUJI-CR 4-48

ENCOURAGING STREET GANG ACTIVITY - ELEMENTS

No person may be convicted of encouraging street gang activity unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/willfully**;

Second, **caused/aided/abetted/encouraged/solicited/ recruited**;

Third, a child under eighteen (18) years old;

Fourth, to **participate/join/associate** with any criminal street **gang/(gang member)**;

Fifth, for the purpose of committing **[Specify Alleged Criminal Act(s)]**.

Statutory Authority: 21 O.S. Supp. 1995, § 856(D).

OUJI-CR 4-49

ENCOURAGING MINOR TO COMMIT

DRUG-RELATED CRIME - ELEMENTS

No person may be convicted of encouraging a minor to commit a drug-related crime unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/intentionally/willfully**;

Second, **caused/aided/abetted/encouraged**;

Third, a child under eighteen (18) years old;

Fourth, to **[Specify the Drug-Related Crime(s) Listed in 21 O.S. 1991, § 856.1]**.

Statutory Authority: 21 O.S. 1991, § 856.1.

OUJI-CR 4-50

ENCOURAGING MINOR TO BE IN NEED OF SUPERVISION - ELEMENTS

No person may be convicted of encouraging a minor to be in need of supervision unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, willfully;

[Third, **caused/aided/abetted/encouraged**;

Fourth, a child under eighteen (18) years old;

Fifth, to be **(in need of supervision)/deprived**].

OR

[Third, contributed to the **(need of supervision)/deprivation**;

Fourth, of a child under eighteen (18) years old].

Statutory Authority: 21 O.S. 1991, § 858.1.

CONTRIBUTING TO DELINQUENCY OF MINORS - DEFINITIONS

Child in Need of Supervision - A child under 18 years old who: **[Select Appropriate Language]**

[has repeatedly disobeyed reasonable and lawful commands or directives of **his/her parent/(legal guardian)/custodian**].

OR

[is willfully and voluntarily absent from his home without the consent of **his/her parent/(legal guardian)/custodian** for a substantial length of time or does not intend to return].

OR

[is subject to compulsory school attendance and is willfully and voluntarily absent from school for **(fifteen (15) or more days/(parts of days) within a semester)/(four (4) or more days/(parts of days) within a four-week period)** without a valid excuse as defined by the local school boards].

Reference: 10 O.S. Supp. 1995, § 7001-1.3(3).

Criminal Street Gang - Any ongoing **organization/association/ group of 5 or more persons)** that specifically **promoted/sponsored/ (assisted in)/(participated in)** and required as a condition of **membership/(continued membership)** the commission of **[Specify the Criminal Act(s) Listed in 21 O.S. 1991, § 856(F)]**.

Reference: 21 O.S. 1991, § 856(F).

Delinquent Child - A child under 18 years old who has violated any criminal law or has **[Specify the Delinquent Act(s) Listed in 21 O.S. 1991, § 857(4)]**.

Reference: 21 O.S. 1991, § 857(4).

Deprived Child - A child under 18 years old who: **[Select Appropriate Language]**

[is for any reason **destitute/homeless/abandoned**].

OR

[does not have the proper parental **care/guardianship** or whose home is an unfit place for the child because of the **neglect/cruelty/depravity of his parents/(legal guardian)/(person in whose care the child is)**].

OR

[is a child in need of special care and treatment because of his physical or mental condition including a child born in a condition of dependence on a controlled dangerous substance, and his **parents/(legal guardian)/custodian** is unable or willfully fails to provide special care and treatment].

OR

[is a handicapped child deprived of the **(nutrition necessary to sustain life)/ (medical treatment necessary to remedy/relieve a life-threatening medical condition in order to cause/allow the death of the child if the nutrition/(medical treatment)** is generally provided to similarly situated non-handicapped or handicapped children].

OR

[is subject to compulsory school attendance and, due to improper parental care and guardianship, is absent from school for **(fifteen (15) or more days/(parts of days) within a semester)/(four (4) or more days/(parts of days) within a four-week period)** without a valid excuse as defined by the local school boards].

Reference: 10 O.S. Supp. 1995, § 7001-1.3(4).

Encourage - In addition to the usual meaning of the word, includes a willful and intentional neglect to do what would directly tend to prevent an act of delinquency by a child under 18 years old, when a person was able to do so.

Reference: 21 O.S. 1991, § 857(3).

Knowingly - With personal awareness of the facts.

Reference: 21 O.S. 1991, § 96.

Willful - Purposeful. "Willful" does not require any intent to violate the law, or to injure another, or to acquire any advantage. It involves simply a willingness to commit the act or omission referred to.

References: 21 O.S. 1991, § 92. Tarver v. State, 651 P.2d 1332, 1334 (Okl. Cr. 1982).

OUJI-CR 4-52

PROCURING MINOR FOR PROSTITUTION, ETC. - ELEMENTS

No person may be convicted of procuring a minor for the purpose of **prostitution/(any lewd or indecent act)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

[First, **offered/(offered to secure)** a child under eighteen (18) years old;

Second, for the purpose of **prostitution/(any lewd or indecent act)]**.

OR

[First, **procured/(offered to procure) [a place for]** a child under eighteen (18) years old;

Second, **for/in** a house of **prostitution/(place where prostitution is practiced)**].

OR

[First, **received/(offered/agreed to receive)** a child under eighteen (18) years old;

Second, into any **house/place/building/structure/vehicle /trailer/conveyance**;

Third, for the purpose of **prostitution/lewdness/ assignation]**.

OR

[First, permitted a person to remain;

Second, in any **house/place/building/structure/vehicle /trailer/conveyance**;

Third, for the purpose of **prostitution/lewdness/assignation** with a child under eighteen (18) years old].

OR

[First, **directed/took/transported/(offered/agreed to take/transport)/ (aid/assist in transporting)** a child under eighteen (18) years old;

Second, to any **house/place/building/structure/vehicle / trailer/conveyance/ (other person)**;

Third, **(with knowledge)/(having reasonable cause to believe)** that;

Fourth, the purpose of the **directing/taking/transporting** was **prostitution/lewdness/assignation**].

Statutory Authority: 21 O.S. 1991, § 1087(A).

OUJI-CR 4-53

PERMITTING THE PROCURING OF A MINOR

FOR PROSTITUTION, ETC. - ELEMENTS

No person may be convicted of permitting the procuring of a minor for **prostitution/(any lewd or indecent act)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

[First, knowingly permitted;

Second, in any **house/building/room/premises/conveyanc e (under the defendant's control)/(of which the defendant has possession)**;

Third, a person to **offer/(offer to secure)** a child under eighteen (18) years old;

Fourth, for the purpose of **prostitution/(any lewd or indecent act)**].

OR

[First, **knowingly permitted**;

Second, in any **house/building/room/premises/conveyanc e (under the defendant's control)/(of which the defendant has possession)**;

Third, a person to **procure/(offer to procure) [a place for]** a child under eighteen (18) years old;

Fourth, **for/in** a house of **prostitution/(place where prostitution is practiced)**].

OR

[First, knowingly permitted;

Second, in any **house/building/room/premises/conveyanc e (under the defendant's control)/(of which the defendant has possession)**;

Third, a person to **receive/(offer/agree to receive)** a child under eighteen (18) years old;

Fourth, into any **house/place/building/structure/vehicle / trailer/conveyance**;

Fifth, for the purpose of **prostitution/lewdness/ assignation**].

OR

[First, knowingly permitted;

Second, in any **house/building/room/premises/conveyanc e (under the defendant's control)/(of which the defendant has possession)**;

Third, a person to permit any person to remain;

Fourth, in any **house/place/building/ structure/vehicle/trailer/conveyance**;

Fifth, for the purpose of **prostitution/lewdness/ assignation** with a child under eighteen (18) years old].

OR

[First, knowingly permitted;

Second, in any **house/building/room/premises/conveyanc e (under the defendant's control)/(of which the defendant has possession)**;

Third, a person to **direct/take/transport/(offer/agree to take/transport)/ (aid/assist in transporting)** a child under eighteen (18) years old;

Fourth, to any **house/place/building/structure/vehicle /trailer/conveyance/ (other person)**;

Fifth, **(with the person's knowledge)/(the person having reasonable cause to believe)** that;

Sixth, the purpose of the **directing/taking/transporting** was **prostitution/lewdness/assignation**].

Statutory Authority: 21 O.S. 1991, § 1087(B).

OUJI-CR 4-54

KEEPING MINOR FOR PROSTITUTION - ELEMENTS

No person may be convicted of keeping a minor for prostitution unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

[First, by **promise/threats/violence/(any device or scheme)**;

Second, **caused/induced/persuaded/encouraged** a child under eighteen (18) years old;

Third, to **(engage in prostitution)/(continue to engage in prostitution)/ (become/remain in a (house of prostitution)/(place where prostitution is practiced))**].

OR

[First, **kept/held/detained/restrained/(compelled against his/her will)** a child under eighteen (18) years old;

Second, to **(engage in the practice of prostitution)/(be in a (house of prostitution)/(place where prostitution is practiced))**].

OR

[First, directly or indirectly **(kept/held/detained/restrained/compell ed)/ (attempted to keep/hold/detain/ restrain/compel)** a child under eighteen (18) years old;

Second, to **(engage in the practice of prostitution)/(be in a (house of prostitution)/(place where prostitution is practiced/allowed))**;

Third, for the purpose of compelling the child to directly or indirectly **pay/liquidate/cancel any debt/ dues/obligations incurred/(said to have been incurred)** by the child].

Statutory Authority: 21 O.S. 1991, § 1088(A).

Committee Comments

The Legislature has designated use of a controlled dangerous substance by way of illustration of a device or scheme in 21 O.S. 1991, § 1088(A)(1), but has expressly not so limited it.

OUJI-CR 4-55

PERMITTING THE KEEPING

OF A MINOR FOR PROSTITUTION - ELEMENTS

No person may be convicted of permitting the keeping of a minor for prostitution unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

[First, knowingly permitted;

Second, in any **house/building/room/tent/lot/premises (under the defendant's control)/(of which the defendant has possession)**;

Third, a person by **promise/threats/violence/(any device or scheme)**;

Fourth, to **cause/induce/persuade/encourage** a child under eighteen (18) years old;

Fifth, to **(engage in prostitution)/(continue to engage in prostitution)/ (become/remain in a (house of prostitution)/(place where prostitution is practiced))**].

OR

[First, knowingly permitted;

Second, in any **house/building/room/tent/lot/premises (under the defendant's control)/(of which the defendant has possession)**;

Third, a person to **keep/hold/detain/restrain/(compel against his/her will)** a child under eighteen (18) years old;

Fourth, to **(engage in the practice of prostitution)/(be in a (house of prostitution)/(place where prostitution is practiced))**].

OR

[First, knowingly permitted;

Second, in any **house/building/room/tent/lot/premises (under the defendant's control)/(of which the defendant has possession)**;

Third, a person directly or indirectly to **keep/hold/detain/restrain/compel)/ (attempt to keep/hold/detain/restrain/compel)** a child under eighteen (18) years old;

Fourth, to **(engage in the practice of prostitution)/(be in a (house of prostitution)/(place where prostitution is practiced/allowed))**;

Fifth, for the purpose of compelling the child to directly or indirectly **pay/liquidate/cancel** any **debt/ dues/obligations incurred/(said to have been incurred)** by the child].

Statutory Authority: 21 O.S. 1991, § 1088(B).

Committee Comments

See Committee Comments to OUJI-CR 4-54.

OUJI-CR 4-56

PROCURING AND KEEPING

MINOR FOR PROSTITUTION -- DEFINITIONS

Anal Intercourse - Contact between human beings of the genital organs of one and the anus of another.

Reference: 21 O.S. Supp. 1995, § 1030.

Assignation - An appointment for the purpose of sexual intercourse.

Reference: Random House Dictionary (2nd ed. 1987).

Cunnilingus - Any act of oral stimulation of the vulva or clitoris.

Reference: 21 O.S. Supp. 1995, § 1030.

Fellatio - Any act of oral stimulation of the penis.

Reference: 21 O.S. Supp. 1995, § 1030.

Lewdness - Any lascivious, lustful or licentious conduct.

OR

The **giving/receiving** of the body for **(sexual intercourse)/fellatio/cunnilingus/ masturbation/(anal intercourse)/lewdness** with any person not **his/her** spouse.

OR

Any act in furtherance of such conduct.

OR

Any **appointment/engagement** for prostitution.

Reference: 21 O.S. Supp. 1995, § 1030.

Masturbation - Stimulation of the genital organs by manual or other bodily contact exclusive of sexual intercourse.

Reference: 21 O.S. Supp. 1995, § 1030.

Prostitution - The **(giving/receiving of the body)/(making of any appointment/ engagement)** for **(sexual intercourse)/fellatio/cunnilingus/masturbation/(anal intercourse)/lewdness** in exchange for payment.

Reference: 21 O.S. Supp. 1995, § 1030.

Notes on Use

The court should select the appropriate definition of lewdness based on the evidence presented at trial.

OUJI-CR 4-56A

LOITERING BY A PERSON REQUIRED TO REGISTER AS A SEX OFFENDER -- ELEMENTS

No person may be convicted of loitering by a person required to register as a sex offender unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] was convicted of a crime that required **him/her** to register as a sex offender; and

Second, while required to register as a sex offender **he/she** knowingly;

Third, was loitering within 500 feet of **a/an** [**elementary/(junior high)/high school]/[permitted/licensed child care facility]/park/playground**.

OR

Third, was loitering within 1,000 feet of the residence of the victim of the sex crime for which [**Name of Defendant**] was convicted.

Loitering means to stand around or move slowly about; to spend time idly; to saunter; to delay; to linger; to lag behind.

[**Loitering does not include:**

(A (custodial parent)/(legal guardian) of a student enrolled at the school/(child care facility) who is enrolling/delivering/retrieving the student at the school/(child care facility) [during regular school/facility hours]/[for (school-sanctioned)/(child-care-facility-sanctioned) extracurricular activities].

OR

(A person receiving medical treatment at a hospital/(a facility certified/ licensed by the State of Oklahoma to provide medical services), unless it is any form of psychological, social or rehabilitative counseling services or treatment programs for sex offenders).

OR

(**A person attending a recognized church/(religious denomination) for worship if he/she has notified the religious leader of his/her status as a registered sex offender and he/she was granted written permission by the religious leader).]**

Statutory Authority: 21 O.S. Supp. 2019, § 1125.

Notes on Use

The trial judge should use the bracketed exceptions at the end of the instructions only if they are supported by the evidence. This Instruction should be modified as appropriate, if the defendant was convicted in another jurisdiction of an offense which would require registration if the defendant had been convicted in Oklahoma of that offense. See 21 O.S. Supp. 2019, § 1125(A)(1).

Committee Comments

The Oklahoma Court of Criminal Appeals held that 21 O.S. Supp. 2010, § 1125 was not unconstitutionally vague in *Weeks v. State*, 2015 OK CR 16, ¶¶ 20-26, 362 P.3d 650, 656-57, and *Engles v. State*, 2015 OK CR 17, ¶ 6, 366 P.3d 311, 314. In *Weeks*, the Court of Criminal Appeals distinguished two of its previous

decisions in which anti-loitering ordinances in Oklahoma City and Tulsa had been struck down on the ground that they were unconstitutionally vague. The Court explained that in contrast to the anti-loitering ordinances in its previous decisions, § 1125 includes exemptions that provide guidance as to what is and what is not prohibited and "the statute clearly defines the prohibited conduct through reference to the only conduct that is permitted." *Weeks v. State*, 2015 OK CR 16, ¶ 26, 362 P.3d 657. Similarly, in *Engles*, the Court decided that the exemptions in § 1125 avoided unconstitutional vagueness. The Court held: "By operation of these specific statutory exemptions, *any* sex offender convicted of a registerable offense involving a victim under thirteen, who is present in the zone of safety *without* a statutory exemption *and* the required prior notice to administrators is, *by definition*, loitering in violation of the law." 2015 OK CR 17, ¶ 6, 366 P.3d 311, 314 (emphasis in original).

(2019 Supp.)

OUJI-CR 4-56B

AGGRAVATED/HABITUAL SEX OFFENDER IN A PARK -

ELEMENTS

No person may be convicted of entering a park by **a/an aggravated/ habitual** sex offender unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] had been designated as **a/an aggravated/ habitual** sex offender ; and

Second, **he/she** knowingly;

Third, entered a park.

OR

First, [**Name of Defendant**] was convicted of an offense in another **state/ country** that if committed in Oklahoma would designate [**Name of Defendant**] as **a/an aggravated/habitual** sex offender ; and

Second, **he/she** knowingly;

Third, entered a park.

A park is any outdoor public area specifically designated as being used for recreational purposes that is operated/supported in whole or in part by a **(homeowners' association)/city/town/county/state/(federal/tribal governmental authority)**.

Statutory Authority: 21 O.S. Supp. 2017, § 1125(A)(2).

(2018 Supp.)

OUJI-CR 4-57

CRIMES AGAINST UNBORN CHILDREN -

DEFINITION AND LIMITATIONS

A **person/(human being)** shall include an unborn child. An unborn child means an unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth.

Statutory Authority: 21 O.S. 2011, §§ 652, 691(B); 61 O.S. 2011, § 1-730(4).

Notes on Use

This instruction should be given along with OUJI-CR 4-4, 4-5, 4-6, 4-7, 4-8, 4-61, 4-64, 4-91, 4-92, 4-94, 4-95, or 4-105, *supra*, in cases where the victim was an unborn child. OUJI-CR 4-57A or 4-57B, *infra*, or both, should also be given, if appropriate.

(2018 Supp.)

OUJI-CR 4-57A

LIMITATIONS ON **(INJURIES TO)/(DEATH OF)** UNBORN CHILD

No person shall be guilty of:

(murder in the first degree of)

(murder in the second degree of)

(manslaughter in the first degree of)

(manslaughter in the second degree of)

(shooting with intent to kill)

(use of a vehicle to facilitate the discharge of a **firearm/crossbow/weapon** in the conscious disregard for the safety of)

(assault and battery with a deadly weapon upon)

(willfully killing)

an unborn child if:

[The acts that caused the death of the unborn child were committed during a legal abortion to which the pregnant woman consented.]

OR

[The acts were committed pursuant to the usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.]

Statutory Authority: 21 O.S. 2011, §§ 652(D), 691(C).

Notes on Use

The court should give the paragraphs in brackets if the issues are asserted as affirmative defenses and there is evidence to support them offered at the trial.

(2018 Supp.)

OUJI-CR 4-57B

NO PROSECUTION OF MOTHER FOR CAUSING DEATH OF UNBORN CHILD

Under no circumstances shall the mother of the unborn child be convicted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.

Statutory Authority: 21 O.S. 2011, §§ 652(E), 691(D).

(2018 Supp.)

OUJI-CR 4-58

(This Instruction is Intentionally Blank)

(2018 Supp.)

OUJI-CR 4-58A

TRAFFICKING IN CHILDREN – ELEMENTS

(COMPENSATION FOR ADOPTIONS)

No person may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] knowingly **accepted/solicited/offered/paid/ transferred** any compensation in **money/property/(anything of value)**;

Second, in connection with the **(acquisition/transfer** of the **legal/physical custody)/adoption** of a minor child.

_____

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(a); 10 O.S. Supp. 2019, § 7505-3.2.

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(a). The statute provides exceptions for certain costs and expenses, and OUJI-CR 4-58A-1 covers these costs and expenses as an affirmative defense to the crime.

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

(2019 Supp.)

OUJI-CR 4-58A-1

TRAFFICKING IN CHILDREN-- AFFIRMATIVE DEFENSE

FOR COURT APPROVED COSTS AND EXPENSES

(COMPENSATION FOR ADOPTIONS)

[**Name of Defendant**] has asserted as a defense to the charge of trafficking in children that the following expenses have been approved by the Court **and/or** authorized by law: **[Specify the applicable costs and expenses ordered by the Court or provided in 10 O.S. 2019, § 7505-3.2**]. The State has the burden of proving beyond a reasonable doubt that the expenses were not approved by the Court **and/or** were not authorized by law.

(2019 Supp.)

OUJI-CR 4-58B

TRAFFICKING IN CHILDREN-- ELEMENTS (ACCEPTING COMPENSATION BY OTHERS BESIDES CHILD-PLACING AGENCIES AND ATTORNEYS)

No **person/organization** may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] knowingly **accepted/solicited** any compensation in **money/property/(anything of value)**;

Second, for services **performed/rendered/(purported to be performed)** to **facilitate/assist** in the **adoption/(foster care placement)** of a minor child.

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(b).

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(b).

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

(2019 Supp.)

OUJI-CR 4-58B-1

TRAFFICKING IN CHILDREN-- AFFIRMATIVE DEFENSE

FOR CHILD-PLACING AGENCIES AND ATTORNEYS

(ACCEPTING COMPENSATION FOR ADOPTIONS)

[**Name of Defendant**] has asserted as a defense to the charge of trafficking in children that **he/she/it** was **(the Department of Human Services)/(a child-placing agency licensed in Oklahoma under the Oklahoma Child Care Facilities Licensing Act)/(an attorney authorized to practice law in Oklahoma)/(an attorney licensed to practice law in a state other than Oklahoma who is working with an attorney licensed in Oklahoma)/(an out-of-state licensed child-placing agency that was working with a child-placing agency licensed in Oklahoma which was providing [adoption services]/[services necessary for placing a child in an adoptive arrangement])**. The State has the burden of proving beyond a reasonable doubt that [**Name of Defendant**] was not **(the Department of Human Services)/(a child-placing agency licensed in Oklahoma under the Oklahoma Child Care Facilities Licensing Act)/(an attorney authorized to practice law in Oklahoma)/(an attorney licensed to practice law in a state other than Oklahoma who is working with an attorney licensed in Oklahoma)/(an out-of-state licensed child-placing agency that was working with a child-placing agency licensed in Oklahoma which was providing [adoption services]/[services necessary for placing a child in an adoptive arrangement])**.

(2019 Supp.)

OUJI-CR 4-58C

TRAFFICKING IN CHILDREN-- ELEMENTS

(BRINGING CHILD INTO STATE OR SENDING OUT OF STATE)

No person may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] knowingly **brought/(caused to be brought)/sent/(caused to be sent)** a child **into/(out of)** Oklahoma;

Second, for the purpose of placing the child **(in a foster home)/(for adoption)**; and

Third, refused afterwards to comply upon request with the Interstate Compact on the Placement of Children.

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(c).

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(c).

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

(2019 Supp.)

OUJI-CR 4-58C-1

TRAFFICKING IN CHILDREN-- AFFIRMATIVE DEFENSE

FOR PARENTS AND GUARDIANS

(BRINGING CHILD INTO STATE OR SENDING OUT OF STATE)

[**Name of Defendant**] has asserted as a defense to the charge of trafficking in children that **he/she (was the parent/guardian of the child)/(brought the child into Oklahoma for the purpose of adopting the child into [Name of Defendant]'s own family)**. The State has the burden of proving beyond a reasonable doubt that [**Name of Defendant**] **(was not the parent/guardian of the child)/(did not bring the child into Oklahoma for the purpose of adopting the child into [Name of Defendant]'s own family)**.

(2019 Supp.)

OUJI-CR 4-58D

TRAFFICKING IN CHILDREN-- ELEMENTS

(RECEIVING MONEY FOR ADOPTION WITH NO INTENT TO CONSENT TO ADOPTION)

No person may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] is the birth parent of a child; and

Second, [**Name of Defendant**] knowingly **solicited/received money/(anything of value)** for expenses related to the placement of a child for the purpose of an adoption;

Third, when [**Name of Defendant**] had no intent to consent to eventual adoption.

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(d).

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(d).

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

(2019 Supp.)

OUJI-CR 4-58E

TRAFFICKING IN CHILDREN – ELEMENTS

(RECEIVING MONEY FOR ADOPTION WHEN NOT PREGNANT)

No person may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] is a woman who knowingly **solicited/received money/(anything of value)** for expenses related to the placement of a child for the purpose of an adoption; and

Second, [**Name of Defendant**] held herself out to be pregnant and offered to place a child upon birth for adoption;

Third, when she knew she was not pregnant.

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(e).

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(e).

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

(2019 Supp.)

OUJI-CR 4-58F-1

TRAFFICKING IN CHILDREN-- ELEMENTS

(RECEIVING MONEY FOR ADOPTION WITHOUT DISCLOSURE TO OTHER PERSONS)

No person may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] was **a/an (birth parent)/(child-placing agency)/attorney**;

Second, who knowingly received **money/(anything of value)** for expenses related to the placement of a child for the purpose of an adoption;

Third, and [**Name of Defendant**] did not disclose to each prospective adoptive parent, child-placing agency, and attorney the receipt of the **money/(anything of value)** immediately upon receipt.

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(f)(1).

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(f)(1).

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

(2019 Supp.)

OUJI-CR 4-58F-2

TRAFFICKING IN CHILDREN-- ELEMENTS

(RECEIVING MONEY FROM MORE THAN ONE ADOPTIVE FAMILY)

No person may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] was **a/an (birth parent)/(child-placing agency)/attorney**;

Second, who knowingly **received/solicited money/(anything of value)** for expenses related to the placement of a child for the purpose of the adoption of one child;

Third, from more than one prospective adoptive family.

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(f)(2).

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(f)(2).

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

(2019 Supp.)

OUJI-CR 4-58G

TRAFFICKING IN CHILDREN-- ELEMENTS

(ADVERTISING FOR ADOPTIONS)

No person may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] was not **(the Department of Human Services)/(a child-placing agency licensed in Oklahoma)/(an attorney authorized to practice law in Oklahoma)**; and

Second, [**Name of Defendant**] knowingly advertised for **(services for compensation to [assist with]/effect the placement of a child for adoption/[care in a foster home])/(legal services related to the adoption of children)**.

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(g).

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(g).

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

(2019 Supp.)

OUJI-CR 4-58H

TRAFFICKING IN CHILDREN-- ELEMENTS

(ADVERTISING FOR PLACING CHILD FOR ADOPTION)

No person may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, [**Name of Defendant**] was not **(a child-placing agency licensed in Oklahoma)/(attorney authorized to practice law in Oklahoma)**; and

Second, [**Name of Defendant**] knowingly advertised for and solicited a pregnant woman to induce her to place her child upon birth for adoption.

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(h).

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(h).

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

(2019 Supp.)

OUJI-CR 4-58H-1

TRAFFICKING IN CHILDREN-- AFFIRMATIVE DEFENSE

FOR FAVORABLE PREPLACEMENT HOME STUDY RECOMMENDATION

[**Name of Defendant**] has asserted as a defense to the charge of trafficking in children that [**Name of Defendant**] has received a favorable preplacement home study recommendation to locate a child into **his/her** own home and [**Name of Defendant**] has not offered any **money/(thing of value)** to induce the pregnant woman to place the child into **his/her** home other than the following expenses that have been approved by the Court **and/or** authorized by law: **[Specify the applicable costs and expenses ordered by the Court or provided in 10 O.S. 2017, § 7505-3.2**]. The State has the burden of proving beyond a reasonable doubt that the expenses were not approved by the Court **and/or** were not authorized by law.

(2019 Supp.)

OUJI-CR 4-59

HOMICIDE - INTRODUCTION

The defendant is charged with **(murder/manslaughter in the first/ second degree)/(negligent homicide)** of **[name of alleged victim]** on **[date]** in **[name of county]** County, Oklahoma.

Committee Comments

This introductory instruction is appropriate for use with each degree or type of criminal homicide defined by Chapter 24 of Title 21, including the particular types of manslaughter described in sections 712, 713, and 714, and the crime of negligent homicide by a vehicle defined by section 11-903 of Title 47. It merely informs the jury of the crime with which the defendant has been charged and does not specify the basic facts alleged in the information or indictment. The Commission adopted the viewpoint that including details set forth in the indictment or information regarding the means employed to effect death or the place at which the slaying occurred would further no purpose and might serve to confuse the jurors. The name of the victim is included for purposes of convenience. Ordinarily, the victim will be an identified person; however, where proving the identity of the deceased may be difficult, the information can charge the identity as "John Doe" or "Jane Doe."

The instruction specifies only the crime with which the defendant is actually charged and does not name any lesser included offenses upon which the proof adduced in a particular case may warrant an instruction.

(2000 Supp.)

OUJI-CR 4-60

HOMICIDE - CAUSATION

No person may be convicted of **(murder/manslaughter in the first/second degree)/(negligent homicide)** unless **(his/her conduct)/(the conduct of another person for which he/she is criminally responsible)** caused the death of the person allegedly killed. A death is caused by the conduct if the conduct is a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life. **[This conduct may be either an act or a failure to perform a legal duty to the deceased]**.

Notes on Use

The last bracketed sentence in this instruction should be given only where the accused disputes a causal link between his alleged omission and the deceased's death, and the required legal duty of the defendant to act is demonstrated.

Committee Comments

This instruction addresses the issue of causation. It incorporates the concept of the defendant's conduct as a substantial factor in the death, in accordance with Oklahoma cases. *See, e.g., Pettigrew v. State*, 1976 OK CR 228, 554 P.2d 1186; *Chase v. State*, 1963 OK CR 56, 382 P.2d 457;*Pitts v. State*, 53 Okl. Cr. 165, 8 P.2d 78 (1932). It also incorporates the concept of proximate cause, although the language "proximate" or "legal" is intentionally omitted in order to avoid confusing the jurors.

Disputes may arise concerning whether the defendant's conduct or some other, intervening agency "caused" the death, where several factors contribute to the victim's demise, as where the defendant shoots a victim at the verge of death from wounds inflicted by another, or in a proximate-cause sense, *see, e.g., Pettigrew v. State*, *supra*, or as exemplified by the common law "death within a year and a day" rule. The tort concept of proximate cause, that the consequences of the defendant's conduct occur as a "natural and probable result" of such conduct, is not reflected in homicide cases, which require that the injury inflicted be "dangerous," and be "calculated to destroy or endanger life." *Pettigrew*, *supra*, 1976 OK CR 228, ¶ 27, 554 P.2d at 1193, *quoting* 40 C.J.S. Homicide § 11c. The instruction makes no reference to "calculated," since the various homicide statutes define the requisite intent with which the conduct must be performed in order to constitute an offense.

In cases where the defendant does not dispute that certain conduct alleged forms the legal cause of the victim's death, but claims instead that he is not the perpetrator of the crime, or where the defendant admits that his conduct legally caused the death, but urges that such conduct establishes only a lesser included offense or raises an affirmative defense, the general causation instruction is superfluous and potentially confusing, and should not be given.

A prosecution for homicide may be premised upon failure to discharge a duty to the deceased placed by law upon the accused. This duty must be one related to the maintenance of life, and failure to perform this duty, accompanied by proof of the necessary mental state, must have the effect of shortening the life of the deceased within legal principles of causation. W. LaFave & A. Scott, *Criminal Law* § 190 (1972); R. Perkins, *Criminal Law* 602-04 (2d ed. 1969). Nonperformance of a duty as a basis for a homicide prosecution, however, is possible only where there is a duty to act imposed by law, such as that which exists between spouses or between parents and children. Unless there is a legal duty to the deceased incumbent upon the defendant, there can be no criminal responsibility for failure to act. For example, an expert swimmer who becomes aware that a child is drowning in a swimming pool cannot be prosecuted for homicide in the

event that the child drowns, unless the swimmer is the child's parent or legal guardian or is under some other duty to act, and the necessary proof of the swimmer's mental state in failing to act is adduced.

(2000 Supp.)

OUJI-CR 4-61

MURDER IN THE FIRST DEGREE

WITH MALICE AFORETHOUGHT - ELEMENTS

No person may be convicted of murder in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, the death was unlawful;

Third, the death was caused by the defendant;

Fourth, the death was caused with malice aforethought.

OUJI-CR 4-62

MURDER IN THE FIRST DEGREE -

DEFINITION AND EXPLANATION OF MALICE AFORETHOUGHT

"Malice aforethought" means a deliberate intention to take away the life of a human being. As used in these instructions, "malice aforethought" does not mean hatred, spite or ill-will. The deliberate intent to take a human life must be formed before the act and must exist at the time a homicidal act is committed. No particular length of time is required for formation of this deliberate intent. The intent may have been formed instantly before commission of the act.

[If you find that **[Name of Defendant]** deliberately intended to kill **[Name of Intended Victim]**, and by mistake or accident killed **[Name of Actual Victim]**, the element of malice aforethought is satisfied even though **[Name of Defendant]** did not intend to kill **[Name of Actual Victim]**. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.]

Notes on Use

This instruction must be given in every prosecution for murder in the first degree with malice aforethought. The last paragraph of the instruction should be given only if the alleged intent of the defendant was to kill a person other than the deceased.

OUJI-CR 4-63

MURDER IN THE FIRST DEGREE -

PROOF OF MALICE AFORETHOUGHT

The external circumstances surrounding the commission of a homicidal act may be considered in finding whether or not deliberate intent existed in the mind of the defendant to take a human life. External circumstances include words, conduct, demeanor, motive, and all other circumstances connected with a homicidal act.

Statutory Authority: 21 O.S. 1991, § 701.7.

Notes on Use

This instruction must be given in every prosecution for murder in the first degree with malice aforethought.

Committee Comments

The Death of a Human. Homicide is defined in section 691 of Title 21 as "the killing of one human being by another." An unborn fetus that is viable at the time of injury is a "human being" and therefore may be the subject of a homicide. *Hughes v. State*, 868 P.2d 730, 731 (Okl. Cr. 1994).

The Death was Unlawful. The second element states the statutory requirement that the taking of life be done "unlawfully." Section 711(2) and sections 731 and 733 of Title 21 raise the same issue. The absence of legal justification for the homicide distinguishes a killing for which the defendant may be criminally culpable from a killing for which the defendant may not be so liable, for, as the court stated in *Smith v. State*, 59 Okl. Cr. 111, 115, 56 P.2d 923, 925 (1936), "[e]ven a justifiable homicide may be premeditated." Omission of this element thus makes indistinguishable criminal homicide from homicide which the law excuses.

The Court of Criminal Appeals ruled that omission of this element of lack of legal justification in a jury charge was reversible error in *Green v. United States*, 2 Okl. Cr. 53, 101 P. 112 (1909), wherein self-defense was raised as a defense to a charge of murder. The court noted regarding the erroneous instruction:

> This definition entirely overlooks the fact that a killing may be intentional and yet not malicious. If the thought "I will kill" precedes the act, it may properly be characterized as aforethought but not "malice aforethought". This charge practically withdraws from the jury the right to convict the defendant of manslaughter or to acquit. The defendant's own testimony showed that before he fired, the thought "I will kill" was actively controlling his conduct; so that if the jury believed his testimony, and followed the instructions of the court, there was nothing left but to convict him of the charge of murder.

at 61-62, 101 P. at 114.

Analogous is the more frequently litigated situation where an instruction concerning manslaughter in the first degree omits the corresponding statutory language of section 711(2): "unless committed under such circumstances as constitute excusable homicide or justifiable homicide." The court reversed a conviction for first degree manslaughter under an instruction omitting this phrase from the definition of the crime in *Anderson v. State*, 90 Okl. Cr. 1, 209 P.2d 721 (1949). Submission of an instruction on justifiable homicide was held ineffectual in cure of this error. *See also Lee v. State*, 96 Okl. Cr. 170, 250 P.2d 883 (1952) (instruction omitting element of unlawfulness disapproved, but error cured by later instruction).

It is well settled that, in a case where the defendant has affirmatively raised as a defense that the homicide was

justifiable, omission of the element of unlawfulness from the instruction regarding those elements which the State must prove in order to establish its case would constitute reversible error. Once the defendant has adduced evidence sufficient to raise a reasonable doubt regarding guilt, the burden of presenting evidence to negate that defense beyond a reasonable doubt devolves upon the State. *See, e.g., Saulsbury v. State*, 83 Okl. Cr. 7, 172 P.2d 440 (1946).

The more difficult issue involves those cases wherein the defendant offers no evidence that the homicide was lawful or justifiable. Without question, the rule is that the State need not produce evidence negating all possible defenses to the crime in order to warrant conviction. In this regard, 22 O.S. 1991, § 745 provides:

> Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

A series of Oklahoma cases accord with this provision, stating that, in order to establish a prima facie case of murder, the prosecution is required to prove only two facts: death of the deceased; and that the deceased was slain by the defendant. *See, e.g., Thompson v. State*, 365 P.2d 834 (Okl. Cr. 1961); *Sawyer v. State*, 94 Okl. Cr. 412, 237 P.2d 167 (1951); *Saulsbury v. State*, *supra*; *Hawkins v. United States*, 3 Okl. Cr. 651, 108 P. 561 (1910). The question then becomes whether inclusion of lack of justification as an element of proof conflicts with this settled precedent. The answer is negative. The constitutional validity of this statute, read literally, might be open to question in light of United States Supreme Court pronouncements. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). However, the Court of Criminal Appeals has expressly denominated the law as merely a statement of trial procedure and has rejected the contention that it constitutes a pronouncement of substantive law sufficient to overcome fundamental conceptions regarding the rights of an accused as pertaining to burdens of proof or presumptions of innocence. *Meadows v. State*, 487 P.2d 359 (Okl. Cr. 1971).

Thus, since the statutory requirement that homicide be committed "unlawfully" embodies an essential element of the crime which must be proved beyond a reasonable doubt, it is one upon which the jury must be instructed. *Turner v. State*, 4 Okl. Cr. 164, 111 P. 988 (1910); *Green v. United States*, *supra*.

Absence of legal justification may be established by permissible inferences from the facts proven by the State, and by the existence of the other essential elements of the crime. *See People v. Loggin*, 23 Cal. App. 3d 603, 100 Cal. Rptr. 528 (1972). Therefore, while the jury may be instructed where appropriate that it may infer from all the circumstances surrounding the slaying that it was done without justification or mitigation, lack of justification must also be presented in instructional form as an element to be proved by the prosecution.

The Death was Caused By the Defendant: Proximate, or Legal, Cause. The issue of whether the defendant's conduct suffices as the proximate, or legal, cause of death should arise only infrequently, given the fact that specific intent to commit homicide is an element of the offense. Where the defendant deliberately intends to effect death and inflicts grievous bodily harm upon the deceased, the fact that the immediate or contributing cause of the death is some other agency, such as subsequent negligent medical care, *Pettigrew v. State*, 554 P.2d 1186 (Okl. Cr. 1976), does not relieve the defendant of criminal responsibility for murder. The former year-and-a-day rule has been abolished by statute. *See* 21 O.S. Supp. 1995, § 694(B) ("The rule of the common law providing that a death occurring after a year and a day from the date of criminal corporal injury is irrebuttably presumed not to be the result of that injury is abolished.").

In the overwhelming majority of cases, death will have occurred as the natural and probable result of the defendant's act, in the manner he intended, and in a manner which he could reasonably foresee from his performance of that act.

The Death was Caused With Malice Aforethought. Perhaps the most striking feature of section 701.7 is its substitution of the language "malice aforethought," and the statutorily included definition thereof, for the "premeditated design to effect the death" statement of requisite intent which had served as the appropriate definition of necessary mental intent since Oklahoma statehood. The instruction employs the statutory language of section 701.7. But the question regarding legislative intent is obvious: Did the legislature intend to effect a change in the requisite mental state which must be proved in order to warrant conviction for murder in the first degree?

Clearly, proof of mental state establishing an intent to kill constitutes an essential element of the crime of murder in the first degree. *Jewell v.Territory*, 4 Okl. 53, 43 P. 1075 (1896); *Spencer v. State*, 231 Ga. 705, 203 S.E.2d 856 (1974). "Malice aforethought" gradually acquired a settled meaning at common law, encompassing not only specific intent to kill, but also intent to perpetrate serious bodily injury short of death, as well as conduct evincing "a depraved heart." Common law judges parsed "malice aforethought" into categories of "express," covering the first situation, and "implied," roughly covering the last two situations, but all states of mind constituted murder. W. LaFave & A. Scott, *Criminal Law* § 67, at 528-30 (1972); R. Perkins, *Criminal Law* 34-37 (2d ed. 1969). Many American jurisdictions have statutorily adopted this common law definition of murder.

Oklahoma, however, has opted to be among those jurisdictions which have statutorily defined first-degree murder to require a specific intent to kill. Until 1973, Oklahoma did not have degrees of murder. 21 O.S. 1971, § 701 (repealed by Laws 1973, c. 167 § 7, emerg. eff. May 17, 1973). Prior to the adoption of the mens rea requirement of malice aforethought, the requirement of "premeditated design to effect the death" had been defined by the Oklahoma Court of Criminal Appeals as the "mental purpose to take human life," a "formed intent to kill," *Basham v. State*, 47 Okl. Cr. 204, 287 P. 761 (1930), a requisite mental state which "takes the place of the common-law doctrine of express malice aforethought." *Turner v. State*, 8 Okl. Cr. 11, 23, 126 P. 452, 457 (1912) (*quoting Blackstone*). *See also Gatewood v. State*, 80 Okl. Cr. 135, 157 P.2d 473 (1945); *Easley v. State*, 78 Okl. Cr. 1, 143 P.2d 166 (1943); *Kent v. State*, 8 Okl. Cr. 118, 126 P. 1040 (1912). On occasion, the court has utilized the terms "malice" and "premeditated design" as though they were interchangeable. *See, e.g., Morgan v. State*, 536 P.2d 952, 955 (Okl. Cr. 1975), *overruled on other grounds*, *Walton v. State*, 744 P.2d 977, 979 (Okl.Cr. 1987); *Gatewood*, *supra*.

The statutory language of section 701.7 is largely adapted from section 1101 of Title 26, Criminal Code of Georgia (Acts 1968, pp. 1249, 1276), which provides in pertinent part:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

Thus, the Legislature's adoption of only that portion of the Georgia statute which describes "express malice" in its definition of the mental state required to warrant conviction for murder in the first degree accords with the mental state required under the former "premeditated design to effect the death" formulation: specific purpose or formed intent to take human life. Therefore, the Oklahoma Legislature has effectively altered the common law connotations of the mental state described by "malice aforethought," by defining it as to a specific intent to kill.

Section 701.7 omits the word "premeditated" and substitutes instead "aforethought" to describe the timing of the formulation of the requisite intent, raising a question regarding the relationship between this statute and section 703 of Title 21, which has not been repealed, and provides: "A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution."

It is settled law that the term "premeditation" has never been construed in Oklahoma, as it has been in other

jurisdictions, particularly in those wherein murder is divided into degrees, as requiring prior deliberation or "lying in wait" preceding the crime. R. Perkins, *Criminal Law* 88-96 (2d ed. 1969). Rather, "premeditation" describes "a formed intent to kill, and such intent may be formed instantly preceding the act of killing." *Easley*, *supra*, 78 Okl. Cr., at 8, 142 P.2d, at 170. The court in Easley expounded upon the interpretation of the statutory language of section 703 as follows:

> A premeditated design under our law need not be entertained for any appreciable length of time. It may be a design formed instantly before committing the act by which it is carried into execution. The time requisite to constitute premeditated design may not be distinguished from the act of killing, although it may be said to precede the act. Premeditation is an intent before the act of killing. It means entertainment by the mind of a design to kill, and is often defined as "thought of beforehand, any length of time, however short." However, the word "premeditatedly" does not mean "thought of" in the sense of "thought over."

Id. Other cases espousing this construction of the term "premeditated" as it was used in the pre-1973 section 701 include *Jones v. State*, 94 Okl. Cr. 359, 236 P.2d 102 (1951); *Basham v. State*, 47 Okl. Cr. 204, 287 P. 761 (1930); *Harrison v. State*, 18 Okl. Cr. 403, 195 P. 511 (1921); *Wadsworth v. State*, 9 Okl. Cr. 84 130 P. 808 (1913).

The term "aforethought" was accorded a similar construction at common law. Commentators maintain that, although the word "aforethought" was appended to "malice" in very early cases to indicate a plan conceived prior to execution of the fatal act, the emphasis upon the requirement of a well-laid plan diminished with time. R. Perkins, *Criminal Law* 34-35 (2d ed. 1969). Current understanding of "aforethought" requires merely that the intent to slay not be formed as an afterthought. Since the statutory definition of "malice" requires a "deliberate intention" which necessarily negates the notion of afterthought, the "aforethought" limitation is probably a superfluity. However, since the primary development of the state-of-mind requirement for murder has been premised upon this term, retaining it to express the concept facilitates understanding. R. Perkins, *supra*, at 35.

The gravamen of "malice aforethought" is that the intention to slay may be conceived and executed on the spur of the moment. In this regard, then, it appears that no inconsistency with section 703 or existing case law is intended by the substitution of "aforethought" for "premeditated." This conclusion is buttressed by decisions interpreting the Georgia statute upon which section 701.7 is based. *See, e.g., Dixon v. State*, 243 Ga. 46, 252 S.E.2d 431 (1979) ("malice necessary to support a conviction for murder can be formed immediately prior to a slaying; the jury is only required to find that malice existed at the time of the slaying and motivated the act"); *Burnett v. State*, 240 Ga. 681, 242 S.E.2d 79 (1978).

The jury should be instructed regarding formation of the requisite intent, to avoid the possibility that the jurors will view it as requiring a preconceived plan to kill. The language of the instruction tracks that found in section 703 and many Oklahoma cases discussing "premeditation." *See, e.g., Jones v. State*, *supra*; *Easley v. State*, *supra*; *Basham v. State*, *supra*.

Another question is raised by a language change in section 701.7 regarding the problem of toward whom the intent to kill must be directed. The prior murder statute, section 701, articulated the requisite intent as "premeditated design to effect the death of the person killed, **or of any other human being**." The emphasized language raises the unintended-victim situation, where the defendant acts only with the intent to kill A but also (or instead) succeeds in killing B. Through utilization of a legal fiction, defendant would be responsible for the murder of B, the unintended victim. *See generally* W. LaFave & A. Scott, *Criminal Law* §§ 34-35 (1972). Although Oklahoma cases echo the statutory language and therefore refer to an intent to effect the death of "any other human being" in describing mental state, *see, e.g., Kent v. State*, 8 Okl. Cr. 188, 126 P. 1040 (1912), no Oklahoma cases squarely confront the issue of criminal responsibility for the death of an unintended victim.

Assuming that section 701 did embrace the concept that the defendant was criminally responsible for the death

of a person he did not specifically intend to kill, as the language indicates, the wording of section 701.7 is much less clear in this respect. The defendant must, with malice aforethought, cause the "death of another human being," while intending "to take away the life of a human being." The Commission has assumed that this broad statement of requisite intent also encompasses the situation where the defendant slays someone other than the person he intended to kill. The widely recognized theory of responsibility for the death of an unintended victim is sometimes referred to as "transferred intent." *See generally* Am. Jur. 2d *Homicide* § 11. *See also Jones v. State*, 508 P.2d 280, 282 (Okl. Cr. 1973) (approving jury instruction on transferred intent in an assault case). Therefore, the last paragraph is included in the instruction to bring the concept to the jurors' attention where appropriate. **Obviously, in the absence of evidence that the defendant's intent was in fact to kill a person other than the deceased, this paragraph should be omitted from the instruction.**

Section 701.7 states that the requisite "malice aforethought" may be "manifested by external circumstances capable of proof," raising an issue regarding the relationship between this articulation of the mode of proof of malice and section 702, which has not been repealed and provides: "A design to effect death is inferred from the fact of a killing, unless such circumstances raise a reasonable doubt whether such design existed."

Proof regarding the motivating forces which impel a person to act is often found only in the circumstances surrounding the commission of the conduct, and the jury should be instructed that it may consider such circumstances in determining whether the accused acted with the requisite intent. However, the mandatory connotation of the language "is inferred" may prove confusing to jurors because it suggests a conclusion that the jury is required to draw where they find that the defendant killed the deceased, unless reasonable doubt is raised by the circumstances. Therefore, this language should be avoided.

In construing this language, Oklahoma cases seem to view the law as allowing a permissive inference. *See, e.g., Jones v. State*, 94 Okl. Cr. 359, 236 P.2d 102 (1951); *Gatewood*, *supra*. However, some cases seem to view the statutory mandate as a nonconclusive presumption regarding the defendant's intent. In *Wadsworth v. State*, *supra*, 9 Okl. Cr., at 93, 130 P. at 811 (1913), the court stated:

> It is also good law and good morals that men are presumed to intend the natural and reasonable consequences of their acts, and that an intention to kill arises from the act of killing, unless the circumstances raise a reasonable doubt whether such design in fact existed.

Accord, *Edwards v. State*, 58 Okl. Cr. 15, 48 P.2d 1087 (1935); *Schmitt v. State*, 57 Okl. Cr. 102, 47 P.2d 199 (1935).

In light of recent United States Supreme Court pronouncements, the constitutional validity of phrasing an instruction in terms that may be interpreted by jurors as raising presumptions regarding intent, or as shifting the burden of persuasion regarding reasonable doubt to defendant, is most questionable. *See, e.g., Sandstrom v. Montana*, *supra*; *Mullaney v. Wilbur*, *supra*. Thus, another reason for disregarding the language of section 702 is presented.

As indicated previously, an instruction should be given regarding proof of malice aforethought in order to forestall the possibility that the jurors will presume the existence of the requisite intent from the fact of the slaying alone.

The nature of circumstances indicative of specific intent to kill obviously varies endlessly from case to case. In *Houck v. State*, 563 P.2d 665 (Okl. Cr. 1977), the deceased was discovered with a towel wrapped tightly around his neck. A physician testified that strangulation was the cause of death, and that it took approximately one to two minutes for the deceased to succumb. The court ruled that these facts would support an inference regarding the defendant's mental state to effect an intentional killing. The nature of the weapon, if any, used to effect death, the conduct of the defendant in going to the scene of the homicide armed with a weapon, the relationship between the defendant and the deceased, if any, are among "external circumstances capable of

proof" which may shed light on the defendant's intent. *Wadley v. State*, 553 P.2d 520 (Okl. Cr. 1976); *Gatewood v. State*, *supra*; *Davis v. State*, 237 Ga. 279, 227 S.E.2d 249 (1976). *Cf. Wood v. State*, 486 P.2d 750 (Okl. Cr. 1971) (murder conviction modified to manslaughter where defendant slew deceased by hitting him on the head with a heavy board during a tavern fracas and evidence showed defendant's fear, but no proof of motive or that defendant sought out, or even knew, deceased).

The instruction merely informs the jury that surrounding circumstances may be taken into account in determining whether the defendant harbored the necessary malice aforethought. Terms such as "infer," "imply," or "presume" were rejected by the Commission in order to avoid the potential difficulties raised earlier in the Commission Comment discussing section 702.

OUJI-CR 4-64

MURDER IN THE FIRST DEGREE
BY FELONY MURDER - ELEMENTS

No person may be convicted of murder in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, the death occurred as a result of an act or event which happened in the defendant?s **commission/(attempted commission)** of **a/an**

[forcible rape]

[robbery with a dangerous weapon]

[kidnapping]

[escape from lawful custody][1]

[eluding an officer]

[first-degree burglary/arson]

[murder of a person other than the deceased]

[shooting/discharge of a firearm/crossbow with intent to kill a person other than the deceased]

[intentional discharge of a firearm/[specify other deadly weapon] into a dwelling/(building used for business/public purposes)]

[unlawful distributing or dispensing of controlled dangerous substances/(synthetic controlled substances)]

[trafficking in illegal drugs];

[(manufacturing)/attempting to manufacture) a controlled dangerous substance)];

Third, the elements of the crime of

[forcible rape]

[robbery with a dangerous weapon]

[kidnapping]

[escape from lawful custody] [1]

[eluding an officer]

[first-degree burglary/arson]

[murder of a person other than the deceased]

[shooting/discharge of a firearm/crossbow with intent to kill a person other than the deceased]

[intentional discharge of a firearm/[specify other deadly weapon] into a dwelling/(building used for business/public purposes)]

[unlawful distributing or dispensing of controlled dangerous substances/(synthetic controlled substances)]

[trafficking in illegal drugs]

[(manufacturing)/(attempting to manufacture) a controlled dangerous substance)]

that the defendant is alleged to have been in the commission of are as follows:

[Give Elements of Underlying Felony]

Notes on Use

The trial judge should give accomplice and/or coconspirator instructions where appropriate.

Committee Comments

As a result of a 1996 amendment, the felony-murder statute, 21 O.S. 2011, § 701.7(B) covers not only deaths that were actually committed by the person charged with the underlying felony but also deaths that were committed by that person's intended victims, police officers and innocent bystanders. *Kinchion v. State*, 2003 OK CR 28, ¶ 6, 81 P.3d 681, 683.

FOOTNOTES

[1] It must be emphasized that the Oklahoma statutes do not include as a specific crime "An Escape from Lawful Custody." This instruction is appropriate only when the defendant has escaped from a peace officer after being lawfully arrested or detained by such officer, 21 O.S. 2011, § 444, or where the escape is from a penal institution, 21 O.S. 2011, § 443. (See OUJI-CR 6-52 through 6-54.)

(2018 Supp.)

OUJI-CR 4-65

MURDER IN THE FIRST DEGREE
BY FELONY MURDER - IN THE COMMISSION OF DEFINED

A person is in the commission of

[forcible rape]

[robbery with a dangerous weapon]

[kidnapping]

[escape from lawful custody]

[eluding an officer]

[first-degree burglary/arson]

[murder of a person other than the deceased]

[shooting/discharge of a firearm/crossbow with intent to kill a person other than the deceased]

[intentional discharge of a firearm/[specify other deadly weapon] into a dwelling/(building used for business/public purposes)]

[unlawful distributing or dispensing of controlled dangerous substances/synthetic controlled substances]

[trafficking in illegal drugs]

[(manufacturing)/(attempting to manufacture) a controlled dangerous substance)]

when **he/she** is **(performing an act which is an inseparable part of)/(performing an act which is necessary in order to complete the course of conduct constituting)/(fleeing from the immediate scene of) a/an**

[forcible rape]

[robbery with a dangerous weapon]

[kidnapping]

[escape from lawful custody]

[eluding an officer]

[first-degree burglary/arson]

[murder of a person other than the deceased]

[shooting/discharge of a firearm/crossbow with intent to kill a person other than the deceased]

[intentional discharge of a firearm/[specify other deadly weapon] into a dwelling/(building used for business/public purposes)]

[unlawful distributing or dispensing of controlled dangerous substances/synthetic controlled substances]

[trafficking in illegal drugs]

[(manufacturing)/(attempting to manufacture) a controlled dangerous substance)] .

Statutory Authority: 21 O.S. 2011, § 701.7(B).

Notes on Use

This instruction must be given in every prosecution for murder in the first degree by felony murder.

If the predicate felony is an attempted crime, the trial judge should give the appropriate instructions for attempts (OUJI-CR 2-10 to 2-15).

Committee Comments

The first-degree felony-murder statute explicitly negates the requirement of mental state, and is analogous in this respect to the pre-1973 felony-murder statute. An analysis of the elements of first-degree felony murder follows.

Since intent to effect death is not an element of the crime of felony murder, an accused may be found guilty of murder in the first degree where he/she engages in one of the specified felonies, and his/her personal conduct causes death. The instruction encompasses this straightforward situation.

The felony-murder statute states that a person commits murder when that person or another person takes the life of a human during, or if the death of a human being results from, the commission of an underlying felony. The statute was amended in 1996 to cover deaths that occur at the hands of the intended victim of the underlying felony, police officers, or innocent bystanders. *Dickens v. State*, 2005 OK CR 4, ¶ 8, 106 P.3d 599, 601 ("That a police officer killed a codefendant does not relieve Appellant of responsibility for the death."); *Kinchion v. State*, 2003 OK CR 28, ¶ 6, 81 P.3d 681, 683.

Even though a person may be convicted under the felony-murder rule for the acts of an accomplice, he may not be subject to the death penalty unless he was individually culpable for the killing. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987) (requiring "major participation in the felony committed, combined with reckless indifference to human life" for defendant to be subject to the death penalty under the felony-murder rule); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (reversing death penalty where the defendant neither killed, attempted to kill, or intended the killing to take place or the use of lethal force).

The Death Occurred as a Result of an Act or Event Which Happened in the Commission of a Specified Felony. The statute defines murder in the first degree to include killings perpetrated during the course of a number of specified felonies.

The trial court must instruct the jury regarding the elements of the underlying felony with which the defendant is charged.

The trial judge must also instruct the jurors regarding the breadth of the "in the commission of" language, so there is no confusion regarding whether a homicide has been committed "in" the course of committing a felony. Therefore, a separate instruction defining "in the commission of" is included.

It must be noted that the guidance afforded by Oklahoma case law regarding the scope of criminal conduct included within the purview of "in the commission of" indicates a broad reading of this language. In *Clark v. State*, 1977 OK CR 4, 558 P.2d 674, in construing the predecessor first-degree felony-murder rule, the court declared:

> [I]f the homicide is committed during the one, continuous transaction, the acts are so closely connected as to be inseparable in terms of time, place, and causal relation, and the actions tend to be explanatory and incidental to each other, the homicide has been committed during the felony in our statutory sense.

Id. ¶ 16, 558 P.2d at 678. The felony-murder rule was held applicable in that case to the killing of a hostage taken during a bank robbery by the defendants after they had left the bank and placed the deceased and another hostage in a different location. *See also Johnson v. State*, 1963 OK CR 91, 386 P.2d 336, (homicide committed during resistance by defendant after burglary attempt was thwarted by pursuing officers constitutes murder); *Oxendine v. State*, 1960 OK CR 26, 350 P.2d 606 (homicide committed to avoid detection and identification of perpetrators of felony constitutes murder).

A defendant may be convicted of murder under the felony-murder rule even though the defendant does not complete the underlying felony crime. For example, the Oklahoma Court of Criminal Appeals affirmed a murder conviction in *James v. State*, 1981 OK CR 145, 637 P.2d 862, where the fatal injury occurred during the course of an attempted robbery with a dangerous weapon. The court stated: "[T]his Court has concluded that the Legislature intended to include attempted armed robbery in the felony murder statute, just as they intended to include attempted armed robbery in the statute defining armed robbery." *Id.* ¶ 13, 637 P.2d at 865. *See also McDonald v. State*, 1984 OK CR 2, ¶ 8, 674 P.2d 51, 53 (following *James*).

Causation. In a line of cases, the Court of Criminal Appeals has recognized a nexus requirement between the underlying felony and the victim's death in order for the felony murder doctrine to be applicable. *Malaske v. State*, 2004 OK CR 18, ¶ 5, 89 P.3d 1116, 1118; *Wade v. State*, 1978 OK CR 77, ¶ 4, 581 P.2d 914, 916; *Lampkin v. State*, 1991 OK CR 33, ¶4, 808 P.2d 694, 695; *Diaz v. State*, 1986 OK CR 187, ¶ 9, 728 P.2d 503, 509; *Irvin v. State*, 1980 OK CR 70, ¶ 34, 617 P.2d 588, 597. This requirement is satisfied if the defendant's conduct was a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life. See OUJI-CR 4-60, supra.

(2018 Supp.)

OUJI-CR 4-65A

MURDER IN THE FIRST DEGREE INVOLVING

DEATH OF CHILD - ELEMENTS

No person may be convicted of murder in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a child under the age of eighteen;

Second, the death resulted from the willful or malicious **injuring/ torturing/maiming/(using of unreasonable force)**;

[Third, by the defendant.]

OR

[Third, which was willfully **caused/procured**;

Fourth, by the defendant.]

OR

[Third, which was willfully permitted by the defendant;

Fourth, who was responsible for the child's health or safety.]

Statutory Authority: 21 O.S. Supp. 2001, § 701.7(C).

Notes on Use

The definition of "willful" in OUJI-CR 4-39 should be used with this Instruction*Fairchild v. State*, 1999 OK CR 49, ¶ 75, 998 P.2d 611, 626, *Bannister v. State*, 1997 OK CR 69, ¶ 6, 930 P.2d 1176, 1178; *Hockersmith v. State*, 1996 OK CR 51, ¶ 12, 926 P.2d 793, 795.

For the definition of a person responsible for the child's health or safety, see OUJI-CR 4- 40D, *supra.*

Committee Comments

The constitutionality of 21 O.S. 1991, § 701.7(C) as applied to the perpetrator or the perpetrator's accomplice, was upheld in *Drew v. State*, 1989 OK CR 1, ¶¶ 10-16, 771 P.2d 224, 227-28. The Court of Criminal Appeals addressed the statute as applied to a person who willfully permitted the death of the child in *Gilson v. State*, 2000 OK CR 14 , ¶¶ 90-95, 8 P.3d 883, 913-14.

Prior to the addition of section 701.7(C), the Oklahoma Court of Criminal Appeals had ruled that the underlying felony of child abuse could not form the basis for a felony murder conviction because it was not independent of the homicide. *Tucker v. State*, 1984 OK CR 36, ¶ 3, 675 P.2d 459, 461. By enacting section 701.7(C), the Oklahoma Legislature has changed this rule by clearly stating its intention to punish as murder in the first degree the use of unreasonable force upon a child that causes the child's death. *Schultz v. State*, 1988 OK CR 17, ¶ 6, 749 P.2d 559, 561-62.

In *Fairchild v. State*, 1999 OK CR 49, ¶ 51, 992 P.2d 350, 361, the Oklahoma Court of Criminal Appeals decided that the mens rea for child-abuse murder under 21 O.S. Supp. 1999 § 701.7(C) was a general intent to commit the act which causes the injury, rather than a specific intent, and that the general intent was included within the terms "willfully" or

"maliciously."

(2003 Supp.)

OUJI-CR 4-66

DEATH PENALTY PROCEEDINGS --

RETURN OF VERDICT (FIRST STAGE)

If you find beyond a reasonable doubt that the defendant committed the crime of **[Specify Crime Charged]**, you shall return a verdict of guilty by marking the Verdict Form appropriately. If you have a reasonable doubt of the defendant's guilt to the charge of **[Specify Crime Charged]**, or if you find that the State has failed to prove each element of **[Specify Crime Charged]** beyond a reasonable doubt, you shall return a verdict of not guilty by marking the Verdict Form appropriately. The issue of punishment is not before you at this time.

Notes on Use

This instruction should be given along with the other appropriate closing instructions in Chapter 9 at the conclusion of the first stage of a case where the death penalty is sought.

Unless sentence enhancement for prior convictions is sought, bifurcation is appropriate only if the prosecution has filed a bill of particulars alleging aggravating circumstances in order to seek the death penalty. If no bill of particulars is filed, the death penalty is not available and it is error for the trial court to conduct a separate punishment stage. *See Cooper v. State*, 1995 OK CR 22, ¶ 3, 894 P.2d 420, 421-22; *McCormick v. State*, 1993 OK CR 6, ¶ 39, 845 P.2d 896, 902-03. The trial court should use OUJI-CR 10-12 and 10-13, rather than this instruction, where the death penalty is not sought and the case is tried in a single stage.

A Verdict Form to go with this instruction is provided in OUJI-CR 4-67, *infra*.

(2000 Supp.)

OUJI-CR 4-67

DEATH PENALTY PROCEEDINGS --

VERDICT FORM (FIRST STAGE)

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

VERDICT

[COUNT 1 -- [CRIME CHARGED]]

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

_____ Guilty.

_____ Not Guilty.

_____
FOREPERSON

(2000 Supp.)

OUJI-CR 4-68

DEATH PENALTY PROCEEDINGS - INTRODUCTION

The defendant in this case has been found guilty by you, the jury, of the offense of murder in the first degree. It is now your duty to determine the penalty to be imposed for this offense.

Under the law of the State of Oklahoma, every person found guilty of murder in the first degree shall be punished by death, or imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole.

Committee Comments

In *Johnson v. State*, 1996 OK CR 36, ¶ 52, 928 P.2d 309, 320, the Court of Criminal Appeals approved a modification of this Instruction concerning the possibility of parole in order to provide greater clarity. The court stated, however, that it did not require the giving of the Instruction with this modification.

Jurors may ask the judge whether a person who has been sentenced to imprisonment for life without the possibility of parole may ever be released from prison. The Court of Criminal Appeals gave the following advice to trial courts in *Littlejohn v. State*, 2004 OK CR 6, ¶ 11, 85 P.3d 287, 293-94, on how to respond to such requests:

Therefore, in future cases where the jury during deliberations asks, in some form or fashion, whether an offender who is sentenced to life imprisonment without the possibility of parole is parole eligible, the trial court should either refer the jury back to the instructions, *Douglas*, 1997 OK CR 79, ¶¶ 103-04, 951 P.2d at 678, tell the jury that the punishment options are self explanatory, *see Mayes*, 1994 OK CR 44, ¶ 137, 887 P.2d at 1318, or advise the jury that the punishment options are to be understood in their plain and literal sense and that the defendant will not be eligible for parole if sentenced to life imprisonment without the possibility of parole. While arguably the latter response is nothing more than another way of referring the jury back to the instructions, it does force the jury to accept the plain meaning of the sentencing options and impose the sentence it deems appropriate under the law and facts of the case. We recognize trial courts are in the best position to decide which answer is best suited to the situation as the questions posed by juries come in a myriad of forms on this issue. However, we believe the latter explanation may alleviate some obvious concerns of jurors more effectively than simply telling the jury it has all the law and evidence necessary to reach a decision.

(2005 Supp.)

OUJI-CR 4-68A

DEATH PENALTY - MENTAL RETARDATION

You must first determine if the Defendant is mentally retarded as it is defined below. This must be done before deciding what sentence to impose. A Defendant who is mentally retarded cannot be sentenced to death. It is the Defendant's burden to prove by a preponderance of the evidence that **he/she** is mentally retarded. Preponderance of the evidence means more probable than not.

A person is mentally retarded if **he/she** has significantly subaverage general intellectual functioning along with significant limitations in adaptive functioning.

"Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below. An intelligence quotient of seventy (70) or below on an individually administered, scientifically recognized standard intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning. A score on an intelligence quotient test may differ from a person's actual intelligence quotient because of the possibility of measurement error, and you must take into account the standard error of measurement for the test administered in determining the intelligence quotient. "Significant limitations in adaptive functioning" means significant limitations in two or more of the following adaptive skill areas; communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills and work skills.

The onset of the defendant's mental retardation must have been noticeable before the age of eighteen (18) years; however, the intelligence quotient test does not have to have been administered before the age of eighteen (18) years.

In reaching your decision, you must determine:

(1) Does the Defendant have an intelligence quotient of seventy (70) or below?

(2) Does the Defendant have significant limitations in adaptive functions in at least two of the following skill areas: communication; self-care; home living; social skills; community use; self-direction; health and safety; functional academics; leisure skills; and work skills?

(3) Is there evidence that the Defendant's onset of the mental retardation was noticeable before the Defendant was eighteen (18) years of age?

If you unanimously find by a preponderance of the evidence that the answer to each of these questions is yes, then you must find that the Defendant is mentally retarded and so indicate on your verdict form. You must then decide whether the Defendant shall be sentenced to life imprisonment or life imprisonment without the possibility of parole and so indicate on your verdict form.

If you unanimously find that the answer to any of these questions is no, then you must find that the Defendant is not mentally retarded and so indicate on your verdict form. If you either unanimously find that the Defendant is not mentally retarded or you are unable to reach a unanimous decision, you must then consider the remainder of the instructions relating to the death penalty and decide whether the defendant shall be sentenced to life imprisonment, life imprisonment without the possibility of parole, or death.

Statutory Authority: 21 O.S. 2011, § 701.10b(D)

Notes on Use

This instruction should be used if the defendant has raised mental retardation as a bar to a death sentence in accordance with ¶ D of 21 O.S. 2011, § 701.10b and has requested submission of the issue of mental retardation to the jury during the

sentencing phase. The verdict form in OUJI-CR 4-87A should be used with this instruction.

If the jury either determines that the defendant is not mentally retarded or is unable to reach a unanimous decision on mental retardation, the judge should instruct the jury that it may consider evidence of mental retardation as a mitigating factor. See 21 O.S. 2011, § 701.10b(G); OUJI-CR 4-79, *infra*.

Committee Comments

The Supreme Court in *Hall v. Florida*, 134 S.Ct. 1986, 1990 (2014) reversed a death sentence because Florida applied a strict IQ test score cutoff of 70 without taking into account the standard error of measurement on the IQ test. *See id.* at 1994 ("That strict IQ test score of 70 is the issue in this case.").

(2014 Supp.)

OUJI-CR 4-69

DEATH PENALTY PROCEEDINGS - BILL OF PARTICULARS

In the sentencing stage of this trial, the State has filed a document called a Bill of Particulars. In this Bill of Particulars, the State alleges the defendant should be punished by death, because of the following aggravating circumstances:

1. The defendant, prior to this sentencing proceeding, was convicted of a felony involving the use or threat of violence to the person;

2. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment for conviction of a felony;

7. The victim of the murder was a peace officer or guard of an institution under the control of the department of corrections, and such person was killed in performance of official duty; or

8. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Notes on Use

The trial judge should list only the aggravating circumstance(s) that were pleaded and supported by evidence during the penalty stage of the trial.

(2000 Supp.)

OUJI-CR 4-70

DEATH PENALTY PROCEEDINGS -

PRESUMPTION OF INNOCENCE

The defendant has entered a plea of not guilty to the allegations of this Bill of Particulars, which casts on the State the burden of proving beyond a reasonable doubt the existence of one or more aggravating circumstances alleged in this Bill of Particulars.

This Bill of Particulars simply states the grounds upon which the State seeks imposition of the death penalty. It sets forth in a formal way the aggravating **circumstance(s)** of which the defendant is accused. The Bill of Particulars is not evidence that any aggravating **circumstance(s) exist(s)**. You must not be influenced against the defendant by reason of the filing of this Bill of Particulars.

The defendant is presumed to be innocent of the allegations made against **him/her** in the Bill of Particulars. This presumption of innocence continues unless one or more of the aggravating circumstances is proven beyond a reasonable doubt. If, upon consideration of all the evidence, facts, and circumstances in the case, you have a reasonable doubt of the existence of each and every aggravating circumstance alleged in the Bill of Particulars, you must give **him/her** the benefit of that doubt and return a sentence of life imprisonment with the possibility of parole or life imprisonment without the possibility of parole.

(2000 Supp.)

OUJI-CR 4-71

DEATH PENALTY PROCEEDINGS - FELONY MURDER

In determining whether a person found guilty of murder in the first degree shall be punished by death, imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole, you are required to give individualized consideration to the defendant's degree of participation and focus on the defendant's individual culpability in the killing.

You are further instructed that you may not impose the death penalty unless you determine beyond a reasonable doubt that the defendant either: 1) killed a person, 2) attempted to kill a person, 3) intended a killing to take place, 4) intended the use of deadly force, or 5) was a major participant in the felony committed and was recklessly indifferent to human life.

Notes on Use

This instruction shall be used in cases where the death penalty is sought based on the felony-murder rule. It should not be used unless an accomplice or accomplices were involved in the killing. *Stiles v. State*, 1992 OK CR 23, ¶ 32, 829 P.2d 984, 992.

Committee Comments

The United States Supreme Court held in*Enmund v. Florida*, 458 U.S. 782, 797 (1982), that the Eighth Amendment to the United States Constitution does not permit the death penalty to be imposed on a person "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." The *Enmund* decision was followed by *Tison v. Arizona*, 481 U.S. 137 (1987), in which the United States Supreme Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. at 158.

The above instruction is similar to one that the Oklahoma Court of Criminal Appeals determined satisfied constitutional standards in *Williamson v. State*, 1991 OK CR 63, ¶¶ 73-74, 812 P.2d 384, 402.

(2000 Supp.)

OUJI-CR 4-72

DEATH PENALTY PROCEEDINGS - AGGRAVATING CIRCUMSTANCES

You are instructed that, in arriving at your determination of punishment, you must first determine whether any one or more of the following aggravating circumstances exists beyond a reasonable doubt:

1. The defendant, prior to this sentencing proceeding, was convicted of a felony involving the use or threat of violence to the person;
2. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
7. The victim of the murder was a peace officer or correctional employee of an institution under the control of the Department of Corrections, and such person was killed in performance of official duty; or
8. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Notes on Use

The trial judge should list only the aggravating circumstance(s) upon which proof has been offered by the State during the second-stage proceeding and of which the defendant was notified prior to trial.

Committee Comments

The Court of Criminal Appeals modified Paragraph 1 of this instruction in *McCarty v. State*, 1999 OK CR 18, ¶ 6, 977 P.2d 1116, 1141.

2012 SUPPLEMENT

OUJI-CR 4-73

DEATH PENALTY PROCEEDINGS -

HEINOUS, ATROCIOUS, CRUEL DEFINED

The State has alleged that the murder was "especially heinous, atrocious, or cruel." This aggravating circumstance is not established unless the State proves beyond a reasonable doubt:

First, that the murder was preceded by either torture of the victim or serious physical abuse of the victim; and

Second, that the facts and circumstances of this case establish that the murder was heinous, atrocious, or cruel.

You are instructed that the term "torture" means the infliction of either great physical anguish or extreme mental cruelty. You are further instructed that you cannot find that "serious physical abuse" or "great physical anguish" occurred unless you also find that the victim experienced conscious physical suffering prior to his/her death.

In addition, you are instructed that the term "heinous" means extremely wicked or shockingly evil; the term "atrocious" means outrageously wicked and vile; and the term "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others.

Committee Comments

The Court of Criminal Appeals has directed trial courts to use this instruction in all future capital murder trials where the State alleges the heinous, atrocious, or cruel aggravator. *DeRosa v. State*, 2004 OK CR 19, ¶ 96, 89 P.2d 1156.

(2005 Supp.)

OUJI-CR 4-74

DEATH PENALTY PROCEEDINGS -

CONTINUING THREAT TO SOCIETY DEFINED

The State has alleged that there exists a probability that the defendant will commit future acts of violence that constitute a continuing threat to society. This aggravating circumstance is not established unless the State proved beyond a reasonable doubt:

First, that the defendant's behavior has demonstrated a threat to society; and

Second, a probability that this threat will continue to exist in the future.

Statutory Authority: 21 O.S. 1991, § 701.12(7).

Notes on Use

This instruction must be given where there is evidence of the continuing threat aggravating circumstance.

Committee Comments

The constitutionality of the aggravating circumstance of "the existence of a probability that the defendant would commit criminal acts of violence that constitute a continuing threat to society" has been upheld by the United States Supreme Court in *Barefoot v. Estelle*, 463 U.S. 880, 896-99 (1983), and by the Oklahoma Court of Criminal Appeals in *Malone v. State*, 1993 OK CR 43, ¶¶ 27-28, 876 P.2d 707, 715-16. The Court of Criminal Appeals analyzed this aggravating circumstance in *Malone* as follows:

> We have held when the State alleges the continuing threat circumstance, it is required to present evidence that the defendant's behavior demonstrated a threat to society and a probability that this threat would continue to exist in the future. [Citations omitted.] The aggravator is not established unless the evidence at trial supports a finding that the defendant will continue to present a threat to society after sentencing. [Citation omitted.] It is, therefore, necessary that the State present sufficient evidence concerning prior convictions or unadjudicated crimes to show a pattern of criminal conduct that will likely continue in the future to support its "continuing threat" contention.
>
> In prior cases in which this Court has upheld the validity of this aggravating circumstance, "continuing threat" was proven through the introduction of Judgments and Sentences showing a history of violent criminal behavior or through the introduction of additional evidence detailing the defendant's participation in other unrelated crimes or both. This Court has also upheld the "continuing threat" aggravator based upon the sheer callousness in which a defendant commits a particular murder. However, each of these cases is readily distinguishable from the instant case.

Id. ¶¶ 38-39, 876 P.2d at 717-18 (footnotes omitted). *See also Lafevers v. State*, 1995 OK CR 26, ¶ 46, 897 P.2d 292, 311 ("The most common grounds for this aggravating circumstance include a history of violent conduct, including unadjudicated offenses, the facts of the homicide of which the defendant was convicted, and other grounds including threats, lack of remorse, attempts to prevent calls for help, testimony of experts, and mistreatment of family members."); *Scott v. State*, 1995 OK CR 14, ¶ 36, 891 P.2d 1283, 1296 ("[The aggravating circumstance of continuing threat to society] can be established through introduction of evidence detailing the defendant's participation in unrelated crimes as well as the sheer callousness with which a defendant commits a particular murder." (footnotes omitted)); *Hooks v. State*, 1993 OK CR 41, ¶ 33, 862 P.2d 1273,

1282 ("[T]he nature and circumstances of the killing itself are sufficient to show a propensity towards future acts of violence."); *Workman v. State*, 1991 OK CR 125, ¶ 25, 824 P.2d 378, 383-84 ("[T]he calloused manner in which a crime is committed may support a finding of a continuous threat.").

The application of these standards in *Malone* resulted in the court's modifying the defendant's death sentence to life imprisonment. The only evidence presented by the prosecution on the continuing threat aggravating circumstance was a 19 year old information charging the defendant with shooting with intent to kill. There was no evidence that the defendant sought out his victim or engaged in any calculated planning that would support a finding that the murder was committed in a particularly brutal or calloused manner. The Oklahoma Court of Criminal Appeals held that the prosecution failed to present sufficient evidence for a rational trier of fact to find the defendant to be a continuing threat to society. *Malone v. State*, 1993 OK CR 43, ¶ 40, 876 P.2d 707, 718. *See also Perry v. State*, 1995 OK CR 20, ¶ 63, 893 P.2d 521, 536-37 (evidence was insufficient to support continuing threat aggravating circumstance because there was no proof of a pattern of criminal behavior).

(2000 Supp.)

OUJI-CR 4-75

DEATH PENALTY PROCEEDINGS - AVOIDING LAWFUL ARREST OR PROSECUTION DEFINED

The State has alleged that "the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution." This aggravating circumstance is not established unless the State has proved beyond a reasonable doubt that:

First, there was another crime separate and distinct from the murder; and

Second, the defendant committed the murder with the intent to avoid being arrested or prosecuted for that other crime.

Statutory Authority: 21 O.S. 1991, § 701.12(5).

Notes on Use

This instruction must be given where there is evidence of the avoiding lawful arrest or prosecution aggravating circumstance.

Committee Comments

The Oklahoma Court of Criminal Appeals analyzed the aggravating circumstance that "the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution" in *Scott v. State*, 1995 OK CR 14, ¶¶ 31-33, 891 P.2d 1283, 1294-95. The Court held: "To support a finding of this aggravating circumstance there must be a predicate crime, separate from the murder, for which the defendant seeks to avoid arrest or prosecution. [Citation omitted.] Central to proof of the predicate crime is the defendant's intent."*Id.* ¶ 32, 891 P.2d at 1294. In *Scott*, the court ruled that this aggravating circumstance was proved by the following circumstantial evidence: 1) the defendant had a motive to rob the decedent; 2) the decedent was last seen with $11 and in the company of the defendant; 3) the defendant said that he had killed the decedent for $11; 4) the defendant had spent a considerable amount of time with the decedent so that he could be identified by him; 5) the defendant set the decedent's truck on fire in an attempt to destroy evidence; and 6) the defendant requested others to fabricate an alibi for him and directed the disposal of the murder weapon. *Id.* ¶ 33, 891 P.2d at 1294-95. In contrast, the Oklahoma Court of Criminal Appeals decided that this aggravating circumstance was not shown in *Barnett v. State*, 1993 OK CR 26, ¶ 30, 853 P.2d 226, 233-34, because the predicate crime of assault and battery was not separate and distinct from the murder, but was instead part of a continuing transaction that culminated in the victim's death.

(2000 Supp.)

OUJI-CR 4-76

DEATH PENALTY PROCEEDINGS -

JURY'S DETERMINATION OF AGGRAVATING CIRCUMSTANCES

Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these instructions.

Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life without the possibility of parole or imprisonment for life with the possibility of parole.

(2000 Supp.)

OUJI-CR 4-77

DEATH PENALTY PROCEEDINGS - CIRCUMSTANTIAL EVIDENCE

The State relies **[in part]** upon circumstantial evidence for proof of the aggravating **circumstance(s)** of **[Specify the Aggravating Circumstance(s) That Is/Are Applicable]** In order to warrant a finding of any aggravating circumstance or circumstances upon circumstantial evidence, each fact necessary to prove the existence of the circumstance must be established by the evidence beyond a reasonable doubt. All of the facts and circumstances, taken together, must establish to your satisfaction the existence of the aggravating **circumstance(s)** beyond a reasonable doubt.

Notes on Use

This instruction may be given when the prosecution relies on circumstantial evidence for proof of an aggravating circumstance. The trial judge shall give OUJI-CR 9-2 through 9-4 along with this instruction.

Committee Comments

This instruction is adapted from former OUJI-CR 804 (currently OUJI-CR 9-5), which was written for cases where circumstantial evidence is used to establish the defendant's guilt. In *Snow v. State*, 1994 OK CR 39, ¶ 33, 876 P.2d 291, 299, the Oklahoma Court of Criminal Appeals found that when circumstantial evidence is used to support an aggravating circumstance, the circumstantial evidence must rule out all other reasonable hypotheses.

The Oklahoma Court of Criminal Appeals has summarized the rules concerning the giving of former OUJI-CR 804 as follows:

1. [O]ne, it is error for the trial court not to instruct the jury, even though no request is made, when all the evidence relied upon is circumstantial;
2. Two, when the evidence is both direct and circumstantial, it is not error to fail to give an instruction when none is requested; and
3. Three, the failure to give an instruction where all of the evidence is circumstantial and no request is made, is not reversible error unless the evidence against the defendant is inherently weak or improbable.

Grimmett v. State, 1977 OK CR 320, ¶ 5, 572 P.2d 272, 274.

In *Harmon v. State*, 2011 OK CR 6, ¶ 57, 248 P.3d 918, 938, the Oklahoma Court of Criminal Appeals held that the reasoning of *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 557, applied to both the first and second stage instructions, and that the reasonable hypothesis test should be removed from OUJI-CR 4-77.

2012 SUPPLEMENT

OUJI-CR 4-78

DEATH PENALTY PROCEEDINGS - JURY'S DETERMINATION OF MITIGATING CIRCUMSTANCES

Mitigating circumstances are 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.

While all twelve jurors must unanimously agree that the State has established beyond a reasonable doubt the existence of at least one aggravating circumstance prior to consideration of the death penalty, unanimous agreement of jurors concerning mitigating circumstances is not required. In addition, mitigating circumstances do not have to be proved beyond a reasonable doubt in order for you to consider them.

Notes on Use

The last paragraph of this instruction addresses the concern noted in *Mills v. Maryland*, 486 U.S. 367, 373-84 (1988), that jurors in a death penalty case might mistakenly think that their instructions precluded them from considering any mitigating circumstance unless they unanimously agreed on its existence. Because the sentencing procedures in the *Mills* case differ from Oklahoma's, the Oklahoma Court of Criminal Appeals has consistently distinguished *Mills* and has ruled that the Oklahoma Uniform Jury Instructions could not reasonably be interpreted to require unanimity regarding mitigating circumstances. *McGregor v. State*, 1994 OK CR 71 , ¶ 41, 885 P.2d 1366 , 1384; *Bryson v. State*, 1994 OK CR 32 , ¶ 61, 876 P.2d 240 , 262. Accordingly, the Court of Criminal Appeals held in *McGregor* and *Bryson*, as well as in other cases, that it is not error for the trial court to not instruct the jury that its findings regarding mitigating circumstances do not have to be unanimous. The Committee has concluded, however, that such an instruction would assist the jury in its deliberations.

Committee Comments

In *Harris v. State*, 2007 OK CR 28, ¶ 26, 164 P.3d 1103 , 1114, 2007 WL 2052612, the Oklahoma Court of Criminal Appeals expressed concern that under the previous version of this Instruction "prosecutors could further argue that evidence of a defendant's history, characteristics or propensities should not be considered as mitigating simply because it does not go to his moral culpability or extenuate his guilt." It suggested modifying this Instruction to "include both (a) that mitigating circumstances may extenuate or reduce the degree of moral conduct or blame, and separately, (b) that mitigating circumstances are those which in fairness, sympathy or mercy would lead jurors individually or collectively to decide against imposing the death penalty." *Id.* at ¶ 27, 164 P.3d at 1114.

(Supp. 2008)

OUJI-CR 4-79

DEATH PENALTY PROCEEDINGS -

CIRCUMSTANCES WHICH MAY BE MITIGATING

Evidence has been introduced as to the following mitigating circumstances:

[the defendant did not have any significant history of prior criminal activity]

[the defendant acted under duress or under the domination of another person]

[the defendant's capacity to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law was impaired]

[the defendant was under the influence of mental/emotional disturbance]

[the victim was a willing participant in the defendant's conduct]

[the defendant acted under circumstances which tended to justify, excuse or reduce the crime]

[the defendant is likely to be rehabilitated]

[cooperation by the defendant with authorities]

[the defendant's age]

[the defendant's character]

[the defendant's emotional/family history]

[evidence of mental retardation]

In addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well.

Notes on Use

The trial court should select the mitigating circumstances listed above that are supported by some evidence. The list of possible mitigating circumstances that the jury may consider is taken from N.M. Stat. Ann. § 31-20A-6. This list is intended to be illustrative, rather than exclusive, and the trial court should instruct the jury on any other mitigating circumstances for which evidence has been introduced.

(1/2007 Supp.)

OUJI-CR 4-80

DEATH PENALTY PROCEEDINGS -

WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances. Even if you find that the aggravating **circumstance(s) outweigh(s)** the mitigating **circumstance(s)**, you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

Committee Comments

In *Paxton v. State*, 867 P.2d 1309, 1322 (Okl. Cr. 1993), the Oklahoma Court of Criminal Appeals stated: "It is sufficient that the jury is instructed to weigh the mitigating and aggravating evidence, and only when the aggravating circumstances clearly outweigh the mitigating may the death penalty be imposed."

The last sentence of this instruction is based on the following statement of the Oklahoma Court of Criminal Appeals in *McGregor v. State*, 885 P.2d 1366, 1384 (Okl. Cr. 1994): "A life sentence may be given notwithstanding a jury finding of aggravating circumstances which outweigh mitigating circumstances, but an instruction on this point is not required."

OUJI-CR 4-81

DEATH PENALTY PROCEEDINGS -

AGGRAVATING CIRCUMSTANCES REDUCED TO WRITING

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the law requires that you reduce such findings to writing by stating specifically what aggravating **circumstance(s)** existed, if any. This finding must be made a part of your verdict.

You must indicate this finding by checking the box next to such aggravating **circumstance(s)** on the appropriate verdict form furnished you, and such verdict form must be signed by your foreperson.

The law does not require you to reduce to writing the mitigating **circumstance(s)** you find, if any.

OUJI-CR 4-82

DEATH PENALTY PROCEEDINGS - CLOSING CHARGE

In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider only the evidence received here in open court presented by the State and the defendant during the sentencing phase of this proceeding.

All the previous instructions given you in the first part of this trial apply where appropriate[, except that in this part of the trial, you may consider sympathy or sentiment for the defendant in deciding whether to impose the death penalty].

You must consider all the previous instructions that apply together with these additional instructions and not just part of them. Together they contain all the law and rules you must follow in deciding this case.

You determine the facts. The importance and worth of the evidence is for you to decide.

I have made rulings during the second part of this trial. In ruling, I have not in any way suggested to you, nor intimated in any way, what you should decide. I do not express any opinion whether or not aggravating circumstances or mitigating circumstances did or did not exist, nor do I suggest to you in any way the punishment to be imposed by you.

You must not use any kind of chance in reaching a verdict, but you must rest it on the belief of each of you who agrees with it.

You have already elected a foreperson. In the event you assess the death penalty, your verdict must be unanimous. You may also return a unanimous verdict of imprisonment for life without the possibility of parole or imprisonment for life with the possibility of parole. Proper forms of verdict will be given you which you shall use in expressing your decision. When you have reached your verdict, all of you in a body must return it into open court.

The law provides that you shall now listen to and consider the further arguments of the attorneys.

Notes on Use

The trial judge shall give the bracketed portion of the second paragraph above only at the request of the defendant.

OUJI-CR 4-83

DEATH PENALTY PROCEEDINGS - DEADLOCKED JURY

If on further deliberation you are unable to agree unanimously as to punishment, I shall discharge you and impose a sentence of imprisonment for life without the possibility of parole or imprisonment for life with the possibility of parole.

Notes on Use

If the jury is unable to reach a verdict within a reasonable time, the judge shall discharge the jury and impose a sentence of imprisonment for life without parole or imprisonment for life. 21 O.S. 1991, § 701.11. This instruction may be used if the jury is unable to reach a verdict within a reasonable time. The Oklahoma Court of Criminal Appeals has determined that whether the jury should be told what the judge would do if the jury did not reach a verdict is a matter for the trial court's discretion. *Ellis v. State*, 867 P.2d 1289, 1301 (Okl. Cr. 1992). *See also Malone v. State*, 876 P.2d 707, 713 (Okl. Cr. 1994) ("[S]uch an instruction is improper because it invites the jury to avoid its difficult duty to pass sentence on the life of an accused."); *Boltz v. State*, 806 P.2d 1117, 1125 (Okl. Cr. 1991) (affirming death penalty where jury was not instructed that the judge would impose a life sentence if the jury did not reach a unanimous decision); *Fox v. State*, 779 P.2d 562, 574 (Okl. Cr. 1989) ("Such an instruction could improperly distract the jury from performing its duty of assessing the sentence.").

If the jury is unable to reach a verdict within a reasonable time, the judge shall discharge the jury and impose a sentence of imprisonment for life without parole or imprisonment for life. 21 O.S. 1991, § 701.11. This instruction should be used only after the judge has decided that the jury in a capital case is deadlocked on the issue of punishment. *Hooks v. State*, 2001 OK CR 1, ¶¶ 30-31, 19 P.3d 294, 311-12.

(2003 Supp.)

OUJI-CR 4-83A

DEATH PENALTY - ALTERNATIVE RESPONSES TO JUROR QUESTIONS ABOUT LIFE WITHOUT POSSIBILITY OF PAROLE

In response to your question about whether a person who is sentenced to life imprisonment without the possibility of parole is parole eligible, you are instructed that **[Select One of the Following Options]:**

You should refer back to the instructions I gave you before;

OR

The punishment options are self explanatory;

OR

You should understand the punishment options in their plain and literal sense, and if **[Name of Defendant]** is sentenced to life imprisonment without the possibility of parole, **he/she** will not be eligible for parole.

Committee Comments

This Instruction is based on the following ruling in *Littlejohn v. State*, 2004 OK CR 6, ¶ 11, 85 P.3d 287, 293-94:

> Therefore, in future cases where the jury during deliberations asks, in some form or fashion, whether an offender who is sentenced to life imprisonment without the possibility of parole is parole eligible, the trial court should either refer the jury back to the instructions, [citation omitted], tell the jury that the punishment options are self explanatory, [citation omitted], or advise the jury that the punishment options are to be understood in their plain and literal sense and that the defendant will not be eligible for parole if sentenced to life imprisonment without the possibility of parole. While arguably the latter response is nothing more than another way of referring the jury back to the instructions, it does force the jury to accept the plain meaning of the sentencing options and impose the sentence it deems appropriate under the law and facts of the case. We recognize trial courts are in the best position to decide which answer is best suited to the situation as the questions posed by juries come in a myriad of forms on this issue. However, we believe the latter explanation may alleviate some obvious concerns of jurors more effectively than simply telling the jury it has all the law and evidence necessary to reach a decision.

(2013 Supp.)

OUJI-CR 4-84

DEATH PENALTY PROCEEDINGS -

VERDICT FORM FOR AGGRAVATING CIRCUMSTANCES

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

We, the jury, empaneled and sworn in the above entitled cause, do upon our oaths unanimously find the following statutory aggravating circumstances or circumstances as shown by the circumstance or circumstances checked:

___ The defendant, prior to the murder, was convicted of a felony involving the use or threat of violence to the person;

___ During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

___ The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

___ The murder was especially heinous, atrocious, or cruel;

___ The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

___ The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

___ The victim of the murder was a peace officer or guard of an institution under the control of the Department of Corrections, and such person was killed in performance of official duty;

___ At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

_____

FOREPERSON

Notes on Use

The jury should receive the following four separate verdict forms on separate pages for death penalty proceedings: OUJI-CR 4-84, 4-85, 4-86, and 4-87.

OUJI-CR 4-85

DEATH PENALTY PROCEEDINGS -

DEATH VERDICT FORM

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

We, the jury, empaneled and sworn in the above entitled cause, do upon our oaths, having heretofore found the defendant, John Doe, guilty of Murder in the First Degree, fix his punishment at death.

_____

FOREPERSON

OUJI-CR 4-86

DEATH PENALTY PROCEEDINGS - LIFE IMPRISONMENT

WITHOUT THE POSSIBILITY OF PAROLE VERDICT FORM

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

We, the jury, empaneled and sworn in the above entitled cause, do upon our oaths, having heretofore found the defendant, John Doe, guilty of Murder in the First Degree, fix his punishment at life in the State Penitentiary without the possibility of parole.

_____

FOREPERSON

_____

Statutory Authority: 21 O.S. 1991, § 701.10.

OUJI-CR 4-87

DEATH PENALTY PROCEEDINGS - LIFE IMPRISONMENT

WITH THE POSSIBILITY OF PAROLE VERDICT FORM

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

We, the jury, empaneled and sworn in the above entitled cause, do upon our oaths, having heretofore found the defendant, John Doe, guilty of Murder in the First Degree, fix his punishment at life in the State Penitentiary with the possibility of parole.

_____

FOREPERSON

_____

Statutory Authority: 21 O.S. 1991 & Supp. 1996, §§ 701.9 - 701.12.

Committee Comments

Although no statutory mandate exists, the Commission has decided that the oral reading of the allegations stated in the Bill of Particulars filed by the State should precede the necessary instructions in a second-stage proceeding resolving the punishment issue in a first-degree murder prosecution. It cannot be emphasized too strongly that, although the allegations of the Bill of Particulars and instruction submitted enumerate all the statutory aggravating factors delineated in 21 O.S. 1991, § 701.12, only those factors upon which proof has been offered by the State during the second stage proceeding and of which the defendant was notified prior to trial should be incorporated. The jury must not be informed of any statutory aggravating factor set forth in section 701.12, absent sufficient proof and prior notice.

The definition of the terms "heinous," "atrocious," and "cruel" is quoted virtually verbatim from the opinion of the Florida Supreme Court in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *quoted with approval in Eddings v. State*, 616 P.2d 1159 (Okl. Cr. 1980).

A decision of the Supreme Court of the United States limits the scope of murder convictions for which the death penalty might be imposed in reliance upon the utter depravity of the crime, as demonstrated by the fourth aggravating circumstance delineated by section 701.12. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the defendant was sentenced to death subsequent to his conviction for the shotgun murders of his wife and mother-in-law on the ground that the offense was, in statutory terms, "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The Court had previously determined this statutory aggravating circumstance to be constitutionally permissible on its face. *Gregg v.*

Georgia, 428 U.S. 153 (1976). In reviewing the application of this statutory standard to defendant's offense, Justice Stewart, writing for a four-Justice plurality, reiterated the holdings of *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, *supra*, that the ultimate penalty may not be imposed where the sentencing procedures relied upon create a substantial risk that the punishment of death might be inflicted in a manner that is arbitrary and capricious.

> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless sentencing discretion." It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance" and that "make rationally reviewable the process for imposing a sentence of death." As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur."

446 U.S. at 428 (citations and footnotes omitted).

The Court determined that the statutory aggravating circumstances were not properly limited by the Georgia courts, in that the defendant's shotgun murders failed to reflect a consciousness materially more depraved than that of any person who commits murder. Thus, "the jury's interpretation of the Georgia statute can only be the subject of sheer speculation." *Id.* at 429. The Court reversed the verdict of death.

Several of the instructions submitted afford the finder of fact guidance in evaluating aggravating, as well as mitigating, factors. Section 701.10 provides that evidence of any of the specific aggravating factors enumerated in section 701.12 may be presented to the jury, provided the defendant has been afforded appropriate notice prior to trial. Section 701.11 provides that the death penalty shall not be imposed unless the jury unanimously finds the existence of at least one of the eight specific statutory aggravating circumstances.

Section 701.11 further provides that the death penalty cannot be imposed if any of the aggravating factors found are outweighed by mitigating circumstances. Section 701.10 (emphasis added), provides that "evidence may be presented as to any mitigating circumstance." This provision has been construed as permitting a defendant to present "any relevant evidence, within the limitations of the rules of evidence, bearing on his character, prior record or the circumstances of the offense." *Chaney v. State*, 612 P.2d 269, 279-80 (Okl. Cr. 1980). Instructions which were substantially similar to those submitted by the Commission were approved in *Chaney* as providing "sufficient guidance to prevent an arbitrary or discriminatory application of the death penalty." *Id.* at 280.

Mitigating factors are not statutorily enumerated, and the jury is not restricted in its determination of mitigating circumstances when deliberating the propriety of the death penalty.

The instruction informing the jury that it is not circumscribed in its consideration of mitigating factors must be given in every ease, regardless of whether the defendant has offered evidence in mitigation.

The verdict form included contains all eight statutory aggravating circumstances. The jury must unanimously find, beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance before it can render a death verdict. However, include only the aggravating circumstance(s) relied on by the State, upon which proof has been offered and which has been made known to the defendant prior to his/her trial.

OUJI-CR 4-87A

DEATH PENALTY - MENTAL RETARDATION VERDICT FORM

IN THE DISTRICT COURT OF THE ____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

VERDICT ON SPECIAL ISSUE OF MENTAL RETARDATION

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

_____ We unanimously find by a preponderance of the evidence that the Defendant is mentally retarded, as defined by the Court's instructions,

_____ We unanimously find that the Defendant is not mentally retarded, as defined by the Court's instructions,

_____ We are unable to unanimously find by a preponderance of the evidence that the Defendant is mentally retarded, as defined by the Court's instructions.

_____
FOREPERSON

_____

Statutory Authority: 21 O.S. Supp. 2006, § 701.10b.

Notes on Use

This Verdict form should be used with OUJI-CR 4-68A.

(1/2007 Supp.)

OUJI-CR 4-87B

LIFE WITHOUT PAROLE PROCEEDINGS - JUVENILES

By your verdict in the first part of this trial you have already found the defendant guilty of the crime of murder in the first degree. You must now determine the proper punishment.

Under the law of the State of Oklahoma, every person found guilty of murder in the first degree shall be punished by imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole.

You are further instructed that **[Defendant]** was a juvenile when this crime was committed. The law regards juvenile offenders generally as having lesser moral culpability and greater capacity for change than adult offenders. An offender's youth matters in determining the appropriateness of the sentence in this case.

You are therefore instructed to consider, in determining the proper sentence, the defendant's youth and youth-related characteristics, the nature of the crime committed, as well as any other circumstances that would justify imposing a higher or lower punishment,

Committee Comments

The Oklahoma Court of Criminal Appeals directed use of a similar Instruction in *White v. State,* 2021 OK CR 29, ¶ 16, 499 P.3d 762, 769-770 The Committee deleted references to mitigating and aggravating circumstances to avoid confusion with death penalty concepts. In *White* the Court of Criminal Appeals provided a nonexhaustive list of factors concerning sentencing in a juvenile LWOP case. *Id.* at ¶¶ 14-15, 499 P.3d 762, 768.

(2024 Supp.)

OUJI-CR 4-87 B-1

LIFE WITHOUT PAROLE PROCEEDINGS - JUVENILE OFFENDER VERDICT FORM

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF
THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

The State of Oklahoma,	)	
Plaintiff,	)	
vs	)	
JOHN DOE,	)	Case No. _____
Defendant.	)	
	)	
	)	
	)	
	)	

VERDICT (SECOND STAGE)

COUNT 1 -- MURDER IN THE FIRST DEGREE

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

Guilty of the crime of Murder in the First Degree and fix punishment at _____.

_____
FOREPERSON

Committee Comments

The Oklahoma Court of Criminal Appeals directed use of this Verdict Form in *White v. State,* 2021 OK CR 29, ¶ 16, 499 P.3d 762, 769-770.

(2024 Supp.)

OUJI-CR 4-87C

LIFE WITHOUT PAROLE PROCEEDINGS -

JUVENILE OFFENDER - CLOSING CHARGE

All the previous instructions given to you in the first part of this trial apply where appropriate, except that in this part of the trial you may consider the defendant's youth and youth-related characteristics, the nature of the crime committed, as well as any other circumstances that would justify imposing a higher or lower punishment.

You must consider all the previous instructions that apply together with these additional instructions and not just part of them. Together they contain all the law and rules you must follow in deciding this case.

The sentencing option of life without the possibility of parole should be understood in its plain and literal sense and that the person sentenced will not be eligible for parole.

You have already elected a foreperson. Proper forms of verdict will be given to you which you shall use in expressing your decision. Any sentence you return must be unanimous. When you have decided on the proper punishment, you shall fill in the appropriate space on the verdict form and return it to the court.

The law provides that you shall now listen to and consider the further arguments of the attorneys.

Committee Comments

This instruction is a modified version of the closing charge for death penalty proceedings in OUJI-CR 4-82. It includes the explanation from *Littlejohn v. State,* 2004 OK CR 6, ¶ 11, 85 P.3d 287, 294, that the punishment option of life without the possibility of parole should be understood in its "plain and literal sense and that the defendant will not be eligible for parole if sentenced to life imprisonment without the possibility of parole." OUJI-CR 10-13B should also be given to explain the operation of the 85% rule for a sentence of life imprisonment with the possibility of parole.

(2024 Supp.)

OUJI-CR 4-87C-1

LIFE WITHOUT PAROLE PROCEEDINGS - JUVENILES - DEFINITIONS

Youth-related characteristics: Youth-related characteristics include, but are not limited to, evidence concerning the defendant's:

(1) chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences;

(2) the incompetencies associated with youth--for example, inability to deal with police officers or prosecutors (including on a plea agreement) or incapacity to assist one's own attorneys; and

(3) whether the circumstances suggest possibility of rehabilitation.

Reference: *White* v. *State,* 2021 OK CR 29, ¶ 15, 499 P.3d 762, 768.

(2024 Supp.)

OUJI-CR 4-88

SOLICITING ANOTHER TO COMMIT

MURDER IN THE FIRST DEGREE - INTRODUCTION

The **defendant(s) is/are** charged with soliciting another to kill **[Name of Alleged Intended Victim]** by committing murder in the first degree on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 4-89

SOLICITING ANOTHER TO COMMIT

MURDER IN THE FIRST DEGREE - ELEMENTS

No person may be convicted of soliciting another to commit murder in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, soliciting;

Second, another;

Third, to kill a human by an act of murder in the first degree;

Fourth, with the intent that the murder be committed;

Fifth, the elements of murder in the first degree are:

[Give OUJI-CR 4-61]

Statutory Authority: 21 O.S. 1991, § 701.16.

OUJI-CR 4-90

SOLICITING DEFINED

Soliciting is urging, requesting or commanding another to commit a criminal act.

Authority: R. Perkins, *Criminal Law*, 582-88; W. LaFave & A. Scott, *Criminal Law* § 58.

Notes of Use

This instruction must be given in every prosecution for soliciting another to commit murder in the first degree.

Committee Comments

The general concepts of common law solicitation are that one must request another to commit a particular crime, such as murder in the first degree. If the person asked refuses the request, the defendant is guilty of criminal solicitation. The asking or request is the only actus reus necessary for the crime. However, if the person asked commits the murder, both the perpetrator and the defendant are guilty of murder in the first degree. The defendant would be a principal under 21 O.S. 1991, § 172. Of course, both could also be guilty of conspiracy. See OUJI-CR 2-16 through OUJI-CR 2-22. Be aware that the crime of solicitation merges into the crime c conspiracy, and solicitation would no longer be a proper charge. It could, however, be a lesser included offense. The defendant could not be convicted of both conspiracy and solicitation.

If the person asked agrees, and attempts to commit the murder and fails, the proper charges would be assault with intent to kill and conspiracy. However, if the person asked agrees to kill the intended victim and only completes a preparatory act toward the killing, the only proper charge against the perpetrator and the defendant would be conspiracy.

The solicitation may be made through a writing as well as orally. It also is not necessary that the solicitation be to a particular individual. It may be a request made to a specific group of persons on one occasion, i.e., during a speech. See W. LaFave & A. Scott, *Criminal Law* § 58, 419-20.

It is further generally recognized that there may be an attempted solicitation, such as in the case of a written request which never reached the addressee.

The Oklahoma Court of Criminal Appeals held in *Martin v. State*, 1988 OK CR 241, ¶ 9, 763 P.2d 711, 713, that a person could be prosecuted under 21 O.S. § 701.16 if the solicitation occurred in Oklahoma, even though the murder was to take place outside of Oklahoma. *See also Martin v. Kaiser*, 907 F.2d 931, 934 (10th Cir. 1990) (affirming denial of petition for writ of habeas corpus).

(2000 Supp.)

OUJI-CR 4-91

MURDER IN THE SECOND DEGREE

BY IMMINENTLY DANGEROUS CONDUCT - ELEMENTS

No person may be convicted of murder in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, caused by conduct which was imminently dangerous to **another/other person(s)**;

Third, the conduct was that of the **defendant(s)**;

Fourth, the conduct evinced a depraved mind in extreme disregard of human life;

Fifth, the conduct is not done with the intention of taking the life of any particular individual.

You are further instructed that a person evinces a "depraved mind" when he engages in imminently dangerous conduct with contemptuous and reckless disregard of, and in total indifference to, the life and safety of another.

You are further instructed that "imminently dangerous conduct" means conduct that creates what a reasonable person would realize as an immediate and extremely high degree of risk of death to another person.

Committee Comments

In *Willingham v. State*, 1997 OK CR 62, ¶¶ 23, 24, 947 P.2d 1074, 1081 (*overruled on other grounds*, *Shrum v. State*, 1999 OK CR 41, n.8, 991 P.2d 1032, 1036), the Oklahoma Court of Criminal Appeals approved the above Instruction. *Willingham* overruled *Palmer v. State*, 1994 OK CR 16, ¶ 12, 871 P.2d 429, 432-33, which had included the words "or harming" immediately after "life" in the Fifth Element. The Court of Criminal Appeals held in *Willingham* that the existence of an intent to harm a particular individual would not preclude a conviction for second degree murder under 21 O.S. 1991, § 701.8. The historical background of Oklahoma's second degree murder statute is described below.

Section 701.8 substantially re-enacted subsection 2 of the pre-1973 murder statute, 21 O.S. 1971, § 701. The few cases construing the former subsection 2 make it clear that, where the defendant's conduct was directed toward or created a great risk to a particular individual, this statute was inapplicable. If the defendant intended to kill the individual imperiled, his conduct constituted "premeditated design" murder under section 701(1). If the defendant formed no purpose to kill the endangered person, but intended rather grievously to injure him, the defendant could not be found guilty of murder. *Tarter v. State*, 1961 OK CR 18, 359 P.2d 596;*Fry v. State*, 91 Okl. Cr. 326, 218 P.2d 643 (1950).

The Court articulated the quintessential interpretation of subdivision 2 of section 701 in *Jewell v. Territory*, 4 Okl. 53, 43 P. 1075, 1078 (1896) (emphasis added):

> The class of cases intended to be covered by this subdivision is where the acts by which the homicide is perpetrated *are directed against no particular person, but against a number of persons generally, or where the act is imminently dangerous to a number of persons but directed against none*, - as when one rides a vicious horse into a crowd of persons with no intent to injure any person, but with a reckless disregard of human life; or, where one throws a heavy stone into a crowded street, or blows up a building with dynamite, knowing there are persons in the building, but with no design to kill anyone, but only with an intent to destroy the building. There are other cases that come within this class, but we use these as illustrations. And the statute has no

> application to a case where the act causing death is directed against some particular person, for then, if it is done with design to effect death, it comes within the class embraced within the first subdivision; or, if there is no premeditated design to effect death, then it is either one of the degrees of manslaughter, or justifiable, or excusable homicide.

See also Gibson v. State, 1972 OK CR 249, 501 P.2d 891;*Ex parte Finney*, 21 Okl. Cr. 103, 205 P. 197 (1922).

In *Gibson v. State*, 1970 OK CR 171, 476 P.2d 362, the defendant was being transported as a passenger in a vehicle driven by a deputy sheriff. The defendant lunged across the front seat, grabbed the steering wheel, and caused the automobile to swerve across the center line and collide with an oncoming vehicle. The deputy was killed, and the defendant was convicted of murder under section 701(2). In affirming the conviction, the Court observed:

> A logical modernization of the 1896 example of riding a horse into a crowded street would be "steering one's speeding vehicle into the oncoming path of another speeding vehicle." The resulting injuries which are sure to follow from such a dangerous act evince a depraved mind and fall well within the pertinent provision of the statute. We are of the opinion, and therefore hold, that when, as in the instant case, it appears that a passenger in a motor vehicle seizes control of the steering wheel from the driver and steers said vehicle into the path of oncoming traffic, and a collision occurs resulting in the death of one or more occupants of two of the colliding vehicles, such evidence supports conviction under the provisions of 21 O.S. § 701, subsection 2.

Id. ¶ 10, 476 P.2d at 365.

However, pre-1973 interpretation of the depraved-mind murder statute does not limit the application of section 701.8 because of the significance of a minute language change effected by the legislature in enacting section 701.8. As noted in *Jewell*, subdivision 2 of section 701 employed the phrase "imminently dangerous to others," clearly connoting recklessness and depravity of spirit to the degree that society at large or, at least, numerous persons were endangered by the defendant's conduct. Section 701.8, by utilizing the terminology "imminently dangerous to another person" apparently effectuates a substantial alteration in the law of murder. If the defendant intends only to inflict grave injury, but not death, upon a particular individual, or "another person" in statutory terms, his conduct, which would constitute manslaughter and would not be included under the old section 701(2), may be encompassed within the literal language of section 701.8. For example, assume the defendant wishes to injure the victim, but harbors no desire to inflict death upon him. The defendant aims a gun at the victim's ankles, but, because he is a poor marksman, the defendant's shot strikes the victim in the back, and he dies. Although the former section 701(2) would denominate this crime manslaughter, at common law, as well as in many jurisdictions today, the defendant's act would constitute murder so long as the defendant formed an intent to do great bodily injury to the deceased and circumstances constituting mitigation, justification, or excuse were absent. W. LaFave & A. Scott, *Criminal Law* § 69, at 540-41 (1972); R. Perkins, *Criminal Law* 36 (2d ed. 1969).

The alteration of the language of the former section 701(2) from "imminently dangerous to others" to "imminently dangerous to another person" changed the law in Oklahoma. An accused may be convicted for second-degree murder under section 701.8 when his/her conduct evinces a depraved mind because it creates grave risk of serious bodily injury to a number of persons, in accordance with existing Oklahoma law. *Gibson*, *supra*; *Jewell*, *supra*. However, section 701.8 broadens Oklahoma law so that it also includes the common law concept that an "intent to do serious bodily injury" which impelled conduct by the defendant that resulted in death was sufficient to constitute murder. At common law, malice aforethought included not only a specific intent to take human life, express malice, but also an intent to perpetrate great bodily injury short of death, as well as conduct evincing a depraved mind, implied malice. Section 701.8 is not phrased in terms of malice. However, the intent to injure greatly, but not to kill, another person which is carried out by the accused through conduct that causes

the person's death is conduct that is, in the language of the statute, "imminently dangerous to another person."

Thus, section 701.8 changed the result of *Tarter v. State*, *supra*, where the accused inflicted gunshot wounds on the deceased which caused his death, but without any intent to take his life. The Court of Criminal Appeals reversed the conviction for murder in *Tarter* and held that, where a reasonable doubt exists as to whether the accused harbored a specific intent to inflict death upon the victim, the jurors must be instructed on the elements of first-degree manslaughter, since a murder conviction under the former section 701(1) could not be sustained without proof of the accused's "premeditated design to effect death," and section 701(2) was made inapplicable to these facts by *Jewell*, *supra*. However, under the current statute, shooting the deceased with the intent to greatly injure the deceased amounts to conduct "imminently dangerous to another person," and an accused, in the opinion of the Commission, could be convicted of second-degree murder under section 701.8.

In principle, it seems as reasonable to term conduct "murder" when it is intended to inflict great bodily injury upon "another person" but succeeds in inflicting death, as it is to determine that conduct is murder when it creates unjustifiable risk to many individuals even without the defendant specifically intending to do so. The latter conduct characterizes depraved mind murder. Both are instances where the common law concept of implied malice would apply.

It is further the opinion of the Commission that, since the intent to inflict great bodily injury is sufficient to constitute "implied malice" only if there is no justification, excuse, or mitigation, R. Perkins, *Criminal Law* 36 (2d ed. 1969), the rule of provocation generally associated with manslaughter must be available as a means of mitigating the homicide from murder in the second degree to manslaughter in the first degree. *Id.*; W. LaFave & A. Scott, *Criminal Law* § 69, at 540-41 (1972).

(2000 Supp.)

OUJI-CR 4-92

MURDER IN THE SECOND DEGREE

BY FELONY MURDER - ELEMENTS

No person may be convicted of murder in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, occurring as a result of an act or event which happened in the commission of a felony;

Third, caused by **[the defendant(s)]/[a person engaged with the defendant(s)]** while in the commission of a felony;

Fourth, the elements of the **[Specify Underlying Felony] defendant(s) is/are** alleged to have been in the commission of are as follows:

[Give Elements of Underlying Felony]

Notes on Use

Accomplice and/or coconspirator instructions should be given where appropriate.

(2000 Supp.)

OUJI-CR 4-93

MURDER IN THE SECOND DEGREE BY FELONY MURDER -

IN THE COMMISSION OF DEFINED

A person is in the commission of **[Specify Underlying Felony]** when **he/she** is performing an act which is an inseparable part of **[Specify Underlying Felony]**, or which is necessary in order to complete the course of conduct constituting **[Specify Underlying Felony]**, or when **he/she** is fleeing from the immediate scene of a/an **[Specify Underlying Felony]**.

Statutory Authority: 21 O.S. 2011, § 701.8.

Committee Comments

The instruction is proposed as a means of focusing the jury's attention upon the two critical elements of felony murder: commission of a felony, and death to the victim as a consequence of the defendant's conduct in committing that crime.

This portion of section 701.8 essentially embodies the language of the pre-1973 felony-murder rule, 21 O.S. 1971, § 701(3). Like section 701(3), section 701.8 does not require that any particular intent or mental state be established in order to convict the defendant of felony-murder. Given the near identity of language, the Oklahoma precedent discussed in relation to first-degree felony murder, holding that all cofelons participating in the felony may be convicted of murder where the conduct of any one of the participants causes death in the commission of the crime, seems fully applicable.

Several points must be emphasized regarding the "any felony" language of section 701.8. First, the Oklahoma Court of Criminal Appeals announced in *Barnett v. State*, 2011 OK CR 28, ¶¶ 10-15, 32, 263 P.3d 959, 963-64, that it would no longer require the precedent felony to be an independent crime that was not included within the resulting homicide, and the Court abandoned the merger doctrine, which previously had restricted the crime of second degree felony murder.

However, an enumerated felony for first degree felony murder cannot serve as the basis for a second degree felony murder charge. *State v. McCann*, 1995 OK CR 70, ¶¶ 7-9, 907 P.2d 239, 241 (affirming demurrer to information charging defendant with second degree felony murder based on felony of unlawful distribution of a controlled dangerous substance).

In addition, the "any felony" language raises the specter of a forger being convicted of murder if he accidentally trips his victim and causes the victim to strike his head and suffer death. Many jurisdictions have circumscribed the scope of the "any felony" rule by judicial decision. *See, e.g., People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130 (1965); *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958). The restriction of the felony-murder rule to those crimes which evince some potential for peril to others is more in accordance with the common law development of the doctrine than it is an unfettered interpretation of the "any felony" provision. Indeed, at common law the felony-murder rule was in fact more narrow and less arbitrary because, at the time the doctrine developed, the few existing felonies were themselves punishable by death. W. LaFave & A. Scott, *Criminal Law* § 71, at 545-48 (1972).

The Oklahoma Court of Criminal Appeals has afforded explicit recognition to this limiting principle. In *Wade v. State*, 1978 OK CR 77, 581 P.2d 914, the defendant committed the felony of possession of a loaded pistol in an establishment where beer or alcoholic beverages were consumed, in contravention of 21 O.S. Supp. 1976, §§ 1272.1 - 1272.2. In affirming the defendant's conviction for felony-murder in connection with the homicide of a woman by the defendant, the Court articulated a requirement which must link the underlying felony to the homicide: "The felony must be inherently or potentially dangerous to human life, inherently dangerous as determined by the elements of the offense

or potentially dangerous in light of the facts and circumstances surrounding both the felony and the homicide." *Id.* ¶ 4, 581 P.2d at 916.

Thus, the Court has adopted an approach to the question of whether the particular felony at issue might form the basis for a felony-murder charge that requires an examination of the circumstances in which the crime was committed, as well as of the crime itself. As an abstract proposition, some felonies, such as burglary or robbery, are inherently dangerous to life, while others, such as larceny or false pretenses, are not. But the facts of the particular case, including the circumstances under which the felony was perpetrated, must be examined in order to determine whether even a nonperilous felony is committed in such a way as to create a potential danger to life.

The determination of the inherent or potential peril to human life engendered by the defendant's conduct must be made by the trial judge. Should he find the felony-murder rule inappropriate as applied to a particular felony, he should not instruct on it. Should he find the felony-murder rule applicable, he must determine which felony or felonies to name and define in the instruction. Note: Due-process requires that any such felony be charged in the information or indictment. *Cole v. Arkansas*, 333 U.S. 196 (1948). If the jury is charged and instructed on the basis of alternative felonies, separate verdict forms should be given in order to determine which felony was committed.

2012 SUPPLEMENT

OUJI-CR 4-94

MANSLAUGHTER IN THE FIRST DEGREE BY MISDEMEANOR-MANSLAUGHTER - ELEMENTS

No person may be convicted of manslaughter in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, occurring as a direct result of an act or event which happened in the commission of a misdemeanor;

Third, caused by **[the defendant(s)]/[a person engaged with the defendant(s)]** while in the commission of a the misdemeanor;

Fourth, the elements of the **[Specify Underlying Misdemeanor] defendant(s) is/are** alleged to have been in the commission of are as follows:

[Give Elements of Underlying Misdemeanor]

Statutory Authority: 21 O.S. 2021, § 711(1).

Notes on Use

Accomplice and/or coconspirator instructions should be given where appropriate. For a definition of "direct result", see OUJI-CR 4-108, *infra*.

Committee Comments

Scope of the misdemeanor-manslaughter rule. The misdemeanor-manslaughter rule, like the felony-murder rule, requires no particular mental state on the part of the defendant except that which is required for conviction of the underlying misdemeanor.

The Oklahoma Court of Criminal Appeals held in *State v. Ceasar,* 2010 OK CR 15, 237 P.3d 792, that any misdemeanor can be used as the underlying offense in a misdemeanor manslaughter charge. In *Ceasar,* the Court overruled the magistrate's sustaining of a demurrer for first degree manslaughter in the commission of a misdemeanor, where the predicate misdemeanor was for driving after revocation of a driver's license. The Court held that because 21 O.S. 2001, § 711(1) "does not distinguish among the type or category of misdemeanor which can be used as the underlying offense in a misdemeanor manslaughter charge," any misdemeanor would satisfy the initial step in charging misdemeanor manslaughter. 2010 OK CR 15, ¶ 10, 237 P.3d at 794. The Court followed *Ceasar* in *State v. Haworth,* 2012 OK CR 12, ¶ 19, 283 P.3d 311, 318 *(overruling Short v. State,* 1977 OK CR 44, 560 P.2d 219).

Proximate Cause. The broad range of conduct defined as violative of the criminal law, and thus constituting misdemeanor offenses, renders the misdemeanor-manslaughter rule, on its face, one of virtually unlimited application, appropriate to any instance where death ensues while the defendant is engaged in perpetration of a misdemeanor. For example, convictions for manslaughter in the first degree have been found appropriate where the defendant's underlying unlawful act was carrying a gun, *Welborn v. State,* 70 Okl. Cr. 97, 105 P.2d 187 (1940), or disciplining a child to the extent of committing assault and battery, *Campbell v. State,* 1976 OK CR 32, 546 P.2d 276.

The Court of Criminal Appeals, however, has circumscribed applicability of the doctrine by requiring that the offense the defendant was engaged in when death ensued must be the "direct and proximate cause" of the homicide. *Logan v. State,* 42 Okl. Cr. 294, 298, 275 P. 657, 658 (1929). In *Logan,* the seminal case, the

Court affirmed the defendant's conviction for manslaughter in the first degree where the homicide with which the defendant was charged ensued while the defendant was driving at an unlawful rate of speed and in an intoxicated state. The Court reasoned that "[c]ertainly, the commission of a misdemeanor in no way connected with the death is not what is meant by the law." *Id.* at 295, 275 P. at 658. Examples cited by the Court where proximate cause would be absent were situations where the defendant unintentionally and otherwise without culpability struck and killed a person while driving without a vehicle tag, or struck and killed a person who had intentionally thrust himself into the path of the defendant's automobile while the defendant was driving at an excessive rate of speed.

This restriction, that the offense relied upon as a predicate for misdemeanor-manslaughter must directly and proximately cause the homicide, has been reiterated and adhered to in subsequent cases. *Ruth* v. *State,* 1978 OK CR 79, 581 P.2d 919; *Nickelberry* v. *State,* 1974 OK CR 81, 521 P.2d 879; *Lime v. State,* 1973 OK CR 178, 508 P.2d 710; *Gallaway v. State,* 1971 OK CR 507,492 P.2d 368; *Chase v. State,* 1963 OK CR 56, 382 P.2d 457. However, these cases also specify that omission of a proximate-cause instruction in a case where death is clearly the result of the defendant's unlawful act is not reversible error.

The Court has also stated that the instruction given need not be in any particular language, so long as it adequately informs the jurors of the necessity of finding a causal link. The Commission is reluctant to insert the term "proximate" or "legal" in the instruction, and has substituted "direct result" as a description of the necessary causal connection.

In *State v. Ceasar,* 2010 OK CR 15, 237 P.3d 792, the Oklahoma Court of Criminal Appeals overruled the magistrate's sustaining of a demurrer for first degree manslaughter in the commission of a misdemeanor, where the predicate misdemeanor was for driving after revocation of a driver's license. The Court decided that the misdemeanor for driving after revocation of a driver's license satisfied the proximate cause requirement for application of the misdemeanormanslaughter rule, because the defendant's driving after revocation of his driver's license was a substantial factor in bringing about the victim's death. *Id.* ¶13, 237 P.3d at 795.

It should be observed that the Court's treatment of this question of causation and inherent nature of the offense is the converse of its resolution of the question in the felony-murder context, where, as discussed in the Committee Comments pertaining to first- and second-degree felony-murder, the Court has determined that the inherently or potentially dangerous nature of the underlying felony must be established, but that proximate cause need not be demonstrated. *Wade v. State,* 1978 OK CR 77, 581 P.2d 914.

"In the commission of." Although the Commission has recommended that the trial judge instruct the jurors regarding the breadth of the "in the commission of' language as embodied in the felony-murder statutes, it is the Commission's position that the proximate cause requirement, emphasized by use of the term "direct result" in the instruction, renders such an instruction superfluous in the misdemeanor-manslaughter context. The Commission has found no Oklahoma cases addressing this precise point.

Accomplice responsibility. Oklahoma precedent clearly provides that a person engaged in the commission of an inherently or potentially dangerous felony is culpable for murder where death ensues, regardless of whether he or a cofelon actually performs the slaying. Prior to the enactment of the current murder statutes, the Court of Criminal Appeals indicated that a felony-murder conviction might be sustained even where the slaying was performed by a police officer while the defendant was perpetrating a felony. *See Johnson v. State,* 1963 OK CR 91, 386 P.2d 336. The issue raised in the misdemeanor-manslaughter context is whether a similar result of accomplice responsibility obtains. The Commission has concluded that it does. The common law foundations for the misdemeanor-manslaughter rule justify accomplice responsibility for homicide. The historical limitation of the doctrine's applicability to situations where the underlying offense is malum in se was intended to punish the defendant for homicide whenever conduct in which he engages poses a peril to the lives and safety of others. R. Perkins, Criminal Law 73-79 (2d ed. 1969).

However, strict application of the proximate-cause requirement, which is the prevailing rule in Oklahoma, makes it difficult to conjure up a hypothetical situation where the defendant's conduct would be deemed the direct and proximate cause of the consequent death unless the defendant himself performed the slaying.

(2024 Supp.)

OUJI-CR 4-95

MANSLAUGHTER IN THE FIRST DEGREE

BY HEAT OF PASSION - ELEMENTS

No person may be convicted of manslaughter in the first degree by heat of passion unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, caused by the **defendant(s)**;

Third, the death was not excusable or justifiable;

Fourth, the death was inflicted in a cruel and unusual manner;

Fifth, when performing the conduct which caused the death, **defendant(s) was/were** in a heat of passion.

OR

Fourth, the death was inflicted by means of a dangerous weapon;

Fifth, when performing the conduct which caused the death, **defendant(s) was/were** in a heat of passion.

Statutory Authority: 21 O.S. 1991, § 711(2).

Committee Comments

See Brown v. State, 1989 OK CR 33, ¶¶ 5-8, 777 P.2d 1355, 1357-58 (heat of passion is required for manslaughter in the first degree by dangerous weapon); *Camron v. State*, 1992 OK CR 17, ¶ 6, 829 P.2d 47, 51 (Okl. Cr. 1992).

Former OUJI-CR 4-96 has been incorporated into this instruction.

(2000 Supp.)

OUJI-CR 4-95A

MURDER IN THE FIRST DEGREE – DEFENSE OF HEAT OF PASSION

A person who kills another person in the heat of passion cannot have the deliberate intent required for murder in the first degree. Thus, malice aforethought and heat of passion cannot co-exist.

Notes on Use

This instruction should be given if the defendant has raised heat of passion manslaughter as a defense to murder in the first degree and evidence supporting this defense has been introduced at trial. In cases where heat of passion manslaughter has been charged as a lesser included offense to murder in the first degree, the trial court should also give OUJI-CR 10-23 and 10-24 relating to lesser included offenses and the appropriate jury instructions on murder in the first degree in OUJI-CR 4-61 through 4-63 and heat of passion manslaughter in OUJI-CR 4-95 and 4-97 through 4-101. This instruction should be given after the heat of passion manslaughter instructions.

Committee Comments

The Oklahoma Court of Criminal Appeals noted in *Hogan v. State*, 2006 OK CR 19, ¶ 45, n. 14, 139 P.3d 907, 925 n. 14, and *Black v. State*, 2001 OK CR 5, 21 P.3d 1047, 1067 n. 17, that more specific jury instructions on the relationship between murder in the first degree and heat of passion manslaughter may be desirable. *See also United States v. Lofton*, 776 F.2d 918, 921-22 (10th Cir. 1985) (reversing murder conviction because the jury instructions did not specifically distinguish heat of passion and malice "as inconsistent mental states or inform the jury that finding one necessarily precluded finding the other").

(1/2007 Supp.)

OUJI-CR 4-96

MANSLAUGHTER IN THE FIRST DEGREE

BY DANGEROUS WEAPON - ELEMENTS

[DELETED AND INCORPORATED INTO OUJI-CR 4-95]

(2000 Supp.)

(DELETED)

OUJI-CR 4-97

MANSLAUGHTER IN THE FIRST DEGREE -

REQUIREMENT FOR HEAT OF PASSION

Heat of passion exists when four requirements are proven. These requirements are:

First, adequate provocation;

Second, a passion or an emotion such as fear, terror, anger, rage, or resentment existed in defendant;

Third, the homicide occurred while the passion still existed, and before there was reasonable opportunity for the passion to cool;

Fourth, there was a causal connection between the provocation, the passion and the homicide.

(2000 Supp.)

OUJI-CR 4-98

MANSLAUGHTER IN THE FIRST DEGREE -

ADEQUATE PROVOCATION DEFINED

"Adequate provocation" refers to any improper conduct of the deceased toward the **defendant(s)** which naturally or reasonably would have the effect of arousing a sudden heat of passion within a reasonable person in the position of the **defendant(s)**. Generally, actions which are calculated to provoke an emotional response and ordinarily cause serious violence are recognized as adequate provocation. Actions that do not ordinarily provoke serious violence do not constitute adequate provocation. In determining whether the deceased's conduct was adequate provocation, the conduct is judged as a person of reasonable intelligence and disposition would respond to it.

Mere words alone, or threats, menaces, or gestures alone, however offensive or insulting, do not constitute adequate provocation. However, words, threats, menaces, or gestures, when considered in connection with provoking conduct of the deceased, may constitute adequate provocation. Personal violence or aggression by the deceased of a nature sufficiently violent to cause or threaten to cause pain, bloodshed, or bodily harm to the **defendant(s)** may be adequate provocation.

(2000 Supp.)

OUJI-CR 4-99

MANSLAUGHTER IN THE FIRST DEGREE -

PASSION DEFINED

The passion or emotion which must exist in the defendant(s) refers to any strong emotion, such as fear, terror, anger, rage or resentment. This passion or emotion must have existed to such a degree as would naturally affect the ability to reason and render the mind incapable of cool reflection. However, the passion need not have been such as would entirely overcome reason, or be so overpowering as to destroy free exercise of choice. This emotional state must, however, actually dominate the person at the time of the commission of the homicidal act and must be directed toward the deceased and not toward another.

(2000 Supp.)

OUJI-CR 4-100

MANSLAUGHTER IN THE FIRST DEGREE -

COOLING TIME DEFINED

There must not be a reasonable opportunity for the passion to cool. This means that the homicide must have occurred while the **defendant(s) was/were** still affected by the passion or emotion. The homicide must have followed the provocation before there was time for the emotion to cool or subside. Whether or not there was a reasonable opportunity for the passion to cool depends upon whether, under all the circumstances of the particular case, there was such a lapse of time between the provocation and the homicidal act that the mind of a reasonable person would have cooled sufficiently, so that the homicide was directed by reason, rather than by passion or emotion.

The length of time that constitutes a reasonable opportunity for the passion to cool may vary according to the circumstances of the particular case.

(2000 Supp.)

OUJI-CR 4-101

MANSLAUGHTER IN THE FIRST DEGREE -

CAUSAL CONNECTION DEFINED

"Causal connection" means that the provocation by the deceased must have caused the passion or emotion of the defendant and that passion or emotion must have caused the act which resulted in death.

Statutory Authority: 21 O.S. 1991, § 711(2).

Committee Comments

The preceding instructions on "heat of passion" first-degree manslaughter should be given only where there is evidence that the killing was committed in the heat of passion. *Walton v. State*, 744 P.2d 977, 978-79 (Okl. Cr. 1987), *overruling Morgan v. State*, 536 P.2d 952 (Okl. Cr. 1976).

Similarly, where the proof demonstrates that the only offense for which the defendant could be convicted is misdemeanor-manslaughter, it is error to instruct the jury concerning homicide committed while in a heat of passion. *Nickelberry v. State*, 521 P.2d 879 (Okl. Cr. 1974).

Although there is language in an old case, *Wood v. State*, 3 Okl. Cr. 553, 571, 107 P. 937, 945 (1910), which suggests that the sufficiency of the provocation offered by the deceased is gauged solely from the standpoint of the defendant, and not from the perspective of a reasonable person, the instructions require that the provocation be such as to induce passion in a reasonable person in the position of the defendant. Despite the language of *Wood* this requirement is otherwise supported by the cases which define circumstances wherein the existence of a "heat of passion" negates the specific mental state requisite for murder. *See, e.g., Wood v. State*, 486 P.2d 750 (Okl. Cr. 1971) (fright or terror may be sufficient); *Grindstaff v. State*, 82 Okl. Cr. 31, 165 P.2d 846 (1946) (swear words or threats alone insufficient to provoke passion); *cf. Ex parte Fraley*, 3 Okl. Cr. 719, 109 P. 295 (1910) (cooling-off period measured objectively under reasonable-man standard as well as subjectively from point of view of defendant).

That the killing was intentional in any sense is not an element to be proved in "heat of passion" manslaughter. *See, e.g., Cantrell v. State*, 562 P.2d 527 (Okl. Cr. 1977); *Husband v. State*, 503 P.2d 563 (Okl. Cr. 1972); *Wood v. State*, *supra*; *Grindstaff v. State*, *supra*; *Ex parte Fraley*, *supra*; *Ex parte Bollin*, 3 Okl. Cr. 725, 109 P. 288 (1910).

The statutory terms require that the homicide be "perpetrated without a design to effect death" in order to constitute manslaughter in the first degree. The Court of Criminal Appeals has refused to construe this characteristic of the governing mental state as an element which must be proved beyond a reasonable doubt in order to convict for manslaughter in the first degree. Moreover, the court has consistently ruled:

> In a prosecution for murder, where the court submits the issue, and the jury finds the defendant guilty of manslaughter in the first degree, although under the law and the facts the crime is murder, yet, if the defendant is convicted of a lower degree of homicide than that established by the evidence, no prejudice could have resulted to him and this court will not reverse a conviction because of such error.

Mayberry v. State, 94 Okl. Cr. 301, 303, 238 P.2d 362, 363 (1951). Thus, a defendant is precluded from arguing as error the fact that he was convicted of manslaughter under section 711(2) despite his clear intention to kill the deceased. *See Washington v. State*, 549 P.2d 1221 (Okl. Cr. 1976); *Chiles v. State*, 508 P.2d 1108 (Okl. Cr. 1973); *Brewer v. State*, 452 P.2d 597 (Okl. Cr. 1969); *Young v. State*, 33 Okl. Cr. 255, 243 P. 763 (1926).

Although the instructions delineate circumstances wherein the existence of a particular emotion in the defendant, engendered

by the deceased's provocation, is a mitigating factor in a murder prosecution, there is a difficulty in interpreting the content of the elements of section 711(2) when the defendant is charged with manslaughter in the first degree. Two fact patterns, suggested by Oklahoma cases, illustrate the difficulty.

FIRST FACT PATTERN

> The defendant, harboring no intent to effect death, determines to disable the deceased, temporarily; the defendant has held a grudge against his victim for a long period of time. The defendant deliberately aims a gun at the deceased's left knee and fires. The defendant is a poor marksman; the bullet pierces the deceased's upper leg, severing the femoral artery. Despite the defendant's attempts to aid the victim, death occurs within a few moments.

See Tarter v. State, 359 P.2d 596 (Okl. Cr. 1961).

Under these facts, murder in the first degree with malice aforethought is not an appropriate charge, absent proof of a deliberate intent to take the deceased's life. Felony-murder is excluded by the court's holding in the *Tarter* case that the felony forming the basis for the conviction must be other than a lesser included offense. The conclusion of the Commission is that the Legislature intended to effect a change in existing law regarding murder in the second degree, depraved-mind murder, section 701.8, as discussed in the Committee Comments pertaining to OUJI-CR 4-91, so that a second-degree murder charge is possible. Unless the underlying offense which could not serve as a predicate for felony-murder because of the independent felony requirement is sufficient to form a basis for a misdemeanor-manslaughter prosecution, section 711(1) does not support a potential charge. *But see Ruth v. State*, 581 P.2d 919 (Okl. Cr. 1978) (defendant convicted for misdemeanor-manslaughter in shooting death). Absent any conduct by the deceased constituting a felonious attempt against the defendant, section 711(3) is likewise eliminated. If the defendant is to be charged with a homicide offense greater than manslaughter in the second degree, section 711(2) must form the basis, unless a second-degree murder charge is available. Under these circumstances, the State must affirmatively establish "heat of passion" and "adequate provocation" beyond a reasonable doubt in order to convict.

SECOND FACT PATTERN

> The defendant calls the police to report the death of his wife. He informs the officers that his wife, a chronic alcoholic who also ingested various barbiturates, was prone to stumbling and falling, and that she had fallen down, striking her head, several hours before he discovered her corpse.
>
> The defendant is charged with first-degree manslaughter. At trial, it is established that death resulted from a subdural hemorrhage on the left side of the head, caused by an external force against the head that could have been the result of a blow or a fall. The defendant testifies that, although he had slapped his wife on a few prior occasions, he did not abuse her in any way on the night of her death.

See Hunter v. State, 478 P.2d 1001 (Okl. Cr. 1970). *See also Moran v. State*, 555 P.2d 1085 (Okl. Cr. 1976); *Chiles v. State*, *supra*; *Husband v. State*, *supra*.

Concededly, this case is more simple, for, assuming that the elements of assault and battery could be established beyond a reasonable doubt, a first-degree manslaughter prosecution is possible under the misdemeanor-manslaughter rule, section 711(1). Otherwise, the difficulty of determining the elements of the offense and the State's burden of proof remain.

OUJI-CR 4-96 follows the holding by the Oklahoma Court of Criminal Appeals in *Brown v. State*, 777 P.2d 1355, 1357 Okla. Crim. App. 1989), that heat of passion is an element of the jury instruction for first degree manslaughter "by means of a dangerous weapon" as well as "in a cruel and unusual manner." The Court of Criminal Appeals overruled its prior decisions to the contrary in *Moody v. State*, 38 (Okl. Cr. 23, 26, 259 P. 159, 161 (1927), and *Smith v. State*, 652 P.2d 303, 304 (Okl. Cr. 1982), and it adopted the interpretation of section 711(2) originally stated in *Barker v. Territory*, 15 Okla. 22, 25-26, 78 P. 81, 82-83 (1904).

A case illustrating circumstances under which death will be deemed to have been perpetrated "in a cruel and unusual manner" is *Camron v. State*, 829 P.2d 47, 51 (Okl. Cr. 1992) (sufficient evidence to prove homicide occurred in a cruel and unusual manner where deceased was beaten to death with a shotgun).

OUJI-CR 4-102

MANSLAUGHTER IN THE FIRST DEGREE

BY RESISTING CRIMINAL ATTEMPT - ELEMENTS

No person may be convicted of manslaughter in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, perpetrated unnecessarily **(while resisting an attempt by the deceased to commit a crime)/(after an attempt by the deceased to commit a crime had failed)**;

Third, perpetrated by the **defendant(s)**.

Statutory Authority: 21 O.S. 1991, § 711(3).

Committee Comments

The Commission has found no cases which rely specifically on subsection 3 of section 711 in discussing the validity of a first-degree manslaughter conviction. Thus, since the parameters of the statute remain unclear, the Commission has relied on common law principles in resolving questions raised by its provisions.

The first question is raised by incorporation of the term "unnecessarily" in the statute. The term could be narrowly construed as synonymous with "unlawfully," so as to negate the applicability of any legal justification for the slaying, such as self-defense or justifiable or excusable homicide. Or the term could be construed as meaning that the slaying was "unnecessary" in order to accomplish successful resistance to the attempted crime. This latter construction should be rejected for two reasons. First, it requires a strained reading of the statute, since "unnecessarily" appears to govern both the resistance to the attempt and the subsequent killing after the attempt has aborted. Second, the latter construction implies that the defendant is justified in slaying another where such killing is "necessary" in order to resist an attempted criminal act by the person slain, a contention that is untenable outside the parameters of the doctrines relating to self-defense and excusable or justifiable homicide. **Thus, the Commission has concluded that "unnecessarily" is equivalent to "unlawfully" or "without legal justification." An "unnecessary" killing constituting first-degree manslaughter would thus be found under circumstances where the defendant did not initiate the difficulty, yet honestly but unreasonably believes either that he is in danger of injury, or that slaying is the only way to prevent injury. The defendant's unreasonableness disallows the defense of self-defense, yet the fact that his honest, albeit erroneous, beliefs negate malice aforethought indicates that his crime is first degree manslaughter.** *Cf. Husband v. State*, 503 P.2d 563 (Okl. Cr. 1972) (defendant shot wife who wielded knife and attempted to stab him); *Fry v. State*, 91 Okl. Cr. 326, 218 P.2d 643 (1950) (defendant stabbed deceased after physical assault); *Wingfield v. State*, 81 Okl. Cr. 146, 160 P.2d 945 (1945) (defendant killed deceased with shotgun blast after deceased moved his hand to a pocket as though to draw a gun). In many cases, where adequate provocation is found, the defendant may demonstrate that the erroneous beliefs he entertained impelled fear in him, so as to produce a "heat of passion" in satisfaction of section 711(2).

Mammano v. State, 333 P.2d 602 (Okl. Cr. 1958), illustrates lack of necessity in killing after an attempt by the deceased to perpetrate a crime has failed. In that case, the deceased grabbed the defendant's hand and placed it on the deceased's private parts while both were sitting in the front seat of an automobile. The defendant freed his hand and stabbed the deceased with a switch-blade knife. In affirming the defendant's first-degree manslaughter conviction, the court declared:

> [T]his homicide was entirely unnecessary.... [T]he assault had already been repelled by the defendant jerking his hand away from the decedent's grasp. ... If [decedent] had persisted in his assault, there was nothing to prevent the defendant from leaving the automobile.... He did not have to kill [decedent] in order to protect his person.

Id. at 604.

The second question raised by the statute is whether the attempted crime must be directed against the person or property of the defendant. The use of the language "resisting" indicates an affirmative answer. However, since section 733 of Title 21 permits use of deadly force where the defendant lawfully attempts to defend enumerated persons from imminent peril (see Committee Comments accompanying OUJI-CR 8-2), it seems reasonable to infer that, in a case where the defendant kills while harboring a belief that his spouse, child, parent, master, or mistress is in imminent peril, although his belief is erroneous, an instruction relating to section 711(3) should be given. The term "resisting" seems to militate against broadening the applicability of section 711(3) to killings committed in an attempt to forestall **any** crime being attempted by the deceased.

Finally, utilization of the word "crime" necessitates an inquiry as to whether the conduct of the deceased must constitute a felony, and, if not, whether it must be the type of misdemeanor offense which poses a threat to the safety and security of the defendant's person or property. Incorporation of the term "crime," as opposed to "felony," is indicative of a negative response to the former question. Thus, if a murder charge is reducible to manslaughter in the first degree where the defendant kills either to prevent a misdemeanor by deceased or subsequent to the failure of an attempt by deceased to perpetrate a misdemeanor, the term "crime" should be restricted to those offenses which, inherently or potentially, endanger the safety or security of the person or property of the defendant .

MANSLAUGHTER IN THE SECOND DEGREE - ELEMENTS

No person may be convicted of manslaughter in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, the death was unlawful;

Third, the death was caused by the culpable negligence of the **defendant(s)**.

OUJI-CR 4-104

MANSLAUGHTER IN THE SECOND DEGREE -

CULPABLE NEGLIGENCE DEFINED

The term "culpable negligence" refers to the omission to do something which a reasonably careful person would do, or the lack of the usual ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions.

Statutory Authority: 21 O.S. 1991, § 716.

Committee Comments

The Oklahoma Court of Criminal Appeals expressly approved this instruction in *Harless v. State*, 759 P.2d 225, 227 (Okl. Cr. 1988), holding that the trial court properly instructed the jury in a second degree manslaughter case by giving this instruction.

The Commission has departed somewhat from the statutory language defining the elements of manslaughter in the second degree in two respects. First, no Oklahoma cases have been found which illuminate the legislative intent in incorporating the language "act" and "procurement." The cases do indicate, however, that a mere "act" by the defendant will not sustain a conviction for manslaughter in the second degree; rather, the defendant's conduct must be such as to justify a finding of "culpable negligence." *Frey v. State*, 97 Okl. Cr. 410, 265 P.2d 502 (1954); *Wilson v. State*, 70 Okl. Cr. 262, 105 P.2d 789 (1940); *Philby v. State*, 64 Okl. Cr. 1, 76 P.2d 412 (1938); *Nail v. State*, 33 Okl. Cr. 100, 242 P. 270 (1926); *Barker v. Territory*, 25 Okl. 22, 78 P. 81 (1904). The terms "act" and "procurement" are therefore omitted from the instruction to obviate confusion.

Second, the statute requires that the conduct charged as criminal fall outside the statutory definitions of murder, manslaughter in the first degree, and excusable or justifiable homicide in order to warrant a conviction for manslaughter in the second degree. In a case where the defendant is charged with murder or first-degree manslaughter, the jurors will be instructed regarding the elements of those offenses where the evidence adduced so warrants, and the State must establish lack of legal justification beyond a reasonable doubt. In a case where the defendant is charged with second-degree manslaughter, the State must demonstrate the requisite culpable negligence and absence of legal justification beyond a reasonable doubt. Therefore, it is somewhat redundant and potentially confusing to inform the jury in the form of an instruction that it must eliminate all the listed statutory categories of offenses and defenses before it can return a finding of guilt to second-degree manslaughter. Instead, the jury is instructed that the death must be proved to be unlawful.

The definition of culpable negligence is that established by the Court of Criminal Appeals in *Crossett v. State*, 96 Okl. Cr. 209, 217, 252 P.2d 150, 159 (1952). *Accord*, *Thompson v. State*, 554 P.2d 105, 108 (Okl. Cr. 1976). Although the definition merely articulates the tort standard concerning duty of care, the cases evince a more pronounced degree of culpability where a conviction for manslaughter in the second degree is affirmed. Not only culpable negligence, but also a direct and proximate causal link between the defendant's conduct and the consequent death, must be established. *Frey v. State*, *supra*; *Barrow v. State*, 17 Okl. Cr. 340, 188 P. 351 (1920). The Oklahoma Court of Criminal Appeals has determined an instruction regarding manslaughter in the second degree to be warranted by the evidence adduced in a myriad circumstances. *See, e.g., Dennis v. State*, 556 P.2d 617 (Okl. Cr. 1976) (defendant fired rifle across a field at some animals while hunting; unwittingly struck deceased); *Pritchett v. State*, 79 Okl. Cr. 401, 155 P.2d 551 (1945) (defendant, who heard his dog barking and his chickens making a noise, but did not see or hear anyone, fired a rifle straight ahead to scare away whatever caused disturbance; struck deceased); *Sweet v. State*, 68 Okl. Cr. 44, 95 P.2d 242 (1939) (defendant and deceased scuffling over gun in automobile during course of a drunken brawl); *Barrow v.*

State, 17 Okl. Cr. 340, 188 P. 351 (1920) (defendant, who held himself out as a physician, undertook to treat deceased's illness through feeding deceased hog-hoof tea and chanting incantations over deceased); *but see Martley v. State*, 519 P.2d 544 (Okl. Cr. 1974) (defendant not entitled to second-degree manslaughter instruction where he and deceased engaged in voluntary affray and defendant stabbed deceased).

Two points concerning the purview of section 716 must be established. First, enactment in 1961 of the statute defining negligent homicide with a vehicle, section 11-903 of Title 47, has been held to have repealed by implication the application of section 716 to cases wherein the defendant is prosecuted for homicide due to reckless operation of a vehicle. In *Atchley v. State*, 473 P.2d 286 (Okl. Cr. 1970), the defendant's conviction for manslaughter in the second degree arising from the negligent operation of an automobile was reversed. The court held:

> [T]he older statute [section 716] is repugnant and inconsistent with the new statute [section 11-903] to such an extent that the legislature must have intended to repeal the older statute insofar as it is applicable to a prosecution for manslaughter based on criminal negligence in the operation of an automobile.

Id. at 289. *Accord*, *Thompson v. State*, *supra*.

Second, by its literal terms, section 716 is inapplicable where the defendant performs an unlawful act which causes the death of the deceased. Under these circumstances, the defendant's conduct might constitute felony-murder or misdemeanor-manslaughter, both of which are excluded from the statutory definition of manslaughter in the second degree. In *Miller v. State*, 523 P.2d 1118 (Okl. Cr. 1974), the defendant and the deceased engaged in a drunken re-enactment of the "William Tell" saga. The defendant was convicted of manslaughter in the first degree and urged on appeal that his conduct evidenced culpable negligence, warranting an instruction on second-degree manslaughter. The court affirmed the refusal to give the requested instruction and noted that the existence of culpable negligence became relevant only where the defendant's conduct did not constitute an offense. Since the evidence overwhelmingly established that the defendant pointed a loaded pistol at the deceased, the defendant's culpable negligence coincided with his commission of a misdemeanor, thus precluding the applicability of section 716. *See also Wratislaw v. State*, 18 Okl. Cr. 150, 194 P. 273 (1921) (instruction on manslaughter in the second degree erroneous where homicide was committed with pistol); *Lady v. State*, 18 Okl. Cr. 59, 192 P. 699 (1920) (instruction regarding culpable negligence unwarranted where defendant committed misdemeanor of discharging firearm in a public place).

OUJI-CR 4-105

NEGLIGENT HOMICIDE - ELEMENTS

No person may be convicted of negligent homicide unless the State proves beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, caused by the defendant's driving a vehicle upon a highway;

Third, in reckless disregard of the safety of others;

[Fourth, the death occurred within a year of the infliction of the injury causing death].

[Fifth, the defendant was 16 years of age or older].

Statutory Authority: 47 O.S. 1991, §§ 1-122, 11-903.

Notes on Use

The Fourth and Fifth Elements should be included only if they are raised as issues.

Committee Comments

Although the Legislature abolished the common law year and a day rule by enacting 21 O.S. Supp. 1995, § 694(B) ("The rule of the common law providing that a death occurring after a year and a day from the date of criminal corporal injury is irrebuttably presumed not to be the result of that injury is abolished."), the requirement remains in the negligent homicide statute, 47 O.S. 1991, § 11-903.

NEGLIGENT HOMICIDE - HIGHWAY DEFINED

A highway is the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

OUJI-CR 4-107

NEGLIGENT HOMICIDE - RECKLESS DISREGARD DEFINED

Reckless disregard of the safety of others is the omission to do something which a reasonably careful person would do, or the lack of the usual and ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions.

Statutory Authority: 47 O.S. 1991, §§ 1-122, 11-903.

Committee Comments

The negligent-homicide statute was enacted in 1961 and is restricted to vehicular operation upon a highway. 47 O.S. 1991, § 11-101. Thus, the location of the reckless operation is incorporated as an element to be proved. The term "highway" is defined in accordance with the statutory definition set forth in 47 O.S. 1991, § 1-122. To date, the cases decided under section 11-903 involve only deaths occurring as a result of reckless operation of a vehicle upon a public road or a city street. Given the inapplicability of section 11-903 to conduct occurring on private property, such as a private parking lot or a private road, presumably reckless conduct in operating a vehicle which results in death in these private places should be prosecuted as manslaughter in the second degree, as defined in 21 O.S. 1991, § 716.

It must be noted that section 11-903 refers to reckless disregard in the operation of a "vehicle." Section 1-186 of Title 47 defines a "vehicle" as "every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks." The statute expressly excludes from the definition of "vehicle" any "implement of husbandry," which is defined in section 1-125 of Title 47.

The statutory standard, "in reckless disregard of the safety of others," is the equivalent of the "culpable negligence" standard defined in 21 O.S. 1991, § 716. *Lester v. State*, 562 P.2d 1163 (Okl. Cr. 1977); *Thompson v. State*, 554 P.2d 105 (Okl. Cr. 1976). The standard is articulated in the cases as follows: "[C]ulpable negligence is the omission to do something which a reasonable and prudent person would do, or the want of the usual and ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions." *Id.* at 108. Utilizing this statement of the standard for culpability, "it is unnecessary to attempt to categorize this definition as ordinary negligence, gross negligence, or as any other degree of negligence." *Id.* Thus, in instructing the jurors, the court should simply substitute the words "reckless disregard of the safety of others" for the phrase "culpable negligence," as indicated in the instruction.

The statute clearly requires that the death of the victim proximately result from the culpable conduct of the defendant, and the jury must be so instructed. Thus, it constitutes reversible error to refuse to permit the defendant to establish that the lack of care evidenced by the conduct of the deceased, rather than the defendant's own conduct, caused the vehicular mishap. *Williams v. State*, 554 P.2d 842 (Okl. Cr. 1976).

The crime of negligent vehicular homicide usurps many homicides occurring as a result of misconduct in the operation of a vehicle, previously characterized as manslaughter in the first degree under 21 O.S. 1991, § 711(1) (misdemeanor-manslaughter), or manslaughter in the second degree under 21 O.S. 1991, § 716. The Court of Criminal Appeals has held that section 11-903 does not repeal by implication the applicability of the first-degree manslaughter statute, 21 O.S. 1991, § 711(1), to prosecutions for homicides occurring where the defendant was operating his vehicle while in a state of intoxication. *Lomahaitewa v. State*, 581 P.2d 43 (Okl. Cr. 1978); *White v. State*, 483 P.2d 751 (Okl. Cr. 1971); *Ritchie v. Raines*, 374 P.2d 772 (Okl. Cr. 1962). Although the court has indicated that driving while intoxicated is merely one instance of the type of gross

negligence which removes the offense from the misdemeanor statute, 47 O.S. 1991, § 11-903, and allows prosecution of a felony under 21 O.S. 1991, § 711(1), *Hopkins v. State*, 506 P.2d 580 (Okl. Cr. 1973), the court has held that other infractions of the highway safety codes, although misdemeanor offenses, could be prosecuted only under the later and more specific negligent homicide statute, section 11-903. *Short v. State*, 560 P.2d 219 (Okl. Cr. 1977). Similarly, 47 O.S. 1991, § 11-903, has been held to repeal by implication section 716 of Title 21, the second-degree manslaughter statute, in vehicular-homicide cases. *Atchley v. State*, 473 P.2d 286 (Okl. Cr. 1970). Thus, section 11-903 controls all highway vehicular homicide cases, except those where it is proven that the defendant was driving while intoxicated under 21 O.S. 1991, § 711(1), or where the defendant's conduct is so willful and wanton that it constitutes murder in the second degree under 21 O.S. 1991, § 701.8.

OUJI-CR 4-108

HOMICIDE - DEFINITIONS

Attempt - The action taken by a person, with the state of mind requisite for commission of a crime, by which the person: (a) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or (b) When causing a particular result in an element of the crime, does anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part.

Reference: 21 O.S. 1991, § 44.

Crime - Any felony or misdemeanor under the law; (Name of Crime Charged) is a crime. Its elements are:

[Give Elements of Crime Allegedly Committed.]

References: Palmer v. State, 78 Okl. Cr. 220, 146 P.2d 592 (1944); 21 O.S. 1991, § 4.

Cruel and Unusual Manner - Means of causing death which is aggravated, out of the ordinary, shocking or barbaric.

Reference: 10A Words and Phrases 295.

Dangerous Weapon - Any **pistol/revolver/dagger/(bowie/dirk/switch-blad e/ spring-type knife)/(sword cane)/(knife having a blade which opens automatically)/ blackjack/(loaded cane)/billy/(hand chain)/(metal knuckles)/(implement likely to produce death or great bodily harm in the manner it is used or attempted to be used)**.

References: Wilcox v. State, 13 Okl. Cr. 599, 166 P. 74 (1917); 21 O.S. Supp. 1995, § 1272.

Direct Result - Immediate consequence which is not separated from its initial cause by other, independent factors.

References: Ruth v. State, 581 P.2d 919 (Okl. Cr. 1978); Stumblingbear v. State, 364 P.2d 1115 (Okl. Cr. 1961); Logan v. State, 42 Okl. Cr. 294, 275 P. 657 (1929); 34A Words and Phrases 618.

Excusable - Note: If necessary to give a definition, see OUJI-CR 8-27 through OUJI-CR 8-30.

In the Commission of - Performing any act which is an inseparable part of a crime or necessary for its completion, or fleeing from the immediate scene of the offense.

References: State v. McCoy, 602 P.2d 1044 (Okl. Cr. 1979); Lime v. State, 508 P.2d 710 (Okl. Cr. 1973).

Justifiable - Note: If necessary to give a definition, see OUJI-CR 8-2.

Lawful Custody - Legally authorized confinement to a penitentiary, county jail, or other person.

References: 21 O.S. 1991 & Supp. 1995, §§ 434, 436, 443.

Legal Duty - An obligation to act which is imposed by statute, by the existence of a status relationship such as husband-wife and parent-child, by contractual agreement, or by voluntary assumption of care of another.

References: Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962); W. LaFave & A. Scott, Criminal Law 183; R. Perkins, Criminal Law 592-601 (2d ed. 1969); 28 C.J.S. Duty 597.

Vehicle - Any device, used for transportation of persons or property on a highway, which is not moved by human power or used only on fixed rails or tracks. Vehicles designed and adapted exclusively for agricultural and horticultural purposes and not subject to registration are expressly excluded from this definition.

Reference: 47 O.S. 1991, § 1-186.

KIDNAPPING, ABDUCTION, CHILD STEALING - INTRODUCTION

The **defendant(s) is/are** charged with **kidnapping/(kidnapping for extortion)/abduction/(child stealing)** of **[Name of Alleged Victim]** on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is meant for use with the crimes created by Title 21, Chapter 25, entitled Kidnapping; Title 21, Chapter 35, entitled Child Stealing; and Title 21, Chapter 45, section 1119, entitled Abduction. The Commission has treated these crimes together because the social interests protected by these statutes are similar.

OUJI-CR 4-110

KIDNAPPING - ELEMENTS

No person may be convicted of kidnapping unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, unlawfully;

Second, **seizes/confines/inveigles/decoys/kidnaps/abducts/(carries away);**

Third, another person;

Fourth, with the intent to **(confine that person)/(imprison that person)/(send that person out of the State)/(sell that person as a slave)/(hold that person to service):** against that person's will.

Statutory Authority: 21 O.S. Supp. 2012, § 741.

Notes on Use

If the defense of consent is raised, the court should give OUJI-CR 8-59, *infra.*

Committee Comments

The statutory language reads "without lawful authority," but the original Jury Instruction Commission has translated that language into the word "unlawful" in the first element. The Commission has decided that the words "without lawful authority" and "unlawful" are synonymous. The Commission has chosen to use the word "unlawful" in order to promote consistency of language among the various instructions. Moreover, the word "unlawful" is more concise. The definition of the word "unlawful" should encompass either of two concepts: (1) that the person who confines another lacks legal or domestic authority; or, (2) that the person who confines another has used fraud to induce consent to the confinement. Either lack of authority or use of fraud makes the confinement unlawful. R. Perkins, Criminal Law 182 (2d ed. 1969).*See Williams v. State*, 1953 OK CR 41, 255 P.2d 532, *overruled on other grounds, Parker v. State*, 1996 OK CR 19, ¶ 23, n.4, 917 P.2d 980, 986 n.4.

The second element lists the activities prohibited by the kidnapping statute. Inveiglement, is illustrated by *Ratcliff v. State*, 1955 OK CR 110, 289 P.2d 152 (12-year-old girl enticed into a car by a man whom she thought to be a friend who would take her to a football game). *See also Williams, supra* (young boy enticed into a car by man who requested the youth's aid in locating a third person).

Even though a person unlawfully confines another, the crime of kidnapping has not been committed unless the accused has the specific mens rea of the crime. The gist of the offense created by section 741 is one of the four alternative mens rea requirements set forth by the statute. *Perry v. State*, 1993 OK CR 5, ¶ 13, 853 P.2d 198, 202 (analyzing "hold to service" provision);*Jenkins v. State*, 1973 OK CR 165, 508 P.2d 660;*Oglesby v. State*, 1966 OK CR 34, 411 P.2d 974; *Vandiver v. State*, 1953 OK CR 130, 261 P.2d 617.

(2013 Supp.)

OUJI-CR-4-111

KIDNAPPING FOR EXTORTION - ELEMENTS

No person may be convicted of kidnapping for extortion unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, unlawful;

Second, **(forcible seizure and confinement)/inveiglement**;

Third, of another;

Fourth, with intent to extort **money/property/(a valuable thing)** from any person.

Statutory Authority: 21 O.S. 1991, § 745(A).

Committee Comments

The first three elements of the instruction for section 745(A) are identical to the elements for section 741 because these elements constitute the false imprisonment that is contained in every kidnapping. Section 741 is not a lesser included offense of section 745(A), however, because section 741 requires proof of a specific mens rea that need not be alleged or proved for conviction under section 745(A). *Ogelsby v. State*, 411 P.2d 974 (Okl. Cr. 1966).

The question is again raised with regard to section 745(A) as to whether or not asportation is an element of the offense. The Commission has concluded that it is not, for the same reasons stated in the discussion of this question with regard to the kidnapping crime in section 741. The gist of the offense of section 745(A) is the specific mens rea to extort money, property, or something of value as specified in the fourth element. *Phillips v. State*, 267 P.2d 167 (Okl. Cr. 1954). The specific mens rea obviates the need for the asportation element. Two cases seem possibly to indicate that kidnapping for extortion is established by proof of an unlawful confinement and asportation without proof of a specific intent. In both cases, however, the facts indicate that the accused had unlawfully confined another person with the intent to obtain something of value from that person. *Williams v. State*, 321 P.2d 990 (Okl. Cr. 1958); *Norris v. State*, 68 Okl. Cr. 172, 96 P.2d 540 (1939). Hence, a person is guilty of kidnapping for extortion at the moment he unlawfully confines another with the intent to extort, even though he has not carried away the person imprisoned.

The phrase "thing of value" in the statute is broadly interpreted by the court. *Householder v. Ramey*, 485 P.2d 247 (Okl. Cr. 1971), *overruled on other grounds*, *Stockton v. State*, 509 P.2d 153 (Okl. Cr. 1973) (woman's chastity is thing of value); *Flowers v. State*, 95 Okl. Cr. 27, 238 P.2d 841 (1951) (use of automobile to aid in escape is thing of value). Thus, it is not impossible to prove that the accused unlawfully confined another with the specific intent required by section 745(A).

The Commission is of the opinion that the word "extort" encompasses the threatening methods listed in the statute. Hence, the language of the statute listing the threatening methods does not present any separate element.

OUJI-CR 4-112

ABDUCTION - ELEMENTS

No person may be convicted of abduction unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, a person under the age of fifteen;

Third, from a person having legal custody;

Fourth, without consent;

Fifth, for the purpose of **marriage/concubinage/(committing a crime involving moral turpitude)**.

Statutory Authority: 21 O.S. 1991, § 1119.

Committee Comments

This statute was amended in 1976 to include abduction of persons of either sex under the age of 15. The purpose of committing a crime of moral turpitude was also added. The statute has not been construed by the Court of Criminal Appeals since its amendment.

The abduction statute protects parental or legal authority over persons under the age of 15 from interference by others who have no legal custody, and is not meant for the protection of the person abducted. Hence, the abduction statute punishes taking a person under 15 from parental or other legal custody without consent of the parent or the person having legal custody, even though the person abducted has consented to being taken. *Scott v. State*, 85 Okl. Cr. 213, 186 P.2d 336 (1947); *Yeats v. State*, 30 Okl. Cr. 320, 236 P. 62 (1925). If the person has not consented to the taking, the prosecutor would probably choose to prosecute the accused under one of the kidnapping statutes. If the person has knowingly consented, kidnapping cannot be proven unless the person is under 12, the statutory age of consent under section 741. Thus, the crime of abduction provides criminal sanctions for conduct that does not constitute kidnapping but is considered antisocial because it interferes with parental authority or the rights of one with legal charge.

The taking from parental authority without consent is punishable, however, only if one of three specific intents can be proven, as listed in the fifth element. The gist of the offense of abduction in Oklahoma is the specific mens rea. The accused either must intend to marry the young person or must intend to have the person as a concubine, *Scott*, *supra*, or must intend to commit a crime involving moral turpitude.

Crimes involving moral turpitude historically have been defined as those which are *mala in se*, as opposed to crimes which are *mala prohibita*. W. LaFave & A. Scott, *Criminal Law* § 6, at 31 (1972). In other statutory contexts, the Court of Criminal Appeals has classed as crimes involving moral turpitude most offenses constituting a felony, as well as offenses such as petty larceny, *Price v. State*, 546 P.2d 632 (Okl. Cr. 1976), and illegal possession of stimulants, *Ruhm v. State*, 496 P.2d 809 (Okl. Cr. 1972).

OUJI-CR 4-113A

HUMAN TRAFFICKING FOR LABOR - ELEMENTS

No person may be convicted of human trafficking for labor unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, **recruiting/enticing/harboring/maintaining/transporting/ providing/obtaining another/other person(s)**;

Third, through **deception/force/fraud/threat/coercion**;

Fourth, for the purpose of engaging **that/those person(s)** in labor.

OR

First, knowingly;

Second, benefiting **(financially/(by receiving anything of value))**;

Third, from participating in a venture that has engaged in;

Fourth, **recruiting/enticing/harboring/maintaining/transporting/ providing/obtaining another/other person(s)**;

Fifth, through **deception/force/fraud/threat/coercion**;

Sixth, for the purpose of engaging **that/those person(s)** in labor.

Statutory Authority: 21 O.S. Supp. 2014, § 748(A)(5).

Notes on Use

For definitions of coercion and legal process, see OUJI-CR 4-114D, *infra*. For an instruction on an affirmative defense of a victim of human trafficking to other crimes, see OUJI-CR 8-61, *infra*.

Committee Comment

"Human trafficking" is defined at 21 O.S. Supp. 2014, § 748(A)(4) as a form of modern day slavery that includes, but is not limited to, extreme exploitation and denial of freedom or liberty of an individual for purposes of deriving benefit from that individual's commercial sex act or labor. The term "not limited to" in the definition appears to contemplate a form of human trafficking in addition to that done for purposes of commercial sex or labor, but the statute does not provide guidance as to human trafficking for other purposes. Accordingly, the Committee has not attempted to draft an instruction that would cover human trafficking for other purposes.

The text of § 748(A)(5)(a) has an "or" between "deception, force, fraud, threat or coercion" and "for purposes of engaging the person in labor." The Committee decided that this "or" should be omitted from the text of the Instruction in order to require that human trafficking for labor must involve deception, force, fraud, threat or coercion. Compare the parallel language of § 748(A)(6)(a), where "or" is not present.

(2014 Supp.)

OUJI-CR 4-113B

HUMAN TRAFFICKING FOR COMMERCIAL SEX - ELEMENTS

No person may be convicted of human trafficking for commercial sex unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, **recruiting/enticing/harboring/maintaining/transporting/ providing/obtaining another/other person(s)**;

Third, through **deception/force/fraud/threat/coercion**;

Fourth, for the purpose of engaging **that/those person(s)** in an act of commercial sex.

OR

First, knowingly;

Second, benefiting **(financially/(by receiving anything of value))**;;

Third, from participating in a venture that has engaged in;

Fourth, **recruiting/enticing/harboring/maintaining/transporting/ providing/obtaining another/other person(s)**;

Fifth, through **deception/force/fraud/threat/coercion**;

Sixth, for the purpose of engaging **that/those person(s)** in an act of commercial sex.

Statutory Authority: 21 O.S. Supp. 2014, § 748(A)(6).

Notes on Use

For definitions of coercion, commercial sex, and legal process, see OUJI-CR 4-114D, *infra*. For an instruction on an affirmative defense of a victim of human trafficking to other crimes, see OUJI-CR 8-61, *infra*.

Committee Comments

"Human trafficking" is defined at 21 O.S. Supp. ,2014 § 748(A)(4) as a form of modern day slavery that includes, but is not limited to, extreme exploitation and denial of freedom or liberty of an individual for purposes of deriving benefit from that individual's commercial sex act or labor. The term "not limited to" in the definition appears to contemplate a form of human trafficking in addition to that done for purposes of commercial sex or labor, but the statute does not provide guidance as to human trafficking for other purposes. Accordingly, the Committee has not attempted to draft an instruction that would cover human trafficking for other purposes.

(2014 Supp.)

OUJI-CR 4-113C

HUMAN TRAFFICKING OF A MINOR FOR COMMERCIAL SEX - ELEMENTS

No person may be convicted of human trafficking of a minor for commercial sex unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, **recruiting/enticing/harboring/maintaining/transporting/ providing/purchasing/obtaining** a minor;

Third, for the purpose of engaging the minor in an act of commercial sex.

A minor is a person under the age of eighteen.

OR

First, knowingly;

Second, benefiting **(financially/(by receiving anything of value))**;

Third, from participating in a venture that has engaged in;

Fourth, **recruiting/enticing/harboring/maintaining/transporting/ providing/purchasing/obtaining** a minor;

Fifth, for the purpose of engaging the minor in an act of commercial sex.

A minor is a person under the age of eighteen.

Statutory Authority: 21 O.S. Supp. 2014, § 748(A) (6)(b), (c), (A)(8).

Notes on Use

For definitions of coercion, commercial sex, and legal process, see OUJI-CR 4-114D, *infra*. . For an instruction on an affirmative defense of a victim of human trafficking to other crimes, see OUJI-CR 8-61, *infra*.

Committee Comments

"Human trafficking" is defined at 21 O.S. Supp. , 2014 § 748(A)(4) as a form of modern day slavery that includes, but is not limited to, extreme exploitation and denial of freedom or liberty of an individual for purposes of deriving benefit from that individual's commercial sex act or labor. The term "not limited to" in the definition appears to contemplate a form of human trafficking in addition to that done for purposes of commercial sex or labor, but the statute does not provide guidance as to human trafficking for other purposes. Accordingly, the Committee has not attempted to draft an instruction that would cover human trafficking for other purposes.

(2014 Supp.)

OUJI-CR 4-113D

HUMAN TRAFFICKING - DEFINITIONS

Coercion - **Compelling/Forcing/Intimidating** a person to act by:

threats of harm or physical restraint against any person.

OR

any **act/scheme/plan/pattern** intended to cause a person to believe that **performing/(failing to perform)** an act would result in serious **(physical/financial/emotional harm/distress to)/(physical restraint against)** any person.

OR

the **abuse/(threatened abuse)** of the **law/(legal process)**.

OR

knowingly destroying/concealing/removing/confiscating/possessing any **actual/purported passport/(labor/immigration document)/(government identification document, including but not limited to a driver license or birth certificate)** of another person.

OR

facilitating/controlling a person's access to any **addictive/controlled** substance other than for legal medical purposes.

OR

blackmail.

OR

demanding/claiming money/goods/(any thing of value) from/(on behalf of) a prostituted person where such **demand/claim (arises from)/(is directly related to)** the act of prostitution.

OR

determining/dictating/setting the times at which another person will be available to engage in an act of prostitution with a third party.

OR

determining/dictating/setting the places at which another person will be available **(for solicitation of)/(to engage in)** an act of prostitution with a third party.

OR

determining/dictating/setting the places at which another person will reside for purposes of making such person available to engage in an act of prostitution with a third party.

Reference: 21 O.S. Supp. 2014, § 748(A)(1).

Commercial sex - Any form of commercial sexual activity such as sexually explicit performances, prostitution, participation in the production of pornography, performance in a strip club, or exotic dancing or display.

Reference: 21 O.S. Supp. 2014, § 748(A)(2).

Minor - A person under the age of eighteen (18) years.

Reference: 21 O.S. Supp. 2014, § 748(A)(8).

Legal process - The **(criminal/civil law)/(regulatory system) of (the federal government)/(any state/territory/district/commonwealth/(trust territory)/(any foreign government)/(subdivision of a foreign government)** and includes **(legal civil/criminal actions)/(regulatory petitions/applications)**.

Reference: 21 O.S. Supp. 2014, § 748(A)(7).

Victim - A person against whom human trafficking has been committed.

Reference: 21 O.S. Supp. 2014, § 748(A)(9).

(2014 Supp.)

OUJI-CR 4-113

CHILD STEALING - ELEMENTS

No person may be convicted of child stealing unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **maliciously/forcibly/fraudulently**;

Second, **taking/enticing** away;

Third, a child under the age of sixteen;

[Fourth, with the intent to detain or conceal the child;

Fifth, from the parent, guardian or other person having the lawful charge of the child.]

OR

[Fourth, with the intent to transport the child outside **of Oklahoma/(the United States)**;

Fifth, without the consent of the person having lawful charge of the child.]

Statutory Authority: 21 O.S. 2011, § 891.

Committee Comments

Oklahoma appellate cases involving the crime of child stealing include *Shinn v. State*, 1925 OK CR 442, 239 P. 269, 31 Okl. Cr. 366 , which reversed a conviction for lack of evidence and *Wilkins v. State*, 1999 OK CR 27, 985 P.2d 184, which upheld the statute against constitutional attacks of vagueness and overbreadth.

This crime generally involves a fact situation concerning a dispute over custody of a child between divorced parents, or between parents and grandparents. The crimes of kidnapping under either sections 741 or 745(A) are probably not committed in these situations because the parent or grandparent does not possess the specific intent required by those sections. Moreover, the crime of child stealing is much broader in its protection of parental or other legal custodial authority than is the crime of abduction. See generally R. Perkins, *Criminal Law* 181-82 (2d ed. 1969).

(2019 Supp.)

OUJI-CR 4-114

KIDNAPPING, ETC. - DEFINITIONS

Concubinage - Living together without authority of law as husband and wife.

References: Scott v. State, 85 Okl. Cr. 213, 186 P.2d 336 (1947); 8 Words & Phrases 588.

Crime Involving Moral Turpitude - A crime involving willful, intentional conduct contrary to justice, honesty, and good morals. Under the law **[Name Crime]** is a crime involving moral turpitude. The elements of **[Name Crime]** are:

[Give Elements of Specific Crime]

References: Kelley v. Tulsa, 569 P.2d 455 (Okl. 1977); State ex rel. Oklahoma Bar Ass'n v. Jones, 566 P.2d 130 (Okl. 1977); Palmer v. State, 78 Okl. Cr. 220, 146 P.2d 592 (1944).

Extort - Obtain property by the use of threat(s).

Reference: 21 O.S. 1991, § 1481.

Hold to Service -- Any acts or services, or the forbearance of same, done at the command of the perpetrator, through force, inveiglement or coercion, for the benefit of the perpetrator.

Reference: Perry v. State, 853 P.2d 198, 202 (Okl. Cr. 1993).

Inveiglement - The act of enticing one person to accompany another without the use of force.

Reference: 51 C.J.S. Kidnapping § 1(5).

Property - Property includes:

(a) Real Property - Every estate, interest, and right in lands, including structures or objects permanently attached to the land;

(b) Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

References: 21 O.S. 1991, §§ 102, 103, 104.

Unlawful - Without authority.

Reference: State v. Stegall, 96 Okl. Cr. 281, 253 P.2d 183 (1953).

Valuable Thing - Includes not only tangible property and common intangibles such as notes and checks, but also other intangibles, such as a woman's chastity or the use of an automobile.

References: Householder v. Ramey, 485 P.2d 247 (Okl. Cr. 1971), overruled on other grounds, Stockton v. State, 509 P.2d 153 (Okl. Cr. 1973).

OUJI-CR 4-115

MAIMING - INTRODUCTION

The **defendant(s) is/are** charged with **(maiming of [Name of Alleged Victim])/(self-maiming)** on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is meant for use with the crimes created by Title 21, Chapter 26, entitled Maiming. Section 751 sets forth the definition of maiming and creates a crime of maiming when the injury is inflicted upon another. Section 752 creates a crime of maiming when one injures oneself to avoid performance of any legal duty. The definition of "maiming" under section 752 is the same as under section 751. Sections 755 and 758 provide statutory guidelines as to the extent and permanency of the injury that must exist before the crime of maiming has been established. Sections 756 and 757 create an inference concerning the required mens rea and a statement as to the time of formation of the required mens rea. Section 754 indicates that it is immaterial how the maiming injury occurred. Hence, the manner or means of inflicting the injury does not need to be pleaded or proved by the State. *Boulding v. State*, 83 Okl. Cr. 352, 177 P.2d 152 (1947); *Payne v. State*, 21 Okl. Cr. 416, 209 P. 334 (1922). Section 759 sets forth the punishment permissible for the crimes of maiming.

OUJI-CR 4-116

MAIMING - ELEMENTS

No person may be convicted of maiming unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, infliction;

Second, upon another;

Third, of a physical injury that **disables/disfigures/(seriously diminishes physical vigor)**;

Fourth, performed with the intent to cause any injury.

Statutory Authority: 21 O.S. 1991, § 751.

Committee Comments

Although neither the cases nor the statutes expressly state that the injury must be a physical injury, it is the Commission's impression that mental injuries, even if incapacitating, are not sufficient to support a conviction for maiming. Moreover, in the opinion of the Commission, the injury need not be permanent. Section 758 states that an injury from which the person has recovered prior to trial is not sufficient to sustain a conviction. Section 758 therefore requires some degree of permanency. The cases also refer to the injuries as permanent injuries. *Boulding v. State*, 83 Okl. Cr. 352, 177 P.2d 152 (1947); *De Arman v. State*, 33 Okl. Cr. 79, 242 P. 783 (1926). But the Commission does not believe that the injury must be an injury beyond healing by medical techniques. Thus, the third element reads "physical injury."

The third element also indicates that the person injured must be disabled, disfigured, or have physical vigor seriously diminished. A disabling injury encompasses an injury to the members or organs of the person. A disfiguring injury is an observable injury to the appearance of the person.

The fourth element presents the mens rea requirement. The defendant must deliberately injure another, but the defendant need not intend specifically to maim, nor specifically to cause the particular injury that occurs. *DeArman*, *supra*; *White v. State*, 22 Okl. Cr. 131, 210 P. 313 (1922); *Payne v. State*, 21 Okl. Cr. 416, 209 P. 334 (1922). Thus, a defendant would be guilty of maiming if he strikes another with the intention of blackening another's eye, and unintentionally knocks the other's eye out of the socket. If the eye had been simply blackened, the defendant would have committed a battery. Since the eye is destroyed, however, the defendant has committed the crime of maiming. Maiming is, therefore, under Oklahoma law, a battery aggravated due to the seriousness of the injury inflicted. *See Savage v. State*, 525 P.2d 1219 (Okl. Cr. 1974). Moreover, even though the statutory language indicates that the design to injure must be premeditated, section 757 states that premeditated design can be formed instantly before the defendant inflicts the injury. As a consequence of section 757, the Commission has decided that a premeditated design to injure is synonymous with an intent to cause any injury. Moreover, the Commission has decided that the language adopted in the fourth element is less confusing and more understandable to a jury than is the statutory language. Hence, the Commission has used the language "performed with intent to cause any injury," rather than the exact statutory language.

OUJI-CR 4-117

SELF-MAIMING - ELEMENTS

No person may be convicted of self-maiming unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, infliction;

Second, upon oneself;

Third, of a disabling physical injury;

Fourth, with the intended purpose of avoiding any existing or anticipated legal duty.

Statutory Authority: 21 O.S. 1991, § 752.

OUJI-CR 4-118

MAIMING - DEFINITIONS

Disables - Injures any member or organ of a person.

Reference: 21 O.S. 1991, § 751.

Disfigures - Injures personal appearance in such a way as is calculated to attract observation after healing.

Reference: 21 O.S. 1991, § 755.

RAPE AND OTHER SEX CRIMES - INTRODUCTION

The **defendant(s) is/are** charged with:

[rape in the first/second degree]

[spousal rape in the first degree]

[rape by instrumentation in the first/second degree]

[forcible oral sodomy]

[sexual battery]

[indecent or lewd acts with a child under sixteen]

[indecent proposals to a child under sixteen]

on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 4-120

RAPE IN THE FIRST DEGREE - ELEMENTS

No person may be convicted of rape in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, sexual intercourse;

Second, with a person who was not the spouse of the defendant **[and who may be of the same sex as the defendant]**;

[Third, **where the defendant was over the age of eighteen, and the victim was under the age of fourteen]**.

OR

[Third, **where the victim was incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent]**.

OR

[Third, **where the victim was intoxicated by a/an narcotic/(anesthetic agent);**

[Fourth, (given by)/(with the knowledge of) the defendant;

[Fifth, as a means of forcing the victim to submit].

OR

[Third, **where the victim was at the time unconscious of the nature of the act and this fact was known by the defendant]**.

OR

[Third**, [where force/violence was used against (the victim)/(another person)]/ [where force/violence was threatened against (the victim)/(another person) and the defendant had the apparent power to carry out the threat of force/violence]**.

Statutory Authority: 21 O.S. 2011, §§ 1111(A), 1114.

Notes on Use

The trial court should read the bracketed language in the second element only if the defendant was of the same sex as the victim. In the third element the trial court should read only the alternative (or alternatives) that is (or are) supported by the evidence.

2012 SUPPLEMENT

OUJI-CR 4-121

SPOUSAL RAPE IN THE FIRST DEGREE - ELEMENTS

No person may be convicted of spousal rape in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, sexual intercourse;

Second, with the spouse of the defendant;

Third, where force/violence was used against **[(the victim)/(another person)]/[where force/violence was threatened against (the victim)/(another person) and the defendant] had the apparent power to carry out the threat of force/violence]**.

Statutory Authority: 21 O.S. Supp. 1995, § 1111(B), 21 O.S. 1991, § 1114.

OUJI-CR 4-122

RAPE - SEXUAL INTERCOURSE DEFINED

Sexual intercourse is the actual penetration of the **vagina/anus** by the penis. Any sexual penetration, however slight, is sufficient to complete the crime of rape.

Authority: Miller v. State, 65 Okl. Cr. 26, 36, 82 P.2d 317, 322 (1938); Ballentine's Law Dictionary 1170 (3d ed. 1969); Dorland's Illustrated Medical Dictionary 322, 748 (24th ed. 1965); C. Frike, 5000 Criminal Definitions 86. 21 O.S. 2001, § 1113 .

Committee Comments

Section 1111(A) of Title 21 expressly provides that rape can be accomplished by vaginal or anal penetration of either a male or a female and that the perpetrator may be either of the same or opposite sex as the victim. Although the spouse of the victim may not be prosecuted for rape under 21 O.S. Supp. 2001, § 1111(A), spousal rape may be prosecuted under 21 O.S. Supp. 2001, § 1111(B). *See* OUJI-CR 4-121, *supra*.

(2003 Supp.)

OUJI-CR 4-123

RAPE - WHETHER VICTIM WAS CAPABLE OF GIVING LEGAL CONSENT

In order to be capable of giving legal consent to a sexual act, a person must be capable of understanding the act, its nature and possible consequences.

Statutory Authority: 21 O.S. 2011, § 1111(A)(2).

Committee Comments

Section 1111(A)(2) of title 21 was amended in 1981 to substitute the phrase "mental illness" for "lunacy." Prior to 1981, a woman who suffered from "lunacy or other unsoundness of mind" was deemed legally incapable of consenting to sexual intercourse. Therefore, intercourse with such a person was deemed to be against her will and thus, by force. In *Adams v. State*, 1911 OK CR 87, 114 P. 347, 5 Okl. Cr. 347, the Court of Criminal Appeals held that upon proof of such a condition the law conclusively presumes that the sexual intercourse was by force and violence. *See also Hacker v. State*, 1941 OK CR 145, 118 P.2d 408, 73 Okl. Cr. 119; *Hyde v. State*, 1923 OK CR 332, 221 P. 787, 26 Okl. Cr. 69. There is an excellent possibility that the word "lunacy" was changed to the phrase "mental illness" because the phrase simply sounds better. The problem that could be created is best established by an evaluation of the *Diagnostic and Statistical Manual of Mental Disorders*, American Psychiatric Association. This reference cites over 100 mental illnesses which might well fall within the statutory definition of 21 O.S. 2011, § 1111(A)(2). These would include such illnesses as a severe state of temporary depression.

The Committee has concluded that the legislative intent was not to substantially change the prior meaning of section 1111(A)(2). It is the opinion of the Commission that the term "mental illness" in OUJI-CR 4-120 can be defined by the use of 43A O.S. 2011 § 1-103(3).

Whether a victim falls within the provision of being "incapable through mental illness or any other unsoundness of mind" is an issue of fact to be determined by the jury or trier of the facts. This determination will probably hinge on the particular evidence presented in the case. However, certain characteristics have been more commonly associated with "lunacy or other unsoundness of mind" than others. These characteristics will probably continue to have relevance under the amended section 1111(A)(2). Characteristics commonly associated with "lunacy or other unsoundness of mind" include: (1) testimony by individuals in frequent contact with the victim that he/she is "feeble minded" or "has the mind of a child," *Hacker*, *supra*; *Adams*, *supra*; (2) testimony from medical experts or relatives that the victim is suffering from a recognized mental disease which is associated with an inability to make decisions; *Hacker*, *supra*; *Hyde*, *supra*; (3) evidence which shows the victim does not feel guilty about having sex; (4) evidence which shows the inability to understand and comprehend the act of sexual intercourse; (5) and, evidence which shows the inability to understand and comprehend the potentially unfortunate consequences of sex, such as venereal disease and pregnancy.

Probably the chief characteristic to be established would be that the victim does not have an understanding of the sexual act, its nature, and its possible consequences.

The Court of Criminal Appeals apparently has never addressed the issue of whether the defendant must have an awareness of the victim's unsoundness of mind. Other jurisdictions which have similar statutes have held that it is not necessary for the State to prove that the defendant knew the victim

was of such unsoundness of mind as to be incapable of consenting to sexual intercourse. *See State v. Dombroski*, 176 N.W. 985 (Minn. 1920); *State v. Meyer*, 226 P.2d 204 (Wash. 1951).

In addition to the "unsoundness of mind" classification, the third element lists two other kinds of sexual intercourse which qualify for prosecution under rape in the first degree. These are: intercourse when the victim is under 14 years of age; and, the rape is accomplished by means of force, violence, or threats of force or violence with apparent power to carry out the threat. Intercourse in these instances is either in fact, or by law, without the consent of the victim.

Age refers to chronological age, not mental age. *Hacker*, *supra*. Although no Oklahoma case has decided the question, a victim apparently is no longer under the age of 14 at the moment he/she becomes 14. *Cf. Application of Smith*, 1960 OK CR 41, 351 P.2d 1076 (rape committed by male over age of 18 upon female under 14; the 18th birthday is the drawing line, and the first moment of the 18th year constitutes him over 18). Moreover, it is no defense to a prosecution for rape that the defendant does not know that the person with whom he/she has sexual intercourse is under the age of consent. *Reid v. State*, 1955 OK CR 106, 290 P.2d 775; *Law v. State*, 1950 OK CR 143, 224 P.2d 278, 92 Okl. Cr. 444 (1950).

At one time persons under the age of eighteen could not be charged with rape, but the rape statutes were amended in 1981 to permit prosecution of persons under eighteen years of age who use force. For a discussion of this change, see *Highsaw v. State*, 1988 Ok CR 128, ¶ ¶ 2-3, 758 P.2d 336, 337-38.

The former requirement that the victim must have offered resistance to force or threats of great bodily harm was removed from section 1111 of title 21 in 1983. When the rape is alleged to have occurred as a result of threats with the apparent power of execution, the State must prove both that the defendant made threats and that the victim believed the threats would be carried out if he/she did not submit. *Barrett v. State*, 1978 OK CR 6, 573 P.2d 1221; *Wines v. State*, 1912 OK CR 201, 124 P. 466, 7 Okl. Cr. 450.

The State must allege and prove that the person with whom the accused had sexual intercourse was not the spouse of the defendant, unless the accused is being prosecuted for spousal rape under 21 O.S. 2011, § 1111(B). *Emyahtubby v. State*, 1918 OK CR 8, 169 P. 1124, 14 Okl. Cr. 213. Proof that the victim was not the defendant's spouse may consist of the testimony from the victim or evidence that the defendant was married to another person. *See Phillips v. State*, 1988 OK CR 103, ¶ 20, 756 P.2d 604, 610 (victim's testimony that she never met the defendant before he attacked her, that the sexual intercourse was accomplished with a knife and a gun, and that she was severely cut during the rape was sufficient to establish that the victim was not the defendant's spouse); *Blackwell v. State*, 1983 OK CR 51 ¶ 14, 663 P.2d 12, 16 (testimony at trial established that the defendant was married to another woman).

2013 Supp.

OUJI-CR 4-124

RAPE IN THE SECOND DEGREE - ELEMENTS

No person may be convicted of rape in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, sexual intercourse;

Second, with a person who is not the spouse of the defendant [**and who may be of the same sex as the defendant];**

[Third, where the victim was under the age of sixteen].

OR

[Third, where the victim was under the belief induced by the defendant that the victim was having intercourse with his/her spouse].

OR

[Third, where the victim was under the legal custody/supervision;

Fourth, of a (state/federal agency)/county/municipality/(political subdivision); and

Fifth, the defendant was an employee/(employee of a [subcontractor of a] contractor of)/the (state/federal agency)/county/municipality/(political subdivision) that exercised authority over the victim;].

OR

[Third, where the victim was between sixteen and twenty years of age;

Fourth, the victim was a **student/(under the legal custody/supervision)** of **a/an (elementary/secondary school)/junior high)/high/(public vocational) school;**

Fifth, the defendant was eighteen years of age or older; and

Sixth, the defendant was an employee of a school system].

OR

Third, where the victim was nineteen years of age or younger; and

Fourth, in the legal custody of a **(state/federal agency)/(tribal court);** and

Fifth, the defendant was a **(foster parent)/(foster parent applicant).**

OR

[Third, where the victim was a student at a secondary school, was concurrently enrolled at an institution of higher education, and engaged in sexual intercourse with the defendant who was an employee of the institution of higher education of which the victim was enrolled. An "employee of an institution of higher education" means **(faculty/(adjunct faculty) /instructors/volunteer)/(an employee of a business contracting with an institution of higher education who may exercise, at any time, institutional authority over the victim). [An employee of an institution of higher education shall not include an enrolled student who was not more than three (3) years of age or older than the concurrently enrolled student and who was employed or volunteering, in any capacity, for the institution of higher education.]**

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

Statutory Authority: 21 O.S. Supp. 2022, § 1111, 21 O.S. 2021, § 1114.

Notes on Use

The trial court should read the bracketed language in the second element only if the defendant was of the same sex as the victim. In the third element the trial court should read only the alternative (or alternatives) that is (or are) supported by the evidence. The trial court should read the bracketed language in the last sentence of the last alternative only if the defendant was not more than three years older than the victim.

Committee Comments

In all instances, the statutory age under which a victim is legally incapable of consenting to sexual intercourse is 16, section 1111(A)(1). If a defense under section 1112 is unavailable, sexual intercourse with a person under 16 years of age is at least rape in the second degree, although if the victim is under 14 years of age, rape in the first degree is a possible charge. Even if the proof establishes that the victim is 13 years of age, a prosecution and conviction for rape in the second degree is proper because rape in the second degree is a lesser included offense of rape in the first degree. Hence, the first alternative in the third element simply indicates a victim under 16 years of age.

The other alternatives in the third element constitute, in fact or by law, sexual intercourse without the consent of the victim.

The age of the defendant is not an element of the crime of second-degree rape. If the prosecutor is uncertain whether it can be proved that the defendant has attained the age of 18, he/she can charge the defendant with second-degree rape and the conviction would be upheld although it is established that the defendant is over 18. *Brasel v. State,* 1929 OK CR 216, 291 P. 807, 48 Okl. Cr. 403. The age of the defendant may become relevant as a defense, however, under section 1112, if the victim is over 14 years of age and consents, and the defendant is under 18 years of age.

Oklahoma's rape shield law, 12 O.S. 2021, § 2412, limits the use of evidence of the sexual behavior of the victim in prosecutions for sexual offenses.

(2024 Supp.)

OUJI-CR 4-125

RAPE BY INSTRUMENTATION IN THE FIRST DEGREE - ELEMENTS

No person may be convicted of rape by instrumentation in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the person penetrated the **anus/vagina;**

Second, of any victim;

Third, with **(an inanimate object)/(a part of the human body other than the penis);** ~~and~~

Fourth, without the victim's consent; and

Fifth, **[List the Circumstance(s) Specified in Section 1111 Which Exist in This Case].**

Any sexual penetration, however slight, is sufficient to complete the crime of rape by instrumentation.

OR

First, the person was eighteen years of age or older;

Second, the person was an employee of the victim's school system; and

Third, the person penetrated the **anus/vagina;**

Fourth, of a **student /(person under the legal custody/supervision) of a public/private (elementary/secondary school)/(junior high) /high/(public vocational)** school;

Fifth, who was at least sixteen years of age and less than twenty years of age;

Sixth, with **(an inanimate object)/(a part of the human body other than the penis).**

Any sexual penetration, however slight, is sufficient to complete the crime of rape by instrumentation.

OR

First, the defendant was an **employee/(employee of a contractor of)/the (state/federal agency)/county/ municipality/(political subdivision);** and

Second, who penetrated the **anus/vagina;**

Third, of a person who was under the legal **custody/supervision;**

Fourth, of the **(state/federal agency) /county/municipality/(political subdivision)** that employed the defendant;

Fifth, with **(an inanimate object)/(a part of the human body other than the penis);**

Any sexual penetration, however slight, is sufficient to complete the crime of rape by instrumentation.

OR

First, the defendant was a **(foster parent)/(foster parent applicant);**

Second, who penetrated the **anus/vagina;**

Third, of a person who was nineteen years of age or younger;

Fourth, with **(an inanimate object)/(a part of the human body other than the penis);**

Fifth, when the person was in the legal custody of a **(state/federal agency)/(tribal court).**

Any sexual penetration, however slight, is sufficient to complete the crime of rape by instrumentation.

OR

First, the defendant was an employee of the institution of higher education of which the victim was enrolled;

Second, who penetrated the **anus/vagina**;

Third, of a person who was a student at a secondary school, and was concurrently enrolled at an institution of higher education;

Fourth, with **(an inanimate object)/(a part of the human body other than the penis).** An "employee of an institution of higher education" means **(faculty/(adjunct faculty)/instructors/ volunteer)/(an employee of a business contracting with an institution of higher education who may exercise, at any time, institutional authority over the victim). [An employee of an institution of higher education shall not include an enrolled student who was not more than three (3) years of age or older than the concurrently enrolled student and who was employed or volunteering, in any capacity, for the institution of higher education.]**

Any sexual penetration, however slight, is sufficient to complete the crime of rape by instrumentation.

Statutory Authority: 21 O.S. 2021 & 2022, §§ 1111.1, 1113, 1114.

Notes on Use

This Instruction should be used for crimes committed on or after November 1, 2017. If the victim is a minor, OUJI-CR 4-138A must be given.

Committee Comments

The first alternative in this Instruction requires a specification of the circumstances from 21 O.S. 2021, § 1111, while the other alternatives are for the circumstances in 21 O.S. Supp. 2022, § 1111.1, where consent is not an element.

(2024 Supp.)

OUJI-CR 4-128

FORCIBLE SODOMY -- ELEMENTS

No person may be convicted of forcible oral sodomy unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, penetration;

Second, of the **mouth/vagina** of the **defendant/victim;**

Third, by the **mouth/penis** of the **defendant/victim;**

[Fourth, which is accomplished by means of force or violence, or threats of force or violence that are accompanied by the apparent power of execution.]

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

OR

[Fourth, by a person over the age of eighteen on a child under the age of sixteen.]

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

OR

[Fourth, committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent].

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

OR

[Fourth, committed by a **state/county/municipal/ (political subdivision) employee/contractor/[employee of a [subcontractor of a] contractor of (the state)/ (a county/municipality/(political subdivision of Oklahoma)]** upon a person who was under the legal custody, supervision or authority of a **(state agency)/county/ municipality/(political subdivision)** of Oklahoma.

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

OR

[Fourth, where the victim was at least sixteen but less than twenty years of age;

Fifth, the victim was a student of a **(secondary school)/(junior high}/ high/(public vocational)** school;

Sixth, the defendant was eighteen years of age or older; and

Seventh, the defendant was an employee of the victim's school system].

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

[Fourth, where the victim was a student at a secondary school and was concurrently enrolled at an institution of higher education; and

Fifth, the defendant was an employee of the institution of higher education of which the victim was enrolled. An "employee of

an institution of higher education" means **(faculty/(adjunct faculty)/instructors/volunteer) /(an employee of a business contracting with an institution of higher education who may exercise, at any time, institutional authority over the victim). [An employee of an institution of higher education shall not include an enrolled student who was not more than three (3) years of age or older than the concurrently enrolled student and who was employed or volunteering, in any capacity, for the institution of higher education.]**

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

OR

[Fourth, where the victim was at the time unconscious of the nature of the act and this fact **was/(should have been)** known by the defendant].

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

[Fourth, where the victim was intoxicated by **a/an narcotic /(anesthetic agent);**

[Fifth, **(given by)/(with the knowledge of)** the defendant;

[Sixth, as a means of forcing the victim to submit].

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

Statutory Authority: 21 O.S. 2021 & Supp. 2022, §§ 886 - 888.

Notes on Use

This instruction is intended for use in forcible oral sodomy cases under 21 O.S. 2022, § 888. It does not cover forcible anal sodomy, which constitutes the crime of rape and is covered by OUJI-CR 4-119 through 4-127.

The trial court should select the Fourth Element that is supported by the evidence. The Fourth Element should not be included for prosecutions under 21 O.S. 2021, § 886.

The trial judge should pay particular attention to making sure the Second and Third Elements conform to the evidence at trial. In *Collins v. State,* 2009 OK CR 32 n.11, 223 P.3d 1014, 1018 n.11, the Court of Criminal Appeals stated that:

[I]n cases involving separate counts of forcible oral sodomy, where the crimes alleged involve different factual theories, it is advisable to instruct the jury with separate instructions. In particular, such instructions should make clear whether the crime alleged is forcing the victim to perform oral sex on the perpetrator (penetration of the mouth of the victim by the penis of the defendant) or forcing the victim to endure oral sex performed by the perpetrator (penetration of the vagina of the victim by the mouth of the defendant).

In addition, in the Second and Third Elements, the trial judge should not select the options of penetration of the vagina of the victim by the penis of the defendant, because that would constitute rape, and the appropriate instruction for rape should be used instead.

Committee Comments

Oklahoma has two sodomy statutes, 21 O.S. 2021, §§ 886, 888. Force is not an element of sodomy under 21 O.S. 2021, § 886. *Hinkle v. State,* 1989 OK CR 4, ¶¶ 4-5, 771 P.2d 232, 233. Proof of force is required under 21 O.S. Supp. 2022, § 888, however, unless the victim was under 16 years of age, unconscious, intoxicated, ~~or~~ mentally ill, or the sodomy was committed by a state employee or contractor upon a person in the custody of a political subdivision of the State, or a student at a secondary school.

Section 886 has been held not to be unconstitutionally vague. *Golden v. State,* 1985 OK CR 9, ¶ 4, 695 P.2d 6, 7. However, in *Post v. State,* 1986 OK CR 30, ¶¶ 11-12, 715 P.2d 1105, 1109-10, the Oklahoma Court of Criminal Appeals declared it unconstitutional as violative of the right to privacy if applied to private consensual heterosexual activity. Accordingly, the jury should receive an instruction on the defense of consent in such cases if there is evidence of consent presented. *Hinkle v. State,* 1989 OK CR 4, ¶¶ 4-5, 771 P.2d 232, 233. In *Garcia v. State,* 1995 OK CR 85, ¶ 4, 904 P.2d 144, 145, the Court of Criminal Appeals ruled that it was error for the trial court to give an instruction for non-forcible sodomy (21 O.S. 2021, § 886) as a lesser included offense of forcible sodomy (21 O.S. 2021, § 888), where the charge involved heterosexual activity and the defendant raised the defense of consent.

Penetration is required under 21 O.S. 2021, § 887. *Salyers v. State,* 1988 OK CR 88, ¶ 7, 755 P.2d 97, 100. Corroboration of the victim's testimony is not required unless "the victim's testimony is so incredible or has been so thoroughly impeached that a reviewing court must say that the testimony is clearly unworthy of belief." *Salyer v. State,* 1999 OK CR 184, ¶ 22, 761 P.2d 890, 895.

(2024 Supp.)

OUJI-CR 4-129

[LEWD ACTS (MOLESTATION) WITH]/
[INDECENT PROPOSALS TO]
A CHILD UNDER SIXTEEN -- ELEMENTS

No person may be convicted of (lewd acts with)/(indecent proposals to) a child under sixteen unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant knowingly and intentionally;

Second, made **a/an oral/written/(electronically/computer generated) lewd or indecent proposal**;

Third, to a **child/(person the defendant believed to be a child)** under sixteen years of age;

Fourth, for the child to have unlawful **sexual relations/intercourse** with any person; and

Fifth, the defendant **(was at least three years older than the child)/(was at least three years older than the purported child's age)/(used force/fear)**.

OR

First, the defendant knowingly and intentionally;

Second, **(looked upon)/touched/mauled/felt**;

Third, the body or private parts;

Fourth, of a child under sixteen years of age;

Fifth, in any lewd or lascivious manner; and

Sixth, the defendant **(was at least three years older than the child)/(used force/fear)**.

OR

First, the defendant knowingly and intentionally;

Second, **asked/invited/enticed/persuaded**;

Third, a **child/(person the defendant believed to be a child)** under sixteen years of age;

Fourth, to go alone with any person;

Fifth, to a **secluded/remote/secret** place;

Sixth, with the unlawful and willful intent and purpose;

Seventh, to commit **[Identify Crime Against Public Decency and Morality]**; and

Eighth, the defendant **(was at least three years older than the child)/(was at least three years older than the purported child's age)/(used force/fear)**.

OR

First, the defendant knowingly and intentionally;

Second, in a lewd and lascivious manner;

Third, for the purpose of sexual gratification;

Fourth, **[urinated/defecated upon]/[ejaculated upon/(in the presence of)]**;

Fifth, a child under sixteen years of age; and

Sixth, the defendant **(was at least three years older than the child)/(used force/fear)**.

OR

First, the defendant knowingly and intentionally;

Second, in a lewd and lascivious manner;

Third, for the purpose of sexual gratification;

Fourth, **forced/required** a child under sixteen years of age;

Fifth, to **urinate/defecate** [upon the **body/(private parts)** of another]; and

Sixth, the defendant **(was at least three years older than the child)/(used force/fear)**.

OR

First, the defendant knowingly and intentionally;

Second, in a lewd and lascivious manner;

Third, for the purpose of sexual gratification;

Fourth, **caused/exposed/forced/required** a child under sixteen years of age;

Fifth, to look upon **[the body/(private parts) of another person]/[sexual acts performed in the presence of the child]**; and

Sixth, the defendant **(was at least three years older than the child)/(used force/fear)**.

OR

First, the defendant knowingly and intentionally;

Second, in a lewd and lascivious manner;

Third, for the purpose of sexual gratification;

Fourth, **forced/required** a child under sixteen years of age;

Fifth, to **touch/feel the body/(private parts) of (the child)/(another person)**; and

Sixth, the defendant **(was at least three years older than the child)/(used force/fear)**.

OR

First, the defendant knowingly and intentionally;

Second, in a lewd and lascivious manner;

Third, for the purpose of sexual gratification;

Fourth, **forced/required** a **child/(person the defendant believed to be a child)** under sixteen years of age;

Fifth, to view **(obscene materials)/(child pornography)/(materials deemed harmful to minors)**; and

Sixth, the defendant **(was at least three years older than the child)/(was at least three years older than the purported child's age)/(used force/fear)**.

The words "lewd" and "lascivious" have the same meaning and signify conduct which is lustful and which evinces an eagerness for sexual indulgence.

Statutory Authority: 21 O.S. Supp.2023, § 1123(A).

Notes on Use

The trial court should select the appropriate alternative elements according to the crime charged and the evidence presented. It may be appropriate for the trial court to set out the elements for a crime against public decency and morality in the third alternative, *supra*. Examples of crimes against public decency and morality include rape, sexual assault, sodomy, and lewd molestation.

If the prosecution is seeking punishment for a victim under twelve years of age and there is no factual dispute about the victim's age, the trial court should substitute "twelve" for "sixteen" in the first sentence and wherever else "sixteen" appears in the rest of the instruction. If there is a jury issue about whether the victim was under the age of twelve at the time of the crime, the court should require the jury to make a separate finding analogous to OUJI-CR 10-22 in the verdict form with respect to the age of the victim. In *Chadwell v. State*, 2019 OK CR 14, ¶ 3, 446 P.3d 1244, 1248 (J. Kuehn, concurring), Judge Kuehn suggested an instruction for OUJI-CR 10-13 on the issue of the age of the vicim.

Committee Comments

The Oklahoma Court of Criminal Appeals ruled that section 1123(A)(1) of title 21 was not unconstitutionally vague in *Reed v. State*, 1986 OK CR 64, ¶¶ 3-6, 718 P.2d 373, 374-75.

The definition of "lewd" and "lascivious" is taken from *Reeves v. State*, 1991 OK CR 101, ¶¶ 44-47, 818 P.2d 495, 504.

Corroboration of the victim's testimony is not required "unless such testimony appears incredible or so unsubstantial as to make it unworthy of belief." *Jones v. State*, 1988 OK CR 281, ¶ 10, 765 P.2d 800, 802.

In *Barnard v. State*, 2012 OK CR 15, ¶ 12, 290 P.3d 759, 763-64, the Oklahoma Court of Criminal Appeals decided that the crime of making an indecent proposal to a child applied to indecent proposals made to an undercover officer posing as a child. In cases where the defendant is accused of making indecent proposals to an undercover officer, the Fifth Element of the First Alternative (and the corresponding elements of other Alternatives) should read: "Fifth, the defendant was at least three years older than the purported child's age."

(2024 Supp.)

OUJI-CR 4-130

SEXUAL BATTERY -- ELEMENTS

No person may be convicted of sexual battery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant intentionally;

Second, **touched/felt/mauled;**

Third, in a lewd and lascivious manner;

Fourth, the **body/(private parts);**

Fifth, of a person sixteen years of age or older;

Sixth, without **his/her** consent.

The words "lewd" and "lascivious" have the same meaning and signify conduct which is lustful and which evinces an eagerness for sexual indulgence.

OR

First, the defendant was a **state/county/municipal/(political subdivision) employee/contractor/[(subcontractor of a contractor)/[employee of a [subcontractor of a] contractor of (the state)/(a county/municipality/ (political subdivision of Oklahoma)] who;**

Second, intentionally;

Third, **touched/felt/mauled;**

Fourth, in a lewd and lascivious manner;

Fifth, the **body/(private parts);**

Sixth, of a person sixteen years of age or older;

Seventh, who was under the legal custody, supervision or authority of the **(state agency)/county/municipality/(political subdivision)** of Oklahoma.

The words "lewd" and "lascivious" have the same meaning and signify conduct which is lustful and which evinces an eagerness for sexual indulgence.

OR

First, the defendant was eighteen years of age or older;

Second, who was an employee of the victim's school system;

Third, and intentionally;

Fourth, **touched/felt/mauled;**

Fifth, in a lewd and lascivious manner;

Sixth, the **body/(private parts);**

Seventh, of a person at least sixteen years of age and less than twenty years of age;

Eighth, who was a **student/(person under the legal custody/supervision)** of a **public/private (elementary/secondary /(technology center)** school.

[An "employee of the victim's school system" means a teacher, principal or other duly appointed person employed by a school system or an employee of a firm contracting with a school system who exercises authority over the victim.]

The words "lewd" and "lascivious" have the same meaning and signify conduct which is lustful and which evinces an eagerness for sexual indulgence.

OR

First, the defendant was a **(foster parent)/(foster parent applicant);** and

Second, intentionally;

Third, **touched/felt/mauled;**

Fourth, in a lewd and lascivious manner;

Fifth, the **body/(private parts);**

Sixth, of a person who was nineteen years of age or younger;

Seventh, when the person was in the legal custody of a **(state/federal agency)/(tribal court).**

OR

First, the defendant was an employee of the institution of higher education of which the victim was enrolled; and

Second, intentionally;

Third, **touched/felt/mauled;**

Fourth, in a lewd and lascivious manner;

Fifth, the **body/(private parts);**

Sixth, of a person who was a student at a secondary school, was concurrently enrolled at an institution of higher education. An "employee of an institution of higher education" means **(faculty/(adjunct faculty)/instructors/volunteer)/(an employee of a business contracting with an institution of higher education who may exercise, at any time, institutional authority over the victim). [An employee of an institution of higher education shall not include an enrolled student who was not more than three (3) years of age or older than the concurrently enrolled student and who was employed or volunteering, in any capacity, for the institution of higher education.]**

The words "lewd" and "lascivious" have the same meaning and signify conduct which is lustful and which evinces an eagerness for sexual indulgence.

Statutory Authority: 21 O.S. Supp. 2022, § 1123(B).

Committee Comments

The definition of "lewd" and "lascivious" is taken from *Reeves v. State,* 1991 OK CR 101, ¶ 44-47, 818 P.2d 495, 504.

(2024 Supp.)

OUJI-CR 4-131

INDECENT EXPOSURE -- ELEMENTS

No person may be convicted of indecent exposure unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, and in a lewd manner;

Third, exposed **his/her person/penis/vagina**;

Fourth, in a **(public place)/(place where there were present other persons to be offended/annoyed thereby)**.

Statutory Authority: 21 O.S. Supp. 2000, § 1021(A)(1).

Committee Comments

It is not necessary for the indecent exposure to have occurred in a public place in order for it to be a crime. *Martin v. State*, 1983 OK CR 168, ¶¶ 4-5, 674 P.2d 37, 39-40.

In *Vanscoy v. State*, 1987 OK CR 50, ¶¶ 9-10, 734 P.2d 825, 827-28, the Oklahoma Court of Criminal Appeals affirmed the trial court's decision not to give additional instructions concerning the crime of outraging public decency or setting out First Amendment guidelines and standards applicable to prosecution for sexual misconduct and obscenity.

(2000 Supp.)

OUJI-CR 4-132

PROCURING LEWD EXHIBITION -- ELEMENTS

No person may be convicted of procuring lewd exhibition unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **procuring/counseling/assisting** any person;

Third, to **(expose himself/herself)/(make any exhibition of himself/herself) to (public view)/(the view of any number of persons)**;

Fourth, for the purpose of sexual stimulation of the viewer.

Statutory Authority: 21 O.S. Supp. 2000, § 1021(A)(2).

(2000 Supp.)

OUJI-CR 4-133

DISTRIBUTION OF PORNOGRAPHY -- ELEMENTS

No person may be convicted of distribution of pornography unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant willfully;

[Second, **wrote/composed/stereotyped/printed/photographed/designed/copied/drew/engraved/painted/molded/cut/prepared/ published/sold/distributed/(kept for sale)/exhibited**;

Third, any **(obscene material)/(child pornography)**.]

OR

[Second, **made/prepared/cut/sold/gave/loaned/distributed/(kept for sale)/exhibited**;

Third, any type of **(obscene material)/(child pornography)**.]

You are instructed that the word "willfully," as used in these instructions, requires that you must find beyond a reasonable doubt from all the evidence in this case (either direct or circumstantial or both) that the defendant knew the nature and character of the contents of **[specify alleged obscene material or child pornography]**. It is not necessary that **[Name of Defendant]** knew the exact content or actually **saw/read** the **[specify alleged obscene material or child pornography]**.

Statutory Authority: 21 O.S. Supp. 2000, § 1021(A)(3),(4).

Committee Comments

The last paragraph is based on the instructions required under *Hanf v. State*, 1977 OK CR 41, ¶ 16, 560 P.2d 207, 211. The Oklahoma Court of Criminal Appeals held in the *Hanf* case that the trial courts must give the following scienter instruction in all future prosecutions under any obscenity statute in Oklahoma:

> You are instructed that the words "knowingly" and/or "willfully," as used in these instructions, require that you must find beyond a reasonable doubt from all the evidence in this case (either direct or circumstantial or both) that the defendant knew the contents of the material introduced into evidence as State's Exhibit(s) No.(s) _____"

Id. Later, in *Trim v. State*, 1996 OK CR 1, 909 P.2d 841, the Court of Criminal Appeals affirmed a conviction under 21 O.S. 1991 § 1021(A)(3) for selling obscene magazines in which the trial court gave the following instructions after giving the *Hanf* instruction:

> In this connection you are instructed that for the defendant to have wilfully sold an obscene magazine(s) he must have knowledge of the character of the content of the magazine alleged to be obscene.
>
> It is not necessary that the Defendant be shown to have known the exact content or to have actually seen or read the particular materials at issue, but only that he knew the nature and character of the materials distributed. It does not matter that the Defendant did not know or believe the materials were obscene.

The Court of Criminal Appeals ruled that these instructions were proper and in harmony with *Hanf*. *Id.* ¶ 15, 909 P.2d at 844. *Trim* was followed in *Davis v. State*, 1996 OK CR 15, 916 P.2d 251, in which the Court of Criminal Appeals held "In order to prove scienter, the prosecution need only show the accused knew the nature and character of what he was selling." *Id.* ¶ 33, 916 P.2d at 260.

(2000 Supp.)

OUJI-CR 4-134

SOLICITATION OF MINOR -- ELEMENTS

No person may be convicted of solicitation of a minor unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **solicited/aided** a minor child to;

[Third, in a lewd manner;

Fourth, expose **his/her person/penis/vagina**;

Fifth, in a place where there were present other persons to be offended or annoyed thereby.]

OR

[Third, **procure/counsel/assist** any person;

Fourth, to **(expose himself/herself)/(make any exhibition of himself/herself)** to **(public view)/(the view of any number of persons)**;

Fifth, for the purpose of sexual stimulation of the viewer.]

OR

[Third, **write/compose/stereotype/print/photograph/design/copy/draw/engrave/paint/mold/cut/prepare/publish/sell/distribute/(keep for sale)/exhibit**;

Fourth, any **(obscene material)/(child pornography)**.]

OR

[Third, **made/prepared/cut/sold/gave/loaned/distributed/ (kept for sale)/exhibited**;

Fourth, any type of **(obscene material)/(child pornography)**.]

Statutory Authority: 21 O.S. Supp. 2000, § 1021(B)(1).

(2000 Supp.)

OUJI-CR 4-135

EXHIBITION OF OBSCENE MATERIAL TO MINOR -- ELEMENTS

No person may be convicted of exhibition of obscene material to a minor unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant willfully;

Second, **showed/exhibited/loaned/distributed** to a minor child;

Third, any **(obscene material)/(child pornography)**;

Fourth, for the purpose of inducing the minor child to;

[Fifth, expose **his/her person/penis/vagina**;

Sixth, in a place where there were present other persons to be offended or annoyed thereby;

Seventh, in a lewd manner.]

OR

[Fifth, **write/compose/stereotype/print/photograph/design/copy/draw/engrave/paint/mold/cut/prepare/publish/sell/distribute/(keep for sale)/exhibit**;

Sixth, any **(obscene material)/(child pornography)**.]

OR

[Fifth, **make/prepare/cut/sell/give/loan/distribute/(keep for sale)/exhibit**;

Sixth, any type of **(obscene material)/(child pornography)**.]

You are instructed that the word "willfully," as used in these instructions, requires that you must find beyond a reasonable doubt from all the evidence in this case (either direct or circumstantial or both) that the defendant knew the nature and character of the contents of **[specify alleged obscene material or child pornography]**. It is not necessary that **[Name of Defendant]** knew the exact content or actually **saw/read** the **[specify alleged obscene material or child pornography]**.

Statutory Authority: 21 O.S. Supp. 2000, § 1021(B)(2).

Committee Comments

See Committee Comments to OUJI-CR 4-133, *supra*.

(2000 Supp.)

OUJI-CR 4-135A

BUYING/POSSESSING/PROCURING

CHILD PORNOGRAPHY -- ELEMENTS

No person may be convicted of **buying/possessing/procuring** child pornography unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **buying/procuring/possessing**;

Third, child pornography.

You are instructed that the word "willfully," as used in these instructions, requires that you must find beyond a reasonable doubt from all the evidence in this case

(either direct or circumstantial or both) that the defendant knew the nature and character of the contents of [specify alleged child pornography]. It is not necessary that **[Name of Defendant]** knew the exact content or actually **saw/read** the **[specify alleged child pornography]**.

Statutory Authority: 21 O.S. Supp. 2000, § 1024.2.

Notes on Use

For the definition of child pornography, see OUJI-CR 4-139, *infra*.

Committee Comments

Section 1024.1 of Title 21 was amended in 2000 to limit its application to child pornography, instead of to obscene material.

The Court of Criminal Appeals decided in *Glenn v. State*, 1988 OK CR 16, ¶ 3, 749 P.2d 121, 124, that the Oklahoma's obscenity statute was not unconstitutionally vague, because it incorporated the standards from *Miller v. California*, 413 U.S. 15 (1973).

The last paragraph of the instruction is required by *Hanf v. State*, 1977 OK CR 41, ¶ 16, 560 P.2d 207, 211; *Trim v. State*, 1996 OK CR 1, 909 P.2d 841; and *Davis v. State*, 1996 OK CR 15, ¶ 33, 916 P.2d 251, 260. *See* the Committee Comments to OUJI-CR 4-133, *supra*.

(2000 Supp.)

OUJI-CR 4-135B

PROCUREMENT OF CHILD FOR PORNOGRAPHY -- ELEMENTS

No person may be convicted of procurement of child for pornography unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, **procuring/causing** the participation of;

Third, a child under the age of 18;

Fourth, in any child pornography.

Statutory Authority: 21 O.S. Supp. 2000, § 1021.2.

(2000 Supp.)

OUJI-CR 4-135C

POSSESSION/PROCUREMENT OF

CHILD PORNOGRAPHY -- ELEMENTS

No person may be convicted of **possession/procurement** of child pornography unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, **possessing/procuring/manufacturing/(causing to be sold/distributed)**;

Third, any child pornography.

You are instructed that the word "knowingly," as used in these instructions, requires that you must find beyond a reasonable doubt from all the evidence in this case (either direct or circumstantial or both) that the defendant knew the nature and character of the contents of **[specify alleged child pornography]**. It is not necessary that **[Name of Defendant]** knew the exact content or actually **saw/read** the **[Specify Alleged Obscene Material]**.

Statutory Authority: 21 O.S. Supp. 2000, § 1021.2.

Notes on Use

For the definition of child pornography, see OUJI-CR 4-139, *infra*.

Committee Comments

Possession of obscene material is not a lesser included offense of possession of child pornography, if there is no factual issue concerning the involvement of a child under 18. *Schultz v. State*, 1991 OK CR 57, ¶ 30, 811 P.2d 1322, 1331.

The last paragraph of the instruction is required by *Hanf v. State*, 1977 OK CR 41, ¶ 16, 560 P.2d 207, 211; *Trim v. State*, 1996 OK CR 1, 909 P.2d 841; and *Davis v. State*, 1996 OK CR 15, ¶ 33, 916 P.2d 251, 260. *See* the Committee Comments to OUJI-CR 4-133, *supra*.

(2000 Supp.)

OUJI-CR 4-136

PEEPING TOM -- ELEMENTS

No person may be convicted of violating the peeping tom statute unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **hiding/waiting/loitering**;

Second , near any **(private dwelling house)/(apartment building)/(place of residence)/(locker/dressing room)/restroom/(place where a person has a right to a reasonable expection of privacy);**

Third, with the unlawful and willful intent;

Fourth, to **watch/gaze/(look upon)** any person;

Fifth, in a clandestine manner.

Statutory Authority: 21 O.S. 2001, § 1171.

(2003 Supp.)

OUJI-CR 4-136A

TAKING CLANDESTINE PHOTOS -- ELEMENTS

No person may be convicted of taking clandestine photos unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, using **photographic/electronic/video** equipment;

Second, in a clandestine manner;

Third, for **a/an illegal/illegitimate/prurient/lewd/lascivious** purpose;

Fourth, with the unlawful and willful intent;

Fifth, to **view/watch/gaze/(look upon)** another person;

Sixth, without the knowledge and consent of the other person;

Seventh, when the other person was in a place where there is a right to a reasonable expectation of privacy.

OR

First, **publishing/distributing** an image obtained from;

Second, using **photographic/electronic/video** equipment;

Third, in a clandestine manner;

Fourth, for **a/an illegal/illegitimate/prurient/lewd/lascivious** purpose;

Fifth, with the unlawful and willful intent;

Sixth, to **watch/gaze/(look upon)** another person;

Seventh, without the knowledge and consent of the other person;

Eighth, when the other person was in a place where there is a right to a reasonable expectation of privacy.

Statutory Authority: 21 O.S. 2001, § 1171(B).

(2003 Supp.)

OUJI-CR 4-137

INCEST -- ELEMENTS

No person may be convicted of incest unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(married to)/(committed adultery/fornication with)**;

Second, the defendant's **[Identify Relationship to Defendant, e.g., Child, Sister, etc.]**.

Statutory Authority: 21 O.S. Supp. 2000, § 885.

Committee Comments

For the degrees of consanguinity that are incestuous as a matter of law, 43 O.S. 1991, § 2.

(2000 Supp.)

OUJI-CR 4-138

CONSENT

It is the burden of the State to prove beyond a reasonable doubt the absence of consent to the **(sexual intercourse)/[specify other sexual conduct]**.

Persons need not expressly announce their consent to engage in sexual activity for there to be consent. Consent can be given either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person that consent for the specific sexual activity had been given.

Consent is present when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.

"Consent" means the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter. Consent can be revoked at any time.

Consent cannot be:

1. Given by an individual who:

a. is asleep or is mentally or physically incapacitated either through the effect of drugs or alcohol or for any other reason, or

b. is under duress, threat, coercion or force; or

2. Inferred under circumstances in which consent is not clear including, but not limited to:

a. the absence of an individual saying "no" or "stop", or

b. the existence of a prior or current relationship or sexual activity.

If there is evidence to suggest that the defendant reasonably believed that consent had been given, the State must demonstrate that such a belief was unreasonable under all of the circumstances. If you find that the State has failed to sustain its burden of proof beyond a reasonable doubt, then the defendant must be found not guilty.

Statutory Authority: 21 O.S. Supp. 2017, § 113.

Notes on Use

This Instruction should be given where consent is an issue in the case, including where "force" is an element of a crime involving sexual assault. See 21 O.S. Supp. 2017, § 111(A) (defining "force") and § 112 (defining "sexual assault").

(2018 Supp.)

OUJI-CR 4-138A

RAPE AND SEX CRIMES - CONSENT OF MINOR

You are instructed that as a matter of law a minor under the age of **fourteen/sixteen** is incapable of giving **consent/agreement** to engaging in sexual conduct which is otherwise prohibited by law and the **agreement/consent** of such minor to such activity should be disregarded by you in determining the question of the defendant's guilt.

Notes on Use

This instruction is appropriate for rape and other sex crimes when the victim is a child below a particular age. This age is fourteen for prosecutions for rape in the first degree and sixteen for prosecutions for rape in the second degree and other sex crimes. See 21 O.S. 2011 & Supp. 2017, §§ 1111-1114.

Committee Comments

The Oklahoma Court of Criminal Appeals held in *Kimbro v. State*, 1990 OK CR 4, ¶¶ 3-4, 857 P.2d 798, 799, that as a matter of law a child under the age of sixteen cannot consent to oral or anal sodomy. In doing so, it overruled *Slaughterback v. State*, 1979 OK CR 28, 594 P.2d 780.

(2018 Supp.)

OUJI-CR 4-139

RAPE AND SEX CRIMES -- DEFINITIONS

Child Pornography - Any **(visual depiction/(individual image) stored/contained** in any format on any medium including, but not limited to, **film/(motion picture)/videotape/photograph/negative/(undeveloped film)/slide/(photographic product)/(reproduction of a photographic product) /play/performance** in which a child under the age of 18 years **(is engaged with any person, other than his/her spouse in)/observes any (act of sexual intercourse, which is normal or perverted)/(act of anal sodomy)/(act of sexual activity with an animal)/(act of sadomasochistic abuse, including flagellation/torture/[the condition of being fettered/bound/(physically restrained) in the context of sexual conduct])/(act of fellatio/cunnilingus)/(act of excretion in the context of sexual conduct)/[(lewd exhibition of the uncovered genitals in the context of masturbation/(sexual conduct)])/(lewd exhibition of the (uncovered genitals)/buttocks/(the breast of a female minor) where the lewd exhibition has the purpose of sexual stimulation of the viewer)**.

Reference: 21 O.S. 2011 & Supp. 2016, § 1024.1.

Force - Force means any force, no matter how slight, necessary to accomplish the act without the consent of the victim. The force necessary to constitute an element need not be actual physical force since fear, fright or coercion may take the place of actual physical force.

Reference: 21 O.S. Supp. 2016, § 111.

Inanimate Object - Not having the qualities associated with active, living organisms.

Genitals or Genitalia - The external sex organs.

Harmful to minors - That quality of any **description/exhibition/presentation/representation**, in whatever form, of **nudity/(sexual conduct or sexual excitement)/(sadomasochistic abuse)** when the **material/performance**, taken as a whole, has the following characteristics:

(1) the average person eighteen (18) years of age or older applying contemporary community standards would find that the **material/performance** has a predominant tendency to appeal to a prurient interest in sex to minors, and

(2) the average person eighteen (18) years of age or older applying contemporary community standards would find that the **material/performance depicts/describes nudity/(sexual conduct or sexual excitement)/(sadomasochistic abuse)** in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors, and

(3) the **material/performance** lacks serious literary, scientific, medical, artistic, or political value for minors,

OR

Any **description/exhibition/presentation/representation,** in whatever form, of inappropriate violence.

Reference: 21 O.S. 2011, § 1040.75.

Knowing or Knowingly - Being aware of the existence of facts that cause the act to be criminal in nature. A person need not be aware of the applicable law to do an act "knowingly," but only need to be aware of the applicable facts.

Lascivious - Characterized by or expressing lust or lewdness.

Law Enforcement Activity - A person engages in "Law Enforcement Activity" when acting under the direction of the courts or the direction or supervision of a law enforcement agency while investigating criminal activity.

Reference: 21 O.S. 2011, § 1021.1.

Lewd - Obscene, lustful, indecent, lascivious, lecherous.

Reference: 21 O.S. 2011, § 1030(6).

Obscene Material - Any representation, performance, depiction or description of sexual conduct in any form or on any medium including **(still/undeveloped photographs)/(motion pictures)/(undeveloped film)/videotape/(optical/magnetic/(solid state) storage)(purely photographic product)/(reproduction of a photographic product in any book/pamphlet/magazine/publication).(electronic/photo-otical format):**

First, in which there are **depictions/descriptions** of sexual conduct which are patently offensive as found by the average person applying contemporary community standards;

Second, which, taken as a whole, has as the dominant theme an appeal to prurient interest, as found by the average person applying contemporary community standards; and

Third, which a reasonable person would find that the **material/performance** when taken as a whole lacks serious literary, artistic, educational, political, or scientific purposes or value.

Reference: 21 O.S. 2011 & Supp. 2016, § 1024.1.

Performance - Any display, live or recorded, in any form or medium.

Reference: 21 O.S. 2011 & Supp. 2016, § 1024.1.

Private Parts - The genitals or sex organs.

Sexual Conduct -- Acts of sexual intercourse including any intercourse which is normal or perverted, actual or simulated.

OR

Acts of deviate sexual conduct, including oral and anal sodomy.

OR

Acts of masturbation.

OR

Acts of sadomasochistic abuse including but not limited to:

(1) **flagellation/torture by/upon** any person who is **nude/[clad in undergarments/(costume which is of a revealing nature)]**, or

(2) the condition of being **fettered/bound/(physically restrained)** on the part of one who is **nude/[clad in undergarments/(costume which is of a revealing nature)]**.

OR

Acts of excretion in a sexual context.

OR

Acts of exhibiting human genitals or pubic areas.

[Sexual conduct includes acts performed alone/(between members of the same/opposite sex)/(between humans and animals) in an act of apparent sexual stimulation/gratification.]

Reference: 21 O.S. 2011 & Supp. 2016, § 1024.1.

(2017 SUPP.)

OUJI-CR 4-140

ROBBERY - INTRODUCTION

The **defendant(s) is/are** charged with

[robbery in the first/second degree]

[conjoint robbery]

[robbery with a dangerous weapon]

of **[Name of Person Allegedly Robbed]** on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

The above introductory instruction is meant for use with regard to the crimes set forth in Title 21, Chapter 28, entitled Robbery. The instruction gives the basic facts alleged in the information.

Chapter 28 includes sections 791 through 801. Section 791 is the statutory definition of robbery, while sections 797, 800, and 801 classify robbery into degrees and stipulate the circumstances which make a robbery an aggravated robbery. The sections which create specific robbery crimes all depend upon section 791 for the definition of robbery. *Roulston v. State*, 1957 OK CR 20, 307 P.2d 861;*Inman v. State*, 61 Okl. Cr. 73, 65 P.2d 1228 (1937); *Simpson v. State*, 40 Okl. Cr. 58, 266 P. 783 (1928).

Sections 792, 793, and 794 provide definitions of force and fear: the element of robbery which primarily distinguishes it from the crime of larceny. Section 795 indicates that the value of the property taken is immaterial, while section 796 distinguishes robbery from the crime of larceny from the person. Sections 798 and 799 set forth the punishments

to be imposed for first-degree and second-degree robbery. It should be noted, however, that section 798 has been impliedly repealed by sections 800 and 801, which set a lesser minimum penalty. *James v. State*, 97 Okl. Cr. 355, 264 P.2d 395 (1953); *Ridgeway v. State*, 54 Okl. Cr. 388, 22 P.2d 932 (1933).

(2000 Supp.)

OUJI-CR 4-141

ROBBERY IN THE FIRST DEGREE - ELEMENTS

No person may be convicted of robbery in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, wrongful;

Second, taking;

Third, carrying away;

Fourth, personal property;

Fifth, of another;

Sixth, from the **person/(immediate presence)** of another;

Seventh, when, in the course of the robbery;

[Eighth, the defendant inflicted serious bodily injury upon the other person;]

OR

[Eighth, the defendant threatened a person with serious bodily injury;]

OR

[Eighth, the defendant intentionally put a person in fear of immediate serious bodily injury;]

OR

[Eighth, the defendant committed/(threatened to commit) the crime of [Specify Felony] upon the other person].

Statutory Authority: 21 O.S. 2001, §§ 791, 797.

Committee Comments

The crime of robbery is basically an aggravated form of larceny. *Inman v. State*, 61 Okl. Cr. 73, 65 P.2d 1228 (1937); *Berry v. State*, 44 Okl. Cr. 150, 279 P. 982 (1929); *Randall v. State*, 33 Okl. Cr. 262, 243 P. 983 (1926). The treatises list the elements of robbery as basically identical to the elements of larceny with the addition of two distinguishing elements: the taking must be from the person or the immediate presence of the one robbed; and the taking must be accomplished by use of force or fear. W. Clark & W. Marshall, *A Treatise on the Law of Crime* § 12.09, 882 (7th ed. 1967); W. LaFave & A. Scott, *Criminal Law* § 94, at 692 (1972); R. Perkins, *Criminal Law* 279 (2d ed. 1969). The statutory language of section 791, however, makes it incorrect to assert that robbery is defined in Oklahoma as it was at common law. Hence, the mens rea element of robbery in Oklahoma is "wrongful," whereas at common law the mens rea element was "the intent to deprive permanently," the same as that required for larceny. *Traxler v. State*, 96 Okl. Cr. 231, 251 P.2d 815 (1953); *overruling Johnson v. State*, 24 Okl. Cr. 326, 218 P. 179 (1923).

The statutory language of section 791 also raises the question of whether the element of asportation, "carrying away," is an element of robbery as it is of larceny. The statutory language says "taking of" with no specific reference to an action of carrying away. The syllabus to *Norris v. State*, 68 Okl. Cr. 172, 96 P.2d 540 (1939), states that robbery does not require

an asportation. The facts and issues of *Norris*, however, involve the crime of kidnapping, and nowhere in the opinion is the crime of robbery even mentioned. In *Karlin v. State*, 540 P.2d 1181 (Okl. Cr. 1975), however, the Court of Criminal Appeals held by implication that asportation is a necessary element of the offense.

The personal property taken during the robbery must be the personal property of another. As in larceny, robbery is a crime against possessory rights of another in property, rather than against ownership. Hence, the use of force to obtain personal property pledged to another with the intent to deprive the pledgee of his possessory right would constitute robbery even though the robber is the owner of the property. It should be emphasized, however, that the person from whom the property is taken, or from whose presence the property is taken, need not be the same person as the owner or as the person having possessory rights. The person robbed need have no more than custody or control over the property taken. *Robards v. State*, 37 Okl. Cr. 371, 259 P. 166 (1927); *Wilson v. State*, 28 Okl. Cr. 102, 228 P. 1108 (1924).

The element of "taking" encompasses the concept that the property was originally in the control, custody, or possession of someone other than the taker. "Taking" indicates a transfer of control, custody, or possession. Hence, despite the statutory language "personal property in the possession of another," the Commission did not think it necessary to list as a separate element the concept of possession of another.

Nor did the Commission think it necessary to list as a separate element the concept present in the statutory language, "against his will." The seventh element indicates that the taking must be accomplished by force or fear of immediate injury. Any taking under those circumstances would necessarily be against the will of the person robbed. If the property is taken with the consent of the owner, the property has not been taken by force or fear. *Shouquette v. State*, 25 Okl. Cr. 169, 219 P. 727 (1923). The lack of consent is assuredly an essential concept to support a conviction for robbery, but the definition of the means used to obtain possession encompasses the concept.

The eighth element lists the alternate force and fear factors that were added to section 797 in 2001 to differentiate first degree from second degree robbery.

(2003 Supp.)

OUJI-CR 4-142

ROBBERY IN THE SECOND DEGREE - ELEMENTS

No person may be convicted of robbery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, wrongful;

Second, taking;

Third, carrying away;

Fourth, personal property;

Fifth, of another;

Sixth, from the **person/(immediate presence)** of another;

Seventh, by **force/fear**.

Statutory Authority: 21 O.S. 1991, §§ 791, 794, 797.

Committee Comments

The elements of second-degree robbery are identical to the elements of first-degree robbery, except for the seventh element. The seventh element indicates that the means used to obtain the property can be force or fear. Although the district attorney would usually choose to prosecute for first-degree robbery if force were used, the conviction for second-degree robbery should stand if the evidence indicates the use of force. Moreover, the fear which establishes second-degree robbery is not limited to fear of immediate injury, as is the case with robbery in the first degree. Any definition of fear as given by section 794 is sufficient to support a conviction for robbery in the second degree. Second-degree robbery is, therefore, a lesser included offense of first-degree robbery.

OUJI-CR 4-143

CONJOINT ROBBERY - ELEMENTS

No person may be convicted of conjoint robbery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, wrongful;

Second, taking;

Third, carrying away;

Fourth, personal property;

Fifth, of another;

Sixth, from the **person/(the immediate presence)** of another;

Seventh, by **force/fear**;

Eighth, committed by two or more persons.

Statutory Authority: 21 O.S. 1991, §§ 791, 800.

Committee Comments

Conjoint robbery, created by section 800, is robbery as defined by section 791, except that two or more persons must participate in the commission of the crime. *Roberts v. State*, 66 Okl. Cr. 371, 92 P.2d 612 (1939); *Simpson v. State*, 40 Okl. Cr. 58, 266 P. 783 (1928). Robbery in the first degree and robbery in the second degree are lesser included offenses of conjoint robbery. *Winfield v. State*, 18 Okl. Cr. 257, 191 P. 609 (1920). Hence, the elements of conjoint robbery are identical to the elements of second-degree robbery, with the addition of the eighth element.

OUJI-CR 4-144

ROBBERY WITH A DANGEROUS WEAPON - ELEMENTS

No person may be convicted of robbery with a dangerous weapon unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, wrongful;

Second, taking;

Third, carrying away;

Fourth, personal property;

Fifth, of another;

Sixth, from the **person/(the immediate presence)** of another;

Seventh, by **force/fear**;

Eighth, through use of a **(loaded/unloaded firearm)/(blank/ imitation firearm capable of raising in the mind of the person threatened with such device a fear that it is a real firearm)/(dangerous weapon)**.

Statutory Authority: 21 O.S. 1991, §§ 791, 801.

Committee Comments

Section 801 creates a crime of aggravated robbery, with the aggravating factor being the use of a firearm or a dangerous weapon. The word "robbery" as used in section 801 has the same definition as in section 791. *Roulston v. State*, 307 P.2d 861 (Okl. Cr. 1957); *Inman v. State*, 61 Okl. Cr. 73, 65 P.2d 1228 (1937); *Simpson v. State*, 40 Okl. Cr. 58, 266 P. 783 (1928). Hence, the elements of the crime created by section 801 are identical to the elements of robbery in the second degree with the addition of the eighth element listing the aggravating circumstance. However, punishment may be fixed under the provisions of section 801 only where the defendant is charged with violating that statute in the information. *Gamble v. State*, 554 P.2d 23 (Okl. Cr. 1976).

The statutory language of section 801 reads, "Any person ... who, with the use of any firearms or any other dangerous weapons, ... robs any person." No distinction is made between a person robbed on the street and a person in an establishment such as a bank teller robbed in a bank. Thus, all robberies with firearms or dangerous weapons are aggravated robberies. It should be remembered, however, that no robbery has occurred unless the taking is from the person or the immediate presence of another. Thus the language "robs ... any place of business, residence or banking institution or any other place inhabited or attended by any person or persons at any time, either day or night" is surplusage. A bank cannot be robbed because a bank is not a person. A robbery can occur in a bank, however, by a robber using force against a bank employee. Some states have made robbery in a bank, more commonly called bank robbery, a separate and more serious form of robbery. Section 801 does not create a bank-robbery crime. It is simply an aggravated form of robbery by the use of a firearm or dangerous weapon against any person no matter where the person is located at the time of the robbery. It is therefore unnecessary to allege or to prove that the robbery with a dangerous weapon occurred in any specified location. The Commission has made these comments because at first glance one could possibly interpret section 801 to encompass all thefts - larceny, burglary, robbery - in a bank or business place. A person who breaks and enters an ice cream store and steals equipment while the store is deserted has committed

burglary and larceny, but has not committed the crime created by section 801.

Section 801 was amended in 1973 to clarify and expand the use of the term "firearm."

OUJI-CR 4-145

ATTEMPTED ROBBERY WITH A DANGEROUS WEAPON - ELEMENTS

No person may be convicted of attempted robbery with a dangerous weapon unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, wrongfully;

Second, attempting to take;

Third, and carry away;

Fourth, personal property;

Fifth, of another;

Sixth, from the **person/(the immediate presence)** of another;

Seventh, by **force/fear**;

Eighth, through use of a **(loaded/unloaded firearm)/(blank/imitation firearm capable of raising in the mind of the person threatened with such device a fear that it is a real firearm)/(dangerous weapon)**.

Statutory Authority: 21 O.S. 1991, §§ 791, 801.

Committee Comments

Section 801 creates a specific crime of attempted robbery with a dangerous weapon and prohibits the State from charging attempted robbery under the general attempt statutes. *See Ex parte Smith*, 95 Okl. Cr. 370, 246 P.2d 389 (1952).

OUJI-CR 4-146

ROBBERY - DEFINITIONS

Carrying Away - Removing an article for the slightest distance. Carrying away is more than a mere change of position; it is a movement for purposes of permanent relocation.

References: *Cunningham v. District Ct. of Tulsa Co*, 1967 OK CR 183, 432 P.2d 992;*Brinkley v. State*, 1936 OK CR 117, 61 P.2d 1023, 60 Okl. Cr. 106.

Dangerous Weapon - Any instrument likely to produce death or great bodily injury in the manner it is in fact used or attempted to be used.

References: *Swaim v. State*, 1977 OK CR 295, 569 P.2d 1009;*Hay v. State*, 1968 OK CR 209, 447 P.2d 447.

Fear (Second-Degree Robbery) (Select Applicable definition) -

A. [Fear of unlawful injury, immediate or future, to the person of the one robbed.]

B. [Fear of unlawful injury, immediate or future, to the property of the person robbed.]

C. [Fear of unlawful injury, immediate or future, to the person or property of any relative or family member of the person robbed.]

D. [Fear of immediate unlawful injury to the person or property of anyone in the company of the person robbed.]

Fear used only as a means of escape is not sufficient to establish robbery.

Reference: 21 O.S. 2011, § 794.

Firearm - Weapon from which a shot or projectile is discharged by force of a chemical explosive such as gunpowder. An airgun, such as a carbon dioxide gas-powered air pistol, is not a firearm within the meaning of this definition.

Note: Archery equipment, flare guns, underwater fishing guns, blank pistols are not **firearm(s)**.

References: 21 O.S. 2011, §§ 1289.3 et seq.; Black's Law Dictionary 570 (5th ed. 1979); *Thompson v. State*, 1971 OK CR 328, ¶ 8, 488 P.2d 944, 947 (*overruled on other grounds, Dolph v. State*, 1974 OK CR 46, ¶ 10, 520 P.2d 378, 380-81).

Force - Force, of any degree, used to obtain or to retain possession of property or to prevent or to overcome resistance to its taking. Force used only as a means of escape is not sufficient to establish robbery.

References: *Cannon v. State*, 71 Okl. Cr. 42, 107 P.2d 809 (1940); 21 O.S. 2011, §§ 792, 793.

Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

Reference: 21 O.S. 2011, § 103.

Serious Bodily Injury (First Degree Robbery)-- A bodily injury that is grave and not trival which involves (select applicable factors): a substantial risk of death; unconsciousness; extreme physical pain; protracted and obvious disfigurement; protracted loss or impairment of the function of a bodily member, organ, or mental faculty, a bone fracture, injury to an internal or

external organ of the body, sexual abuse or exploitation, chronic abuse, or torture. [If applicable, add the following: Bruising, swelling, and even a few stitches are not alone sufficient for a serious bodily injury].

References: *Harney v. State*, 2011 OK CR 10, ¶ 12, n.3, 256 P.3d 1002, 1005 n.3; *Owens v. State*, 2010 OK CR 1, 229 P.3d 1261; 21 O.S. 2011, § 797; 10A O.S. 2011, § 1-1-105 (31); 27A O.S. 2011, § 2-6-202.

Committee Comment

In *Harney v. State*, 2011 OK CR 10, ¶ 12, n.3, 256 P.3d 1002, 1005 n.3, the Oklahoma Court of Criminal Appeals stated that the definition of "serious bodily injury" should include all the applicable examples that are set out in 10A O.S. 2011, § 1-1-105 (31) and 27A O.S. 2011, § 2-6-202.

Wrongful - Without legal authority.

References: *Traxler v. State*, 1952 OK CR 162, 251 P.2d 815, 96 Okl. Cr. 231; Black's Law Dictionary 1446 (5th ed. 1979).

2012 SUPPLEMENT

OUJI-CR 4-147

ABUSE [BY CARETAKER] OF A PERSON ENTRUSTED TO ONE'S CARE - ELEMENTS

No person may be convicted of abuse of a person entrusted to one's care unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a **caretaker/person**;

[Second, **abused/(financially neglected)/neglected/(sexually abused)/exploited**;

Third, another person who was entrusted to **his/her** care].

OR

[First, a person knowingly caused/permitted another person who was entrusted to **his/her** care;

Second, to be **abused/(financially neglected)/neglected/(sexually abused)/exploited**].

[**Note - Use only if applicable: You are further instructed that consent shall not be a defense to this crime.]**

Statutory Authority: 21 O.S. 2011, § 843.1.

Notes on Use

Under 43A O.S. Supp. 2019, § 10-103(B), good faith use of spiritual means for treatment shall not be abuse or neglect if in accordance with practices of a recognized church or the express consent of the vulnerable adult. For a prosecution for caretaker abuse, see the definitions of caretaker and vulnerable adult in OUJI-CR 4-148, *infra.*

Committee Comments

The Committee did not include an option for "secure," because it is covered by "cause".

(2019 Supp.)

OUJI-CR 4-147A

VERBAL ABUSE OF A PERSON ENTRUSTED TO ONE'S CARE - ELEMENTS

No person may be convicted of verbal abuse of a person entrusted to one's care unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a caretaker;

[Second, verbally abused;

Third, another person who was entrusted to **his/her** care].

OR

[Second, knowingly **caused/permitted** another person who was entrusted to **his/her** care;

Third, to be verbally abused.]

Statutory Authority: 21 O.S. 2011, § 843.2.

Committee Comments

For definitions of verbal abuse, caretaker, and vulnerable adults, see OUJI-CR 4-148*infra*. The Committee did not include an option for "secure," because it is covered by "cause".

(2013 Supp.)

OUJI-CR 4-148

ABUSE BY CARETAKER/(OTHER PERSON) - DEFINITIONS

Abuse- - **Causing/permitting** the **[infliction of (physical pain)/injury/ (sexual abuse)/(sexual exploitation)/(unreasonable restraint/confinement)/ (mental anguish)]/[deprivation of nutrition/clothing/shelter/(health care)/care/ services without which serious physical/mental injury is likely to occur to a vulnerable adult by a caretaker/(person providing services to a vulnerable adult)]**.

Reference: 43A O.S. Supp. 2019, § 10-103(8).

Vulnerable Adult -- An incapacitated person or an individual who, because of physical or mental disability, including persons with Alzheimer's disease or other dementias, incapacity or other disability, is substantially impaired in **his/her** ability to provide adequately for **his/her** own care or custody, or is unable to manage **his/her** property and financial affairs effectively, or to meet essential requirements for mental or physical health or safety, or to protect **himself/herself** from abuse, verbal abuse, neglect, or exploitation without assistance from others.

Reference: 43A O.S. Supp. 2019, § 10-103(5).

Caretaker -- A person who has **[the responsibility for the (care of a vulnerable adult)/(financial management of the resources of a vulnerable adult as a result of a family relationship)]/[assumed the responsibility for the care of a vulnerable adult voluntarily/(by contract)/(as a result of the ties of friendship)]/[been appointed a guardian/ (limited guardian)/ conservator under the Oklahoma Guardianship and Conservatorship Act]**.

Reference: 43A O.S. Supp. 2019, § 10-103(6).

Elderly Person -- A person who is sixty-two years of age or older.

Reference: 22 O.S. 2011, § 991a-15.

Exploitation -- An unjust or improper use of the resources of a vulnerable adult for the profit or advantage, pecuniary or otherwise, of another person through the use of **(undue influence) /coercion /harassment/duress/deception/ (false representation /pretense)**.

Reference: 43A O.S. Supp. 2019, § 10-103(9).

Incapacitated Person-- Any **(person eighteen (18) years of age or older who is impaired by reason of mental or physical illness or disability, dementia or related disease, mental retardation, developmental disability or other cause and whose ability to receive and evaluate information effectively or to make and to communicate responsible decisions is impaired to such an extent that he/she lacks the capacity to manage his/her financial resources or to meet essential requirements for his/her mental or physical health or safety without assistance)/(person for whom a guardian/(limited guardian)/conservator has been appointed pursuant to the Oklahoma Guardianship and Conservatorship Act**).

Reference: 43A O.S. Supp. 2019, § 10-103(4).

Neglect- - **[The failure to provide protection for a vulnerable adult who is unable to protect his/her own interest]/[the failure to provide a vulnerable adult with adequate shelter/nutrition/(health care)/clothing]/[negligent acts/omissions that result in harm/(the unreasonable risk of harm) to a vulnerable adult through the action/inaction/(lack of supervision) by a caretaker providing direct services]**.

Reference: 43A O.S. Supp. 2019, § 10-103(11).

Financial Neglect-- repeated instances by a **caretaker/(any person, who has assumed the role of financial**

management) of failure to use the resources available to **restore/maintain** the health and physical well-being of a vulnerable adult, including, but not limited to **[Select applicable subparagraph]**:

a. squandering/(negligently mismanaging) the money/property/accounts of a vulnerable adult,

b. refusing to pay for necessities/utilities in a timely manner, or

c. providing substandard care to a vulnerable adult despite the availability of adequate financial resources.

Reference: 43A O.S. Supp. 2019, § 10-103(10).

Sexual Abuse - **[(Oral/Anal/Vaginal penetration of a vulnerable adult by/through the union with the sexual organ of a caretaker/(person providing direct services to the vulnerable adult)]/[anal/vaginal penetration of a vulnerable adult by a caretaker/(person providing direct services to the vulnerable adult) with any object]/[The touching/feeling of the body/(private parts) of a vulnerable adult for the purpose of sexual gratification by a caretaker/(person providing direct services to the vulnerable adult)]/[Indecent exposure by a caretaker/(person providing direct services to a vulnerable adult)]**.

Reference: 43A O.S. Supp. 2019, § 10-103(12).

Verbal Abuse - The repeated use by a caretaker of **words/sounds/ language/actions/behaviors/(forms of communication)** that are calculated to **humiliate/intimidate/(cause fear/embarrassment/shame/degradation to)** the person entrusted to the care of the caretaker.

Reference: 43A O.S. Supp. 2019, § 10-103(16).

(2019 Supp.)

OUJI-CR 5-1

ARSON - INTRODUCTION

The defendant is charged with arson in the **first/second/third/fourth** degree of **[Describe Premises, Property, etc.]**, located at **[Address or Location]**, **[Name of County]** County, Oklahoma, on **[Date]**.

Committee Comments

This instruction is meant for use with the arson crimes set forth in sections 1401 through 1404 of Title 21. It is an introductory instruction, intended to inform the jury simply and straightforwardly of the crime with which the defendant is charged and the relevant facts from the information.

The introductory instruction does not indicate who owned, occupied, or possessed the premises burned because the statutory language indicates that the accused can be guilty of arson with respect to premises owned, occupied, or possessed by himself. *Cf. Clemens v. State*, 17 Okl. Cr. 274, 187 P. 1100 (1920) (conviction for second-degree arson affirmed even though accused occupied building burned.)

Nor does the instruction indicate the time of day at which the crime occurred, because the current statutes do not distinguish between daytime and nighttime. Historically, the crime of arson could be committed at any time, day or night. However, under the arson statutes, sections 1381 through 1392 of Title 21, which were repealed in 1967, whether the burning occurred during the day or at night was important as a distinction among the degrees of arson.

(2000 Supp.)

OUJI-CR 5-2

ARSON IN THE FIRST DEGREE - ELEMENTS

No person may be convicted of arson in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a willful and malicious;

Second, (setting fire to)/burning/(destroying in whole or in part by use of any (explosive device)/accelerant/(ignition device)/ (heat-producing device/substance));

Third, (a building/structure)/(the contents of a building/structure);

Fourth, which was **inhabited/occupied** by one or more persons;

Fifth, caused/aided/counseled/procured by the defendant.

OR

First, (destroying in whole or part)/(causing to be burned/destroyed)/(aiding/counseling/procuring the burning/destruction of);

Second, (a building/structure)/(the contents of a building/structure);

Third, which was **inhabited/occupied** by one or more persons;

Fourth, while **manufacturing/(attempting/endeavoring to manufacture) [**specify controlled dangerous substance listed in 63 O.S. Supp. 2014, § 2-401**].**

OR

First, willfully and maliciously;

Second, **(setting fire to)/burning** another person.

OR

First, willfully and maliciously;

Second, causing another person to be burned;

Third, by the use of any **(explosive device)/accelerant/(ignition device)/(heat-producing device/substance);.**

OR

First, willfully and maliciously;

Second, **aiding/counseling/procuring** the burning of another person.

OR

First, **(causing another person to be burned)/(aiding/counseling/procuring the burning of another person);**

Second, while **manufacturing/(attempting to manufacture) [**specify controlled dangerous substance listed in 63 O.S. Supp. 2014, § 2-401**].**

Statutory Authority: 21 O.S. Supp. 2014, § 1401.

2015 SUPPLEMENT

OUJI-CR 5-3

ARSON IN THE FIRST DEGREE -

INHABITED OR OCCUPIED DEFINED

A building or structure is deemed to be occupied if it actually contains one or more persons at the time of the commission of the alleged crime. A building or structure is deemed to be inhabited if any part of it is normally used by any person for lodging.

Statutory Authority: 21 O.S. 1991, § 1401.

Committee Comments

Sections 1401 and 1402 were adopted in 1979 and substantially modify the former sections 1401 and 1402, which were adopted in 1967. The 1967 statutes constituted a significant revision of prior law, so that case authority prior to 1967 is of limited interpretive value. The definitions and interpretations incorporated in these instructions are primarily based upon interpretation of the statutes as written.

In accordance with the language of sections 1401 through 1404, the first element lists the mens rea requirement for arson as "willful and malicious." This raises the question of whether two distinct mens rea elements must be proven to establish the crime, i.e., willfulness and maliciousness. If not, the Legislature may have simply used surplus words, so that only one mens rea element is required. The question then becomes: If only one element is required, is that element "willful" or "malicious"? It has been argued forcefully by Professor Perkins that statutes reading "willfully and maliciously" actually include only one mens rea element, that of maliciousness. R. Perkins, *Criminal Law* 216-20 (2d ed. 1969). Other authority is contrary. An Iowa statute using both words was interpreted to require proof of two elements. *State v. Willing*, 129 Iowa 72, 105 N.W. 355 (1905). In a California case involving a statute substantially similar to the Oklahoma statutes with respect to the mens rea requirement, the accused, the owner of the dwelling burned contended the statute was unconstitutional because it prohibited him from doing as he wished with his property. The court upheld the statute by construing it to prohibit "both a willful and a malicious act." The emphasis of the opinion, however, was on the mens rea element of maliciousness. *People v. George*, 42 Cal. App. 2d 568, 109 P.2d 404 (1941).

The basic arson statute in Oklahoma prior to 1967, 21 O.S. 1961, § 1381, used the words "willful and malicious." The Court of Criminal Appeals was never presented with the issue as to the interpretation to be given these words. However, in cases involving the issue of whether corroborating evidence of an alleged accomplice's testimony exists, the court has used the word "willful" several times to indicate that the act of burning must have been an intentional act. *Allen v. State*, 1977 OK CR 71, ¶ 14, 560 P.2d 1030, 1033; *Rogers v. State*, 57 Okl. Cr. 294, 48 P.2d 344 (1935); *cf. Parrott v. State*, 1974 OK CR 72, ¶ 9, 522 P.2d 635, 637 (term "willfully" simply implies purpose or willingness to commit an act or an omission). In contrast, the prior arson-in-the-first-degree statute, section 1390, used only the word "maliciously." A general impression gained from reading several arson cases under the old statutes is that the words "willful and malicious" were deemed to be words of art and expressed only one mens rea.

Furthermore, the present statutes make it a crime to burn certain property, whether it is "the property of himself or another." As defined by 21 O.S. 1991, § 92, "willfully" connotes simply a purposeful act, as opposed to an accidental or an unintended act.

However, it is the conclusion of the Commission that a person who burns his house solely because it is old and of very little value, and knows he is not endangering life or property, is not guilty of arson despite an intentional destruction by burning of his property. On the other hand, a person who burns his house and hopes to trap his family inside has, in the viewpoint of the Commission, committed arson, even though he is unaware that his family

is absent. The latter hypothetical seems best described as a malicious burning in accordance with the definition of "maliciously" set forth at 21 O.S. 1991 § 95.

The combination of the argument by Professor Perkins, the general impression gleaned from the old statutes and cases, and the two hypotheticals in the preceding paragraph caused the Commission to conclude that the statutory language expresses only one mens rea element. The Commission further concluded that the mens rea element would be best described as "maliciousness." However, since the term "maliciously" also seems to incorporate the concept of "knowingly," the Commission has determined to avoid confusion by instructing in the terms of the statutory expression of the mens rea requirement.

The second element of the crime indicates the prohibited activity. The statutory terms "sets fire to" and "burns" appear somewhat synonymous. At common law, the crime of arson required some burning of the building itself. R. Perkins, *Criminal Law* 222-23 (2d ed. 1969). Nevertheless, although the conjunction of phrases in the instruction may be superfluous, the Commission has concluded that it is preferable to instruct in the language of the statute

Section 1401 criminalizes as arson the burning of "any building or structure or contents thereof," that is occupied or inhabited, a significant change from the former section 1401, which defined as arson the destruction of a dwelling house or adjoining structures, or the contents thereof.

The language "occupied or inhabited" is construed as encompassing two distinct situations: a building or structure actually contains persons at the time the crime is committed (occupied); or the building is ordinarily utilized as a lodging, although it might be unoccupied at the time the crime is perpetrated (inhabited). It should be noted that the former first-degree arson statute, 21 O.S. 1961, § 1390, repealed in 1967, criminalized as first-degree arson the burning of an "inhabited building in which there is at the same time some human being." An "inhabited building" was statutorily defined at 21 O.S. 1961, § 1383, repealed in 1967, as one "any part of which has usually been occupied by any person lodging therein at night." The addition of the phrase "occupied" and its disjunctive use in the current statute is indicative of a legislative intent to encompass more than structures that are ordinarily inhabited, and to include those that actually contain persons at the time the crime is committed. If this construction of the "occupied or inhabited" phrase is appropriate, interpretation of the parameters of the term "structure" will be important, since the dichotomy between arson in the first degree and arson in the second degree under the existing statutory law is between buildings and structures which are occupied and inhabited, and those which are unoccupied and uninhabited. Should it be determined, for example, that an occupied automobile or an inhabited boat is a "structure" for purposes of sections 1401 and 1402, the common law definition of arson would be greatly expanded.

Although at common law arson could be committed only against the habitation of another, the statute specifically indicates that the crime can be committed against "the property of himself or another." The Commission has interpreted this language to mean that the owner, occupier, or possessor can be convicted of arson even though the structure burned or destroyed is owned, occupied or possessed by the accused. Hence, "of another" is not an element. *Clemens v. State*, 17 Okl. Cr. 274, 187 P. 1100 (1920); *People v. Miller*, 41 Cal. App. 2d 252, 106 P.2d 239 (1940); *State v. Ferguson*, 233 Iowa 354, 6 N.W.2d 856 (1942).

(2000 Supp.)

OUJI-CR 5-4

ARSON IN THE SECOND DEGREE - ELEMENTS

No person may be convicted of arson in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a willful and malicious;

Second, **(setting fire to)/burning/(destroying in whole or in part by use of any explosive device/substance)/(destroying in whole or in part while manufacturing/(attempting to manufacture) [specify controlled dangerous substance listed in 63 O.S. Supp. 2014, § 2-401]**;

Third, **(a building/structure)/(the contents of a building/structure)**;

Fourth, which was **uninhabited/unoccupied**;

Fifth, **caused/aided/counseled/procured** by the defendant.

Statutory Authority: 21 O.S. 2011, § 1402.

Committee Comments

The Committee interprets the statute strictly to require "willfully and maliciously" to apply to all the elements in the statute, including "while manufacturing or attempting to manufacture a controlled dangerous substance in violation of subsection G of Section 2-401 of Title 63 of the Oklahoma Statutes." *See State v. Davis*, 2011 OK CR 22, ¶ 5, 260 P.3d 194, 195 ("This Court is committed to the rule of strict construction in the application of criminal statutes."); *Durant v. State*, 2008 OK CR 17, ¶ 8, 188 P.3d 192, 194 ("The purpose of strict construction is not to reward those who commit acts which should be punishable. Rather, it is to ensure that when liberty is at stake, all citizens have fair and clear warning of what conduct is prohibited, and, equally important, the severity of punishment for any infraction.").

(2014 Supp.)

OUJI-CR 5-5

ARSON IN THE SECOND DEGREE -

UNINHABITED OR UNOCCUPIED DEFINED

A building or structure is deemed to be unoccupied if it contains no persons at the time of the alleged crime. A building or structure is deemed to be uninhabited if no part of the building or structure is normally used by any person for lodging.

Statutory Authority: 21 O.S. Supp. 2000, § 1402.

Notes on Use

This instruction must be given in every prosecution for arson in the second degree.

Committee Comments

Second-degree arson differs from first-degree arson solely in the type of structure protected. First-degree arson is limited to inhabited or occupied buildings and structures and related contents. The second-degree arson statute protects any unoccupied or uninhabited structure as well as its contents. The elements are identical to first-degree arson except for the fourth element.

(2000 Supp.)

OUJI-CR 5-6

ARSON IN THE THIRD DEGREE (1403(A)) - ELEMENTS

No person may be convicted of arson in the third degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a willful and malicious;

Second, **(setting fire to)/burning/(destroying in whole or in part by use of any explosive device/substance)**;

Third, any real or personal property valued at $50 or more;

Fourth, **caused/aided/counseled/procured** by the defendant.

Statutory Authority: 21 O.S. Supp. 2000, § 1403(A).

Committee Comments

Third-degree arson as set forth in section 1403(A) differs from the first and second degrees of arson because the statute protects any real or personal property with a value of $50 or more, whereas the first- and second-degree arson statutes protect structures and buildings. The elements of third-degree arson are otherwise identical to the elements of first- and second-degree arson. Third-degree arson under 21 O.S. 1991, § 1403(A), may be a lesser included offense of first- and second-degree arson.

(2000 Supp.)

OUJI-CR 5-7

ARSON IN THE THIRD DEGREE

(INSURANCE, SECTION 1403(B)) - ELEMENTS

No person may be convicted of arson in the third degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a willful and malicious;

Second, **(setting fire to)/burning/(destroying in whole or in part by use of any explosive device/substance)**;

Third, any **building(s)/property/chattels**;

Fourth, which **was/were** insured at the time of the commission of the alleged offense;

Fifth, with intent to **defraud/injure** an insurer;

Sixth, **caused/aided/counseled/procured** by the defendant.

Statutory Authority: 21 O.S. Supp. 2000, § 1403(B).

Committee Comments

Section 1403(B) creates an additional crime when the person who commits arson does so with a specific intent to injure or defraud an insurance company. Except for the fourth and fifth elements, the crime has the same basic general elements as the other arson crimes.

It should be noted that the punishment in section 1403(B) is less severe than the punishment in sections 1401 and 1402. This section covers the burning of any property irrespective of its value.

(2000 Supp.)

OUJI-CR 5-8

ARSON IN THE FOURTH DEGREE (1404(A)) - ELEMENTS

No person may be convicted of arson in the fourth degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a willful and malicious;

Second, attempt to **(set fire to)/burn/(destroy in whole or in part by the use of any explosive device or substance)**;

Third, **(any building/structure)/(the contents of any (building/structure)/(any property that is insured)/(any real/personal property valued at $50 or more)**;

Fourth, **made/aided/counseled/procured** by the defendant.

(2000 Supp.)

OUJI-CR 5-9

ARSON IN THE FOURTH DEGREE (1404(B)) - ELEMENTS

No person may be convicted of arson in the fourth degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a willful and malicious;

Second, **placing/distributing**;

Third, of any **flammable/explosive/combustible material/substance/device**;

Fourth, **in/on (any building/structure)/(the contents of any building/ structure)/(any property that is insured)/(any real/personal property valued at $50 or more)**;

Fifth, by **(an arrangement)/(a preparation)** with intent eventually to **(set fire to)/burn/(procure the setting fire to)/(procure the burning of)** such property;

Sixth, such **placing/distributing** was **performed/procured** by the defendant.

Statutory Authority: 21 O.S. Supp. 2000, § 1404.

Committee Comments

Arson in the fourth degree is a specific attempt statute and prohibits the State from bringing an arson charge under the general attempt statutes. *See Ex parte Smith*, 95 Okl. Cr. 370, 246 P.2d 389 (1952). Subsection A defines an attempt which either fails or is thwarted by unforeseen external circumstances. Subsection B criminalizes conduct that would otherwise be deemed "preparatory," and thus insufficient to constitute an attempt, as opposed to the "perpetrating" conduct encompassed within subsection A. Under subsection B, merely distributing or placing flammable or combustible material in or on any property, with the requisite intent eventually to burn such property, is a criminal attempt. *See generally* W. LaFave & A. Scott, *Criminal Law* § 59, at 423-38 (1972); R. Perkins, *Criminal Law* 557-66 (2d ed. 1969).

That subsection B is in derogation of the common law dichotomy between preparatory acts as noncriminal and perpetrating acts as criminal attempts is illustrated by an example provided by Professor Perkins:

> The time of intended perpetration is a factor to be considered, and may be controlling in certain situations. Suppose D, intending to burn down the dwelling house of X, has entered the building with combustible materials which he has so arranged that the lighting of a fuse will be followed in due time by a roaring fire. If D has no intention of lighting the fire now, -- if he has merely "set the stage" so the fire can be started without loss of time when he returns on a future occasion -- this is merely preparation. It is not an attempt to commit arson. Had D, on the other hand, intended to light the fire at that time he would be guilty of attempted arson although arrested before he struck the match. If such was his intention, in fact, he was guilty of attempted arson when he entered the building, or even before an actual entry was accomplished.

Perkins, *supra*, at 559-60 (citations omitted).

Under subsection B of section 1404, the act of arranging the combustible materials, with intent eventually to accomplish the burning of the building, would constitute an attempt.

(2000 Supp.)

OUJI-CR 5-9A

ENDANGERMENT OF LIFE BY ARSON - ELEMENTS

No person may be convicted of endangerment of life unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, endangering a human life;

Second, while in the commission of;

Third, **[Set forth the elements of Arson in the First, Second, Third, or the Fourth Degree from OUJI-CR 5-2, 5-4, 5-7, 5-8, or 5-9]**;

[Fourth, and personal injury resulted].

Statutory Authority: 21 O.S. Supp. 2000, § 1405.

Notes on Use

Under 21 O.S. Supp. 2000, § 1405, the punishment is enhanced if personal injury resulted. Accordingly, the court should include the Fourth Element if there is evidence presented of a personal injury resulting from the endangerment of a human life.

(2000 Supp.)

OUJI-CR 5-10

ARSON - DEFINITIONS

Malicious - A wish to vex, annoy or injure.

References: State v. McCray, 15 Okl. Cr. 316, 176 P. 418 (1919); 21 O.S. 1991, § 95.

Willful - Purposeful. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Reference: 21 O.S. 1991, § 92.

(2000 Supp.)

OUJI-CR 5-11

BURGLARY - INTRODUCTION

The defendant is charged with:

[burglary in the first/second degree]

[burglary with explosives]

[illegal entry]

[breaking and entering without permission]

o f **[Description of Premises]**, located at **[Address or Location]**, **[Name of County]** County, Oklahoma, **(owned/occupied by)/(in the possession of) [Name of Owner, Occupier, Possessor]** on **[Date]**.

Committee Comments

The above instruction is meant for use with regard to the crimes, except possession of burglary instruments, listed in Chapter 58 of Title 21, entitled Burglary and House Breaking. The time, place, date, and description of the premises, plus ownership, possession, or occupancy, must be proved by the State to sustain the conviction. *Ross v. State*, 78 Okl. Cr. 293, 147 P.2d 797 (1944); *Simpson v. State*, 5 Okl. Cr. 57, 113 P. 549 (1911). When the crime is burglary in the second degree of a vending or coin operated machine, description of the premises should be interpreted to mean the type of machine with its serial number. Failure to prove the serial number is reversible error, *Bly v. State*, 1971 OK CR 213, 485 P.2d 479, unless there is otherwise sufficient evidence to prove property identification. *Matthews v. State*, 1975 OK CR 4, 530 P.2d 1044;*Neal v. State*, 1974 OK CR 221, ¶ 12, 529 P.2d 526, 530,*overruled on other grounds*, *State v. Neal*, 1979 OK CR 148, ¶ 3, 604 P.2d 145, 146-47.

Title 21 O.S. 1991, § 1438, is headed "Entering buildings or structures with intent to commit felony, larceny or malicious mischief--Braking [sic] and entering dwelling without permission." The Commission decided that this heading was too cumbersome to use in the instruction. Thus the Commission has adopted a term which better describes the crime and which is more appropriate for use in the instruction: "illegal entry." The name given the crime is unimportant so long as the name is an accurate description of the crime. "Illegal entry" seems more accurate than "house breaking."

The language "owned by," "in the possession of," and "occupied by" is placed in parentheses because the common law crime of burglary is most accurately described as a crime against habitation. Hence, an owner of a dwelling can be convicted of the burglary of that dwelling if the dwelling has been rented or leased to another person who has taken possession and has slept in the dwelling. For burglary in the first degree, the language "occupied by" seems most appropriate. For the other three crimes, the language "owned by" or "in the possession of" seems more appropriate. The alternate language on ownership, possession, and occupancy permits the judge to choose the language he feels is most suitable to the case being tried.

(2000 Supp.)

OUJI-CR 5-12

BURGLARY IN THE FIRST DEGREE -- ELEMENTS

No person may be convicted of burglary in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, breaking;

Second, entering;

Third, a dwelling;

Fourth, of another;

Fifth, in which a human is present;

Sixth, with intent to commit some crime therein;

Statutory Authority: 21 O.S. 2021, § 1431.

Committee Comments

The statutory definition of burglary in the first degree in 21 O.S. 2021, § 1431 includes three alternative modes for breaking: "forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window[,] or the locks or bolts of such door, or the fastening of such window or shutter"; "breaking in any other manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present"; or "unlocking an outer door by means of false keys or by picking the lock thereof.". Nevertheless, the Oklahoma Court of Criminal Appeals has ruled that these modes do not need to be included in the jury instruction defining the elements of burglary. *Cleary v. State*, 1997 OK CR 35, ¶ 27, 942 P.2d 736, 745 (overruling *Hendricks v. State*, 1985 OK CR 39, 698 P.2d 477). However, the Court of Criminal Appeals subsequently ruled that the question of whether a particular door is an outer door "cannot be made by a bright line rule," but rather is a fact-intensive inquiry. *State v. Busby*, 2022 OK CR 4, ¶ 11, 505 P.3d 932, 935. If there is a factual question about whether a door that the defendant entered is an outer door, then the jury should be instructed on the relevant mode of breaking.

(2024 Supp.)

OUJI-CR 5-13

BURGLARY IN THE SECOND DEGREE - ELEMENTS

No person may be convicted of burglary in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, breaking;

Second, entering;

Third, **a/an (dwelling house where no human being was present at the time)/(commercial building)/(any part of a building)/room/booth/tent/ (railroad car)/structure/erection**;

Fourth, of another;

Fifth, in which property is kept;

Sixth, with the intent to **steal/(commit any felony)**.

Statutory Authority: 21 O.S. Supp. 2019, § 1435 (A).

Committee Comments

The elements of second-degree burglary are presented clearly by the statute. The statute also seems to indicate that two mental states, intent to steal and intent to commit any felony, are appropriate mens rea elements for conviction. Hence, the Commission has included the mental states alternatively to permit the trial judge to charge with respect to the appropriate mental state under the facts of the case. Please realize that facts may indicate that one or the other, or both, mental states might have existed, and the court may need to give both mens rea elements in this instruction.

In contrast to section 1431, the second-degree burglary statute does not specify that ownership or possession of the structure, upon which a breaking and entering is perpetrated must be vested in another. The Commission has concluded, however, that since at common law the proscription of burglary was intended to safeguard possessory rights, R. Perkins, *Criminal Law* 206 (2d ed. 1969), a right of entry negates the possibility of prosecution for burglary. Although no Oklahoma cases have addressed this question, the Supreme Court of California, in construing a statute defining as burglary the entering into any dwelling, held that a right of entry to an apartment dispels the possibility of prosecution for burglary when one cotenant forcibly entered the apartment for the purpose of feloniously assaulting another cotenant. In reversing the defendant's conviction of burglary, the court observed:

To hold otherwise could lead to potentially absurd results. If a person can be convicted for burglarizing his own home, he could violate [the burglary statute] by calmly entering his own house with intent to forge a check. A narcotics addict could be convicted of burglary by walking into his house to administer a dose of heroin to himself. Since a burglary is committed upon entry, both could be convicted even if they changed their minds and did not commit the intended crimes.

People v. Gauze, 125 Cal. Rptr. 773, 777, 542 P.2d 1365, 1369 (1975).

(2019 Supp.)

OUJI-CR 5-14

BURGLARY IN THE SECOND DEGREE

(VENDING MACHINES) - ELEMENTS

No person may be convicted of burglary in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, breaking;

Second, a **(coin operated)/vending machine/device**;

Third, of another;

Fourth, with the intent to **steal/(commit any felony)**.

Statutory Authority: 21 O.S. Supp. 2019, § 1435 (A).

Committee Comments

In the opinion of the Commission, section 1435 creates a separate crime with different elements, still called burglary in the second degree, when the place burglarized is a vending machine. The Commission has concluded that "breaks into" is synonymous with "forcibly opens" so that the language indicates only one element. The Commission has also decided that "breaks into and forcibly opens" does not imply an "entry" as a separate element of the crime. The Commission has concluded that the court would decide that "breaks into or forcibly opens" means the use of force, however slight, to remove an obstruction to entry, *Matthews v. State*, 1975 OK CR 4, ¶ 18, 530 P.2d 1044, 1047 (washing machine coin box opened with key); *Hudson v. State*, 1974 OK CR 161, ¶ 12, 525 P.2d 1380, 1382-83 (same), but that actually reaching inside the machine to fetch the contents or money is not an element of the crime. The Commission has reached this conclusion because the other crime created by section 1435 has the specific language "breaks and enters," whereas the vending machine crime does not, although the word "into" possibly could be interpreted to require entry.

(2019 Supp.)

OUJI-CR 5-14A

BURGLARY IN THE THIRD DEGREE - ELEMENTS

No person may be convicted of burglary in the third degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, breaking;

Second, entering;

Third, **a/an automobile/truck/trailer/vessel**;

Fourth, of another;

Fifth, in which property is kept;

Sixth, with the intent to (**steal any property in the automobile/truck/ trailer/vessel)/(commit any felony)**.

_____

Statutory Authority: 21 O.S. Supp. 2019, § 1435(B).

(2019 Supp.)

OUJI-CR 5-15

BURGLARY BY THE USE OF EXPLOSIVES - ELEMENTS

No person may be convicted of burglary by the use of explosives unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, breaking;

Second, entering;

Third, a **building/(railway car)/vehicle/structure**;

Fourth, of another;

Fifth, **(by opening)/(by attempting to open)/(with the intent to open)** a receptacle in which property is kept;

Sixth, by the use of explosives;

Seventh, with the intent to **steal/(commit any felony)**.

Statutory Authority: 21 O.S. 1991, § 1441.

Committee Comments

In *Ex parte Bailey*, 55 Okl. Cr. 99, 25 P.2d 718 (1933), the petitioner filed a habeas corpus proceeding which alleged, *inter alia*, that section 1441 conflicted with section 1435. The court stated that section 1441 was a statute of classification and not of definition. Hence, section 1441 does not change the elements of burglary, as given in section 1435, but merely provides a greater punishment when the burglary involves explosives. A later case, *Hobson v. State*, 280 P.2d 735 (Okl. Cr. 1955), as a second ground for upholding the trial court's denial of a motion to quash, stated that burglary in the second degree was a lesser included offense of burglary with explosives. *Cf. Ward v. State*, 34 Okl. Cr. 386, 246 P. 664 (1926) (robbery with firearms or other dangerous weapon is a classification of a particular manner of committing robbery); *Richards v. State*, 22 Okl. Cr. 199, 210 P. 295 (1922) (conjoint robbery is not distinct offense but one method of committing robbery).

In light of the *Bailey* and *Hobson* cases, the instruction on burglary with explosives uses language which is as consistent as possible with the language of the second-degree burglary instruction.

OUJI-CR 5-16

ILLEGAL ENTRY - ELEMENTS

No person may be convicted of illegal entry unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, entering;

Second, **a/an building/booth/tent/warehouse/(railroa d car)/vessel/structure/ erection**;

Third, of another;

Fourth, with the intent to commit **(any felony)/larceny/(malicious injury/defacing/destruction of real/personal property of another)**.

Statutory Authority: 21 O.S. 1991, § 1438(A).

Notes on Use

This instruction is meant for use with 21 O.S. 1991, § 1438(A). In the opinion of the Commission, illegal entry differs from the other crimes in Chapter 58 of Title 21 primarily in that breaking is not an element of the crime. For the elements of malicious mischief, see 21 O.S. 1991, § 1760; *McDaris v. State*, 505 P.2d 502, 503-04 (Okl. Cr. 1973); *Creekmore v. Redman Industries, Inc.*, 671 P.2d 73, 77 (Okla. Ct. App. 1983).

OUJI-CR 5-17

BREAKING AND ENTERING WITHOUT PERMISSION - ELEMENTS

No person may be convicted of breaking and entering without permission unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, intentionally;

Third, breaking;

Fourth, entering;

Fifth, a **building/trailer/vessel/(premises used as a dwelling)**;

Sixth, without the permission of its **owner/occupant**;

Seventh, without the intent to commit any crime in the **building/trailer/vessel/ (premises used as a dwelling)**.

Statutory Authority: 21 O.S. 1991, § 1438(B).

Notes on Use

This instruction is meant for use with 21 O.S. 1991, § 1438(B).

OUJI-CR 5-18

BURGLARY - DEFINITIONS

Breaking - Any act of physical force, however slight, by which obstructions to entering are removed.

References: *Pack v. State*, 1991 OK CR 109, ¶ 10, 819 P.2d 280, 283; *Williams v. State*, 1988 OK CR 221, ¶ 11, 762 P.2d 983, 986; *Lewis v. State*, 1987 OK CR 6, ¶ 5, 732 P.2d 1, 2; 21 O.S. 2021, § 1491.

Dwelling - Every house, building, or enclosed structure, any part of which has usually been occupied by any **person(s)** lodging therein; or any enclosed structure joined to and immediately connected with a house.

References: *Tate v. State*, 1976 OK CR 296, ¶ 8, 556 P.2d 1014, 1017; *Sallee v. State*, 1931 OK CR 282, 1 P.2d 794, 795, 51 Okl. Cr. 414, 417; *Harris v. State*, 1928 OK CR 314, 271 P. 957, 41 Okl. Cr. 121, 123; *Simpson v. State*, 1911 OK CR 34, 113 P. 549, 552, 5 Okl. Cr. 57, 63; 21 O.S. 2021, § 1439.

Entering - An entry which occurs when any part of a person's body is within the **[Name of Object or Structure]**.

[Use If Applicable]

[However, if a tool or an instrument is used and inserted inside, without any part of the person being within the object or structure, it is an entry if the insertion of the tool or instrument is capable of completing the purpose of the intended crime.]

References: W. LaFave & A. Scott, Criminal Law § 96, at 710 (1972); R. Perkins, Criminal Law 198, 199 (2d ed. 1969).

Intent to Steal - Intent permanently to deprive the person in rightful possession of property without the possessor's consent.

References: *Alvarado v. State*, 1927 OK CR 361, 261 P. 983, 985, 38 Okl. Cr. 360, 367; *Sullivan v. State*, 1912 OK CR 169, 123 P. 569, 570, 7 Okl. Cr. 307, 309.

Of Another - Of any person who is in rightful possession of the property.

References: *Calhoun v. State*, 1991 OK CR 112, 820 P.2d 819, 821; *Byington v. State*, 1961 OK CR 64, ¶ 5, 363 P.2d 301, 303; *Sallee v. State*, 1931 OK CR 282, 1 P.2d 794, 795, 51 Okl. Cr. 414, 418; W. LaFave & A. Scott, Criminal Law § 96, at 712 (1972).

Confederate - One who assists in a plot.

(2024 Supp.)

OUJI-CR 5-19

EMBEZZLEMENT - INTRODUCTION

The defendant is charged with **felony/misdemeanor** embezzlement of **[Description of Property, Amount, etc.]** on **[Date] (owned by)/(entrusted to him/her/them by) [Name of Owner, Employer, etc.]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is meant for use with the crimes set forth in Title 21, Chapter 59, entitled Embezzlement.

Under 21 O.S. Supp. 2002, § 1451(B), the crime of embezzlement is a misdemeanor if the value of the property embezzled is less than $500, an it is a felony if the value of the property embezzled is $500 or more.

Embezzlement is basically a crime against ownership, since the defendant has acquired physical possession by lawful means. If the defendant unlawfully acquired physical possession, he should have been charged with larceny, a crime against possession, not with embezzlement. The usual case involves entrustment of property by the owner to a person who embezzles the property. The language "owned by" is appropriate here. Situations arise, however, in which an agent embezzles money received from a principal but under circumstances that make it inappropriate to say that the principal is the owner of the property. *See, e.g., State v. Harrison*, 1989 OK CR 27, ¶ 5, 777 P.2d 1343 , 1345 (embezzlement statute covered employer who withheld taxes on behalf of the State but refused to pay them over to the State); *Wallen v. State*, 1961 OK CR 110, ¶ 1, 367 P.2d 516 , 517 (Justice of the Peace failed to pay fines he collected into the county treasury); *Wiley v. State*, 1960 OK CR 4, ¶¶ 8-10, 349 P.2d 30 , 34 (assistant county attorney received fines from traffic violators); *Waldock v. State*, 42 Okl. Cr. 331, 333-34, 276 P. 509, 511 (1929) (trustee of county received proceeds of bond issue). In these latter situations, the language "entrusted to him by" is more appropriate.

(2005 Supp.)

OUJI-CR 5-20

EMBEZZLEMENT (APPROPRIATING) - ELEMENTS

No person may be convicted of embezzlement unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, fraudulently;

Second, appropriated;

Third, personal property;

Fourth, with a value of **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**);

Fifth, of a **person/(legal entity)**;

Sixth, to any use or purpose not intended or authorized by its owner;

Seventh, where the property was legally obtained; and

[Eighth, the property was entrusted to the defendant for a specific purpose/use/disposition, including any funds "held in trust" for any purpose].

OR

[Eighth, the defendant obtained the property by virtue of a power of attorney for the sale/transfer of the property].

OR

[Eighth, the property was controlled/possessed for the use of another person].

OR

[Eighth, the property was to be used for a public/benevolent purpose].

OR

[Eighth, the defendant diverted money appropriated by law from the purpose and object of the appropriation].

OR

[Eighth, the defendant failed/refused to pay over to the state/(Specify Other Appropriate Authority) any tax/(Specify Other Type of Monies) collected in accordance with state law; and

Ninth, the defendant appropriated the tax/(Specify Other Type of Monies) for (his/her own use)/(the use of another person)].

OR

[Eighth, the defendant possessed the property for the purpose of transportation without regard to whether packages containing the property have been broken].

OR

[Eighth, the defendant removed crops from leased/rented premises with the intent to deprive the owner/landlord of rent due from the premises].

OR

[Eighth, the defendant fraudulently appropriated rent from leased/rented premises to himself/herself/(any person)].

OR

[Eighth, the property was possessed/controlled by virtue of a lease/rental agreement; and

Ninth, the defendant willfully/intentionally did not return the property within 10 days after the agreement expired].

Statutory Authority: 21 O.S. Supp. 2019, § 1451.

Notes on Use

If the prosecution seeks to aggregate the value of multiple offenses, OUJI-CR 5-90A, *infra,* should also be used.

Committee Comments

Two element instructions are given for embezzlement under section 1451 because two fact situations constitute crimes under the statute. This instruction covers the usual case in which the State will present evidence that the accused has in fact appropriated the property. The next instruction (OUJI-CR 5-21, *infra*) covers the case in which no appropriation has occurred but the accused has hidden the property with fraudulent intent to appropriate it at a more convenient time. Common law cases are split on the question of whether the act of hiding the property constitutes a conversion. Section 1451 explicitly resolves the question. Hence, instructions are presented to cover both situations. The trial judge should use the instruction more appropriate for the facts of the pending case.

The third element indicates that the property which is subject to embezzlement is personal property, not real property. The statutory language does not specify personal property, but merely "property." Basic research into Oklahoma cases has not revealed a case addressing this question. Only a few cases in the United States have dealt with the specific question of whether real property is covered by the embezzlement crime. *See People v. Roland*, 134 Cal. App. 675, 26 P.2d 517 (1933) (real property is subject to embezzlement); *Manning v. State*, 175 Ga. 875, 166 S.E. 658 (1932); *State v. Clark*, 60 Ohio App. 367, 21 N.E.2d 484 (1938) (real property is not subject to embezzlement). Even the treatise writers appear divided on the question. R. Perkins, *Criminal Law* 291 (2d ed. 1969) and W. Clark & W. Marshall, *A Treatise on the Law of Crimes* 904-07 (7th ed. 1967) imply that real property cannot be embezzled, whereas W. LaFave & A. Scott, *Criminal Law* § 89, at 646-647 (1972), state that, on principle, conviction for embezzlement of real property should be possible.

The Committee has concluded that real property was not meant to be included within the embezzlement statutes of Oklahoma. The Committee reached this conclusion for several reasons. First, embezzlement historically has been used to fill the gaps opened by interpretation of common law larceny. Larceny applies to personal property only because real property cannot be taken and carried away. Second, the punishment for embezzlement in Oklahoma is correlated to the punishment for larceny. 21 O.S. 2011, § 1462. Third, the common law definition is to be followed, in the opinion of the Commission, unless the Legislature has clearly indicated otherwise. If the Legislature had meant to expand embezzlement, it should have used the words "real or personal property."

The seventh element presents the concept of lawful acquisition by the person who has embezzled. If the property

is wrongfully acquired initially, the crime is larceny, not embezzlement. *Ennis v. State*, 1917 OK CR 150, 13 Okl. Cr. 675, 167 P. 229; *Bivens v. State*, 1912 OK CR 11, 6 Okl. Cr. 521, 120 P. 1033; *Flohr v. Territory*, 1904 OK CR 93, 14 Okl. 477, 78 P. 565.

In light of the statutory language of section 1451, a question arises whether the Legislature intended to abolish the distinction made at common law between custody and possession. At common law if a person merely acquired custody of property, *i.e.*, physical possession, and then converted the property, the person had committed larceny but not embezzlement. The common law reasoning is that a person who has custody does not have legal possession of the property; hence, the conversion is a trespassory taking, rather than an appropriation. Taking is an element of larceny, whereas appropriating is an element of embezzlement. R. Perkins, *Criminal Law* 289 (2d ed. 1969). The language of the statute is susceptible to a construction indicating that it is immaterial whether the embezzler had custody or possession when he converted.

Conflicting lines of cases decided under prior Oklahoma statutes exist in Oklahoma concerning the custody/possession dichotomy. In *Cunningham v. District Court of Tulsa*, 1967 OK CR 183, 432 P.2d 992, and *Gibson v. State*, 1958 OK CR 74, 328 P.2d 718, *overruled on other grounds*, *Parker v. State*, 1996 OK CR 19, n.4, 917 P.2d 980, 986, the distinction between custody and possession is drawn. In *Smith v. State*, 1929 OK CR, 42 Okl. Cr. 136, 275 P. 359, the distinction is repudiated. Although *Cunningham*, *Gibson*, and *Smith* construe separate statutes, the language of the statutes is similar. Former section 1452 read, "in his possession or under his control"; former section 1454 read, "entrusted with or having in his control"; former section 1456 read, "has come into his control or care"; and former section 1453 read, "having under his control." The Commission has concluded that the reasoning of the court in the *Cunningham* and *Gibson* cases should be adopted when construing the embezzlement statutes in order to preserve the custody/possession distinction.

The fourth element is included to indicate whether the defendant is charged with felony or misdemeanor embezzlement and for the purposes of determining the appropriate range of punishment.

Some overlap with the larceny statutes may result from the following provision at the end of 21 O.S. Supp. 2019, § 1451(A)(7): "without regard to whether packages containing the property have been broken." The common law courts hold that misappropriation of the entire package delivered to a carrier is not larceny because the carrier has lawful possession. Misappropriation of the entire package is therefore embezzlement. If the carrier opened the package and took an item in the package, however, the courts held that larceny has been committed because the carrier did not have lawful possession of the individual items in the package. This is known as the "breaking bulk" doctrine. However, under section 1451(A)(7) this latter factual situation is also embezzlement. The language of section 1451(A)(7) indicates that embezzlement is committed whether the carrier takes the whole package or individual items. R. Perkins, *Criminal Law* 260-62 (2d ed. 1969).

(2019 Supp.)

OUJI-CR 5-21

EMBEZZLEMENT (SECRETING) - ELEMENTS

No person may be convicted of embezzlement unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, secreted;

Second, personal property;

Third, with a value of **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**);

Fourth, of a **person/(legal entity)**;

Fifth, with fraudulent intent to appropriate;

Sixth, to any use or purpose not intended or authorized by its owner;

Seventh, where the property was legally obtained; and

[Eighth, the property was entrusted to the defendant for a specific purpose/use/disposition, including any funds "held in trust" for any purpose].

OR

[Eighth, the defendant obtained the property by virtue of a power of attorney for the sale/transfer of the property].

OR

[Eighth, the property was controlled/possessed for the use of another person].

OR

[Eighth, the property was to be used for a public/benevolent purpose].

OR

[Eighth, the defendant diverted money appropriated by law from the purpose and object of the appropriation].

OR

[Eighth, the defendant failed/refused to pay over to the state/(Specify Other Appropriate Authority) any tax/ (Specify Other Type of Monies) collected in accordance with state law; and

Ninth, the defendant appropriated the tax/(Specify Other Type of Monies) for (his/her own use)/(the use of another person)].

OR

[Eighth, the defendant possessed the property for the purpose of transportation without regard to whether packages containing the property have been broken].

OR

[Eighth, the defendant removed crops from leased/rented premises with the intent to deprive the owner/landlord of

rent due from the premises].

OR

[Eighth, the defendant fraudulently appropriated rent from leased/rented premises to himself/herself/(any person)].

OR

[Eighth, the property was possessed/controlled by virtue of a lease/rental agreement; and

Ninth, the defendant willfully/intentionally did not return the property within 10 days after the agreement expired].

Statutory Authority: 21 O.S. Supp. 2019, § 1451.

Notes on Use

If the prosecution seeks to aggregate the value of multiple offenses, OUJI-CR 5-90A, *infra,* should also be used.

(2019 Supp.)

OUJI-CR 5-22

EMBEZZLEMENT (APPROPRIATING, SECTION 1453) - ELEMENTS

THIS INSTRUCTION HAS BEEN DELETED

(2005 Supp.)

OUJI-CR 5-23

EMBEZZLEMENT (APPROPRIATING, SECTION 1454) - ELEMENTS

THIS INSTRUCTION HAS BEEN DELETED

(2005 Supp.)

OUJI-CR 5-24

EMBEZZLEMENT (SECRETING, SECTION 1454) - ELEMENTS

THIS INSTRUCTION HAS BEEN DELETED

(2005 Supp.)

OUJI-CR 5-25

EMBEZZLEMENT (APPROPRIATING, SECTION 1455) - ELEMENTS

THIS INSTRUCTION HAS BEEN DELETED

(2005 Supp.)

OUJI-CR 5-26

EMBEZZLEMENT (SECRETING, SECTION 1455) - ELEMENTS

THIS INSTRUCTION HAS BEEN DELETED

(2005 Supp.)

OUJI-CR 5-27

EMBEZZLEMENT (APPROPRIATING, SECTION 1456) - ELEMENTS

THIS INSTRUCTION HAS BEEN DELETED

(2005 Supp.)

OUJI-CR 5-28

EMBEZZLEMENT (SECRETING, SECTION 1456) - ELEMENTS

THIS INSTRUCTION HAS BEEN DELETED

(2005 Supp.)

OUJI-CR 5-29

EMBEZZLEMENT
BY PUBLIC OFFICER - ELEMENTS

No person may be convicted of embezzlement by public officer unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant is a [deputy/employee of a] county/state officer; and

Second, the defendant diverted;

Third, any money appropriated by law;

Fourth, from the purpose and object of the appropriation;

Statutory Authority: 21 O.S. Supp. 2004, § 1451(C).

(2005 Supp.)

OUJI-CR 5-30

EMBEZZLEMENT - DEFINITIONS

Appropriate - Convert to a use not authorized by the true owner or possessor.

References: Terry v. Water Improvement Dist. No. 5, 1937 OK 82, 179 Okl. 106, 64 P.2d 904 (1937); Blake v. State, 1916 OK CR 91 , 12 Okl. Cr. 549, 160 P. 30 .

Fraudulent - With intent to deprive wrongfully the owner or the person who entrusted the property.

References: Smith v. State, 78 Okl. Cr. 343, 148 P.2d 206 (1944); R. Perkins, Criminal Law 293 (2d ed. 1969).

Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

Reference: 21 O.S. 2001, § 103.

Secrete - To conceal or secretly transfer.

Reference: Black's Law Dictionary 1382 (8th ed. 2004).

Value - Fair market value or reasonable selling price.

Reference: 21 O.S. 2001, § 1462.

OUJI-CR 5-31

EXTORTION - INTRODUCTION

The defendant is charged with **extortion/(attempted extortion)/(extortion by letter)** of **[Description of Property, etc.]** on **[Date]** from **[Person From Whom Property Allegedly Extorted]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is meant for use with sections 1481 through 1486, Title 21, Chapter 60, entitled Extortion.

Sections 1481 and 1486 create extortion crimes that are felonies, whereas section 1484 creates a misdemeanor. In order to distinguish the felony crimes from the misdemeanor, the Commission has used the appellations "felony" and "misdemeanor" which have been used with respect to other crimes.

Section 1485 does not create a separate crime, but it does provide protection for written documents under both the felony and misdemeanor crimes. No separate instruction is drafted for section 1485; rather, its protection is presented as an alternate in the second element in the felony and misdemeanor extortion instruction.

Section 1482 is a definitional statute; and section 1483 sets forth the punishment for the felony extortion crimes. No instruction is needed for section 1483.

Prior to its repeal in 1991, section 1487 provided for the misdemeanor of attempted extortion. At the same time that section 1487 was repealed, section 1483 was amended to include attempts to extort as a felony.

FELONY **EXTORTION/(ATTEMPTED EXTORTION)** - ELEMENTS

No person may be convicted of **extortion/(attempted extortion)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **obtaining/(attempting to obtain)**;

Second, **property/(a signature to a writing transferring property)/(a signature to a writing creating a debt/demand/charge/[right of action])**;

Third, of another;

Fourth, with the consent of the other person;

Fifth, induced by use of **force/threat**.

Statutory Authority: 21 O.S. 1991, §§ 1481, 1483, 1485.

OUJI-CR 5-33

EXTORTION - THREAT DEFINED

A person has been threatened when that person has been put in fear of:

[unlawful injury to his/her person/property]

[unlawful personal injury to his/her relatives/(family members)]

[unlawful injury to the property of a relative/(family member)]

[accusation of a crime against him/her]

[accusation of a crime against his/her relatives/(family members)]

[exposure of his/her deformity/disgrace]

[imputation of a (deformity in)/(disgrace to) him/her]

[exposure of a relative's/(family member's) deformity/ disgrace]

[imputation of a deformity/disgrace to a relative/(family member)]

[exposure of his/her secret]

[exposure of a relative's/(family member's) secret].

Statutory Authority: 21 O.S. 1991, § 1482.

OUJI-CR 5-34

MISDEMEANOR EXTORTION - ELEMENTS

No person may be convicted of extortion unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtaining;

Second, **property/(a signature to a writing transferring property)/(a signature to a writing creating a debt/demand/charge/[right of action])**;

Third, of another;

Fourth, with the consent of the other person;

Fifth, under color of official right by an official misusing **his/her** office.

Statutory Authority: 21 O.S. 1991, §§ 1484, 1485.

Committee Comments

Felony extortion and misdemeanor extortion have identical elements except for the means by which the property is obtained as set forth in the fifth element. Because the crimes are committed by different means, as stated in the fifth element, misdemeanor extortion is not a lesser included offense of felony extortion. Cases which have construed the other elements of extortion, however, are authoritative for the crimes of both felony and misdemeanor extortion

The first element makes it clear that the defendant must obtain property or signatures before the crimes defined by sections 1481 and 1484 are committed. *Hill v. State*, 50 Okl. Cr. 59, 296 P. 508 (1931). If the other elements of extortion exist but the victim has failed to deliver the property or signature, a conviction for extortion must be reversed, although a conviction for attempted extortion under section 1483 would be valid. *See Yoder v. State*, 493 P.2d 1141 (Okl. Cr. 1972) (decided under § 1487 (repealed 1991).

The second element indicates that property or signatures to certain documents are the subject matter meant to be protected by the extortion statutes. No cases have defined "property," although the definition should certainly encompass personal property. Where an issue is raised in a case concerning whether the subject matter of the alleged extortion constitutes "property" in statutory terms, the court should define "property" for the jurors.

Whether the word "property" in section 1481 would encompass real property is, in the opinion of the Commission, a moot question because of the protection accorded certain written documents by section 1485. The second element takes into account the language of section 1485 in the alternate language concerning signatures. Two cases have dealt with situations falling within the coverage of section 1485. *McKeown v. State*, 34 Okl. Cr. 381, 246 P. 659 (1926) (check); *Pendleton v. Greever*, 80 Okl. 35, 193 P. 885 (1920) (promissory note). The Commission has concluded that the word "property" does not encompass personal services or services from a business. *See* 21 O.S. 1991, § 1541.1 (false pretense statute with language "valuable thing"); *compare Stokes v. State*, 366 P.2d 425 (Okl. Cr. 1961), *with Ex parte Finney*, 7 Okl. Cr. 562, 124 P. 764 (1912).

The fourth element indicates that the victim must give consent, even though the consent is given under duress. The fourth element is important because it serves in certain instances to distinguish extortion from robbery. Robbery does not involve any consent of the victim, not even coerced consent. *Connard v. State*, 56 Okl. Cr.

134, 35 P.2d 278 (1934); *McKeown*, *supra*.

The fifth element is the element which distinguishes felony extortion from misdemeanor extortion. In the commission of felony extortion, the defendant must have wrongfully used either force or threats. Although the statutory language of section 1481 uses the word "fear," the Commission has concluded that the word "threat" is a better word to use in the fifth element because threat can then be defined in accordance with section 1482. A definitional instruction on "threat" is set forth by the Commission for the use of the trial judge.

A threat to accuse one of crime falls within section 1482(2) whether or not a crime has actually been committed. *Pendleton*, *supra*. Other kinds of threats which would seemingly be sufficient are illustrated by *Yoder*, *supra*, (threat to distribute lewd photographs of a woman), and *McKeown*, *supra*, (threat to injure). Moreover, a threat that comes within section 1482 is not excused simply because the threat is used to collect a valid debt. *Traxler v. State*, 96 Okl. Cr. 231, 251 P.2d 815 (1952).

Extortion in Oklahoma overlaps robbery, to a limited extent, when the means used is either force or threat as defined in section 1482(1). This occurs because the definitions of "threat," section 1482, and "fear," section 794, overlap. When property is obtained by force or threat under section 1482(1), the distinguishing element between robbery and extortion is the fourth element, the consent of the victim. "Threat" is defined, however, much more broadly under section 1482, for purposes of extortion, than is "fear" under 21 O.S. 1991, § 794, for purposes of robbery. Hence, when property is obtained by threats as defined by sections 1482(2), (3), and (4), the expanded definitions, the distinguishing element between robbery and extortion is primarily the means used to obtain the property, although the consent of the victim must also be proved. W. LaFave & A. Scott, *Criminal Law* § 95, at 704-07 (1972). It should also be noted that felony extortion requires fear induced by threats, whereas false pretense requires lies, not threats.

For the misdemeanor extortion crime, the fifth element indicates that the means used to obtain the property or signatures must be under color of official right. The defendant must be a public officer to be convicted of misdemeanor extortion. Extortion has not been committed if the defendant lies to another that the defendant is an officer of the State. *Drake v. State*, 2 Okl. Cr. 643, 103 P. 878 (1909) (correct charge would have been false pretense). Nor has the defendant committed extortion if the defendant is an employee of the State, as opposed to being an officer of the State. *Ray v. Stevenson*, 71 Okl. Cr. 339, 111 P.2d 824 (1941). *See also Lawhorn v. Robertson*, 266 P.2d 1008 (Okl. Cr. 1954); *State v. Sowards*, 64 Okl. Cr. 430, 82 P.2d 324 (1938), *overruled on other grounds*, *Parker v. State*, 917 P.2d 980, 986 n.4 (Okl.Cr. 1996). The correct charge when a State employee gains or obtains property by lies relating to State business would be either larceny or false pretense.

A public officer is acting under color of official right when the officer collects (1) a fee for a purpose not authorized by law; (2) a fee in an amount larger than the authorized fee; or, (3) a fee when none is due although the fee is authorized. *Cox v. State*, 33 Okl. Cr. 436, 244 P. 206 (1926); R. Perkins, *Criminal Law* 367-68 (2d ed. 1969). *Cf. Finley v. State*, 84 Okl. Cr. 309, 181 P.2d 849 (1947) (comparison of the crimes of bribery and extortion).

OUJI-CR 5-35

FELONY EXTORTION BY LETTER - ELEMENTS

No person may be convicted of felony extortion by letter unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, sending;

Second, a **letter/writing**;

Third, with intent to obtain;

Fourth, **property/(a signature to a writing transferring property)/(a signature to a writing creating a debt/demand/charge/[right of action])**;

Fifth, of another;

Sixth, with the consent of the other person;

Seventh, to be induced by use of **threat(s)**.

Statutory Authority: 21 O.S. 1991, § 1486.

Notes on Use

See OUJI-CR 5-33 for a definition of threat.

Committee Comments

Section 1486 makes it a crime to send a letter or other written communication to another with intent to extort. Hence, the crime created by section 1486 contains all the elements of the crime of extortion, except that the defendant need not obtain the property. The first and second elements, sending a letter or written communication, substitute for obtaining property. Although the statutory language of section 1486 is "with intent to extort," the Commission has spelled out the specific elements of extortion in the instruction to define clearly the word "extort."

The first element, "sending," is satisfied by the hand delivery of the letter or written communication. The use of postal service is not necessary. *Wehr v. State*, 79 Okl. Cr. 426, 155 P.2d 731 (1945). Nor is it necessary that the letter or written communication be received.

The second element requires that a letter or written communication be used to convey the threat. Verbal threats which do not result in the transfer of property are not sufficient to constitute the crime of section 1486, although unsuccessful verbal threats are sufficient to constitute the crime of attempted extortion created by section 1483. *Compare Fauble v. State*, 53 Okl. Cr. 153, 11 P.2d 202 (1932) (section 1486), *with Wilson v. State*, 306 P.2d 717 (Okl. Cr. 1957) (section 1487 (repealed 1991)), and *Nelms v. State*, 31 Okl. Cr. 185, 237 P. 870 (1925) (section 1487 (repealed 1991)).

The gravamen of the crime of section 1486 is the intent to extort as reflected in the third through seventh elements. If a person merely sends a threatening letter to another, but does not have the intent to extort, the appropriate charge is under 21 O.S. 1991, § 1304, mailing threatening or intimidating letters, not under section 1486. *Fauble*, *supra*.

The third through seventh elements are the elements of extortion. There is only one substantive difference between the extortion elements of felony extortion by letter and the elements of felony and misdemeanor extortion. The seventh element indicates that the means used by the extortionist to induce consent is limited to the use of threats. This is in accordance with the statutory language of section 1486. Thus, a public officer who sends a letter with the intent to obtain property from another under color of official right cannot be prosecuted under section 1486, but would probably be subject to prosecution for attempted extortion under section 1483. Moreover, section 1486 does not mention the use of force because force cannot be exerted through a letter or written communication. Of course, a threat of force is covered by the definition of "threats" under section 1482. (See OUJI-CR 5-33.)

OUJI-CR 5-36

EXTORTION - DEFINITION

Personal Property - Includes money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

Reference: 21 O.S. 1991, § 103.

OUJI-CR 5-37

FALSE PRETENSE - INTRODUCTION

The defendant is charged with

[false pretense of (Description of Property, Money, etc.)]

[attempted false pretense of (Description of Property, Money, etc.)]

[false pretense for alleged charitable purposes of (Description of Property, Money, etc.)]

[false pretense by false negotiable paper of (Description of Property, Money, etc.)]

[false personation]

[assault while masked]

[false claim for insurance]

[home repair fraud]

[credit/debit card theft]

[possession of credit/debit card]

of [Description of Property, Money, etc.] on **[Date]** obtained from **[Name Person Allegedly Obtained From]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is meant for use with sections 1541.1 through 1545 of Title 21, Chapter 61, the subdivision on False Pretenses.

False pretense is a crime against the ownership of property. False pretense is, therefore, closely related to the crimes of larceny and embezzlement. In contrast with larceny, false pretense is the acquisition of title to the property of another through a fraudulent scheme, whereas larceny is the acquisition of possession of--not title to--the property. In contrast with embezzlement, false pretense is committed by the prohibited activity of obtaining title to the property through fraudulent schemes, whereas embezzlement involves the prohibited activity of appropriation of property already lawfully possessed. *Warren v. State*, 93 Okl. Cr. 166, 226 P.2d 320 (1950); R. Perkins, *Criminal Law* 306 (2d ed. 1969). The person from whom the property is obtained need not be the owner of the property so long as that person has the ability to pass title to the property. *Moore v. State*, 96 Okl. Cr. 118, 250 P.2d 46 (1952). Hence, the language "obtained from" is used in the instruction rather than "owned by" or "in the possession of."

Sections 1541.1 through 1541.3 create crimes of false pretense that distinguish the felony crime from the misdemeanor crime on the basis of the value of the property. Sections 1542 through 1544 also create felony false pretense crimes.

Sections 1541.4, 1541.5, and 1545 provide statutory definitions of false or bogus checks, credit, and false token. Since no crimes are stated by these three sections, no instructions were drafted for them.

OUJI-CR 5-38

FALSE PRETENSE (FELONY, SECTION 1541.2) - ELEMENTS

No person may be convicted of false pretense unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtained title;

Second, to **money/property/(a valuable thing)**;

Third, of another;

Fourth, valued **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**);

Fifth, by means of a **(trick or deception)/(false representation)/ (confidence game)/(false check)/(false written/printed/ engraved instrument)/ (spurious coin)**;

Sixth, known by the defendant to be **false/spurious/(a trick or deception)**;

Seventh, with intent to cheat and defraud.

(2019 Supp.)

OUJI-CR 5-39

ATTEMPTED FALSE PRETENSE (FELONY, SECTION 1541.2) - ELEMENTS

No person may be convicted of attempted false pretense unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, attempted to obtain title;

Second, to **money/property/(a valuable thing)**;

Third, of another;

Fourth, valued at **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**);

Fifth, by means of a **(trick or deception)/(false representation)/ (confidence game)/(false check)/(false written/printed/ engraved instrument)/ (spurious coin)**;

Sixth, known by the defendant to be **false/spurious/(a trick or deception)**;

Seventh, with intent to cheat and defraud.

(2019 Supp.)

OUJI-CR 5-40

FALSE PRETENSE (FELONY, SECTION 1541.3) - ELEMENTS

No person may be convicted of false pretense unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtained title;

Second, to **money/property/(a valuable thing)**;

Third, of another;

Fourth, by means of two or more false checks written for a total amount of **($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**);

Fifth, known by the defendant to be false;

Sixth, in pursuance of a common scheme;

Seventh, with intent to cheat and defraud.

Statutory Authority: 21 O.S. 2011 & Supp. 2019, §§ 1541.1, 1541.2, 1541.3.

Committee Comments

Sections 1541.1 through 1541.5 are statutes passed in 1967 to replace section 1541, the previous false-pretense and bogus-check statute. Although the 1967 law adds section 1541.3 to make it a felony to pass several checks totaling more than $50 (raised to $500 in 2001) in a common scheme, the present statutes are substantially similar to the repealed section 1541. Hence, the cases construing section 1541 are still valid precedent for statutory interpretation of sections 1541.1 through 1541.5.

Two instructions in addition to the attempt instruction are presented under the heading of Felony False Pretense because two sections, 1541.2 and 1541.3, create felony false-pretense crimes. Although the language of section 1541.3 is different from the language of sections 1541.1 and 1541.2, it was the opinion of the Commission that, since these three sections are part of the same legislation, section 1541.3 does not provide a different definition of false pretense. Rather, the Commission has concluded that section 1541.3 is a statute of classification that uses the definition of "false pretense" given by section 1541.1. The elements of the two false-pretense crimes are therefore identical, with the exception of the specific aggravating facts indicated in the fourth element and the means used to accomplish the intended purpose in the fifth element.

The act of obtaining made punishable by the false-pretense crimes involves the passage of title to the accused from the person who has been deceived. As the element of taking in larceny encompasses the concept of transfer of possession, so the element of obtaining in false pretense encompasses the concept of transfer of title. Whether or not title has passed to the accused is primarily a question of the intent of the parties to the transaction, especially the intent of the victim. If the victim meant only to transfer possession, the crime is larceny by fraud. *Braswell v. State*, 1964 OK CR 28, ¶ 10, 389 P.2d 998, 1001; *Warren v. State*, 1950 OK CR 162, 226 P.2d 320, 93 Okl. Cr. 166.

The second element indicates what must be obtained in order to constitute false pretense for the purpose of sections 1541.1 through 1541.3. The statutory language reads "money, property or valuable thing." The word "money" presents no difficulty. *Mason v. State*, 1923 OK CR 62, 212 P. 1028, 23 Okl. Cr. 111 ~~(1923)~~. The

words "valuable thing" have expanded the protection of false-pretense to include, for example, telephone service and the cancellation of a promissory note and chattel mortgage. *Stokes v. State*, 1961 OK CR 76, ¶ 17, 366 P.2d 425, 430; *Bright v. State*, 1943 OK CR 17, 134 P.2d 150, 76 Okl. Cr. 67. Nothing of value has been obtained, however, when the accused gives a false check for a pre-existing debt. The debt simply is not satisfied by the check and still exists. *Jones v. State*, 1913 OK CR 155, 132 P. 914, 9 Okl. Cr. 621.

The word "property" has been used without any descriptive adjective in the instruction. The issue is thereby raised as to whether the element should be limited to personal property, or whether real property is protected by the false-pretense statutes. No Oklahoma case has dealt with the issue, and cases in American jurisdictions are split on the issue. W. LaFave & A. Scott, *Criminal Law* § 90, at 665 (1972).

False pretense, like embezzlement, is a statutory crime created to cover situations not punishable under common law interpretations of larceny. Larceny is limited to personal property. If the legislative intent with respect to embezzlement excluded real property, as concluded in the commentary following the embezzlement instructions, it would follow that the Legislature also intended to exclude real property from the protection of the false-pretense statutes. On the other hand, 21 O.S. 2011, § 104, defines "property" as including both real and personal property.

The issue may actually be moot, because the Court of Criminal Appeals has held that the deed to real property is personal property possessing a value equivalent to the value of the land it represents. Thus, a person could be convicted of larceny when the property allegedly taken is a deed to real property. *State v. McCray*, 1919 OK CR 7, 177 P. 127, 15 Okl. Cr. 374 (construing section 1709). It would therefore appear that a person who obtains a deed transferring title to real property through false representations has obtained personal property. The person should then be subject to prosecution for false pretense.

The Commission has decided to use only the word "property" in the instructions on false pretenses. The Commission leaves the precise question raised to further court interpretation and decision.

The language "of another" is used in the third element to promote consistency of language with the larceny and embezzlement instructions, although the statutory language actually reads "any person, firm or corporation."

The fourth elements for both sections 1541.2 and 1541.3 are similar. Under section 1541.2, the property obtained by the defendant must be valued at more than $1,000, whereas, under section 1541.3, the total value of the checks must be more than ~~$50~~ $2,000, although the amount of each separate check need not equal more than ~~$50~~ $1,000. *Morris v. State*, 1977 OK CR 267, ¶ 9, 568 P.2d 1303, 1305 (amount in statute at the time was $20). Although the defendant is guilty of a felony if the amount obtained or total value of the checks is $2,000 or more, the range of punishment is dependent on whether the amount obtained or total value of the checks is more or less than ~~$1,000~~ $2,500 as well as $15,000.

The fifth element lists the alternative means by which the deception can be accomplished. The Oklahoma Court of Criminal Appeals held in *Broadway v. State*, 1991 OK CR 113, ¶ 7, 818 P.2d 1253, 1255, that the crime of false-pretense may be committed by means other than a "statement," such as by a trick, deception, false or fraudulent representation, or by a pretense. The trial should select the appropriate means of deception in the instruction so that it fits the actual facts of the case being tried. The crime created by section 1541.3 can be committed only by means of false checks. Therefore, the fourth element of the instruction for section 1541.3 lists only that method of deception.

The fifth element of section 1541.2 and the fourth element of section 1541.3 indicate that the representation or check must be false.

The sixth element indicates that the defendant must know that a false representation has been made or a false check has been given. Although the statutory language does not indicate explicitly that the defendant must know

that the representation or check is false, section 1541.4 creates a presumption of knowledge of lack of sufficient funds to pay the check if it is not paid within five days from the date the check is presented for payment. The presumption of section 1541.4 in conjunction with the general understanding of the elements of false pretense would indicate that the representation or check must be known to be false by defendant. *Ross v. State*, 1977 OK CR 340, ¶ 7, 572 P.2d 1001, 1003; W. LaFave & A. Scott, *Criminal Law* § 90, at 666 (1972); R. Perkins, *Criminal Law* 309 (2d ed. 1969).

In addition to the mens rea of knowledge concerning the falseness of the representation or check, the defendant must also have the intent to cheat and defraud. This is the specific mens rea of the crimes of false pretense. *Dunaway v. State*, 1977 OK CR 86, ¶ 9, 561 P.2d 103, 106; *Moore v. State*, 1952 OK CR 140, 250 P.2d 46, 96 Okl. Cr. 118; *Beach v. State*, 1924 OK CR 187, 230 P. 758, 28 Okl. Cr. 348. Section 1541.4 also creates a presumption of intent to defraud if the defendant fails to pay the check within the specified period.

Section 1541.1 also creates a specific attempted-false-pretense crime. OUJI-CR 5-39 has been drafted for this offense. The only variance between the false-pretense instruction and the attempted-false-pretense instruction is in the first element where "attempting to obtain title" is substituted for "obtaining title."

Since a specific attempt statute exists for false pretense under 21 O.S. ~~2001~~ 2011, § 1541.1, the State is prohibited from charging an attempted false pretense under the general attempt statutes. *See Ex parte Smith*, 1952 OK CR 81, 246 P.2d 389, 95 Okl. Cr. 370.

(2019 Supp.)

OUJI-CR 5-41

FALSE PRETENSE (MISDEMEANOR, SECTION 1541.1) - ELEMENTS

No person may be convicted of false pretense unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtained title;

Second, to **money/property/(a valuable thing)**;

Third, of another;

Fourth, valued at less than $1,000;

Fifth, by means of a (**trick or deception)/(false representation)/ (confidence game)/(false check)/(false written/ printed/engraved instrument)/(spurious coin)**;

Sixth, known by the defendant to be **false/spurious/(a trick or deception)**;

Seventh, with intent to cheat and defraud.

(2019 Supp.)

OUJI-CR 5-42

ATTEMPTED FALSE PRETENSE (MISDEMEANOR, SECTION 1541.1) - ELEMENTS

No person may be convicted of attempted false pretense unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, attempted to obtain title;

Second, to **money/property/(a valuable thing)**;

Third, of another;

Fourth, valued at less than $1,000;

Fifth, by means of a **(trick or deception)/(false representation)/ (confidence game)/(false check)/(false written/printed/engraved instrument)/(spurious coin)**;

Sixth, known by the defendant to be **false/spurious/(a trick or deception)**;

Seventh, with intent to cheat and defraud.

(2019 Supp.)

OUJI-CR 5-43

FALSE OR BOGUS CHECK DEFINED

A false or bogus check is a **check/order** which is not honored because **[of insufficient funds of the maker to pay the same]/[the check or order was drawn on a closed/nonexistent account)]** when the **check/order** was given:

in exchange for **money/property/(a benefit/(thing of value).**

OR

as a down payment for the purchase of an item of which the purchaser is taking immediate possession**.**

OR

as payment made to a landlord under a **lease/(rental agreement)**.

Statutory Authority: 21 O.S. Supp. 2014, § 1541.4.

Committee Comments

The elements for the misdemeanor false-pretense crime under section 1541.1 are identical to the elements of the felony false-pretense crime under section 1541.2 except for the fourth element. The statutory language of section 1541.1 indicates that the value of the property must be alleged and proved to be $500 or less. Hence, if a prosecutor is uncertain as to the value of the property, the prosecutor should charge the felony crime. If the facts at trial indicate that the property is of a value of $500 or less, the accused can then be convicted of the misdemeanor, because misdemeanor false pretense is a lesser included offense of the felony.

Section 1541.1 also creates the misdemeanor crime of attempted false pretense. As noted in the Committee Comments for the felony crime of attempted false pretense, the State is prohibited from prosecuting under the general attempt statutes because a specific attempt statute for false pretense exists.

(2014 Supp.)

OUJI-CR 5-44

FALSE PRETENSE (FELONY, SECTION 1542) - ELEMENTS

No person may be convicted of the felony of false pretense unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtaining title;

Second, to **money/property**;

Third, of another;

Fourth, by means of a false **token/writing/representation**;

Fifth, known by the defendant to be false;

Sixth, with intent to defraud.

OUJI-CR 5-45

FALSE PRETENSE

(FELONY, SECTION 1542, ALTERNATE) - ELEMENTS

No person may be convicted of the felony of false pretense unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtaining;

Second, a signature of another;

Third, to any written instrument;

Fourth, by means of a false **token/writing/representation**;

Fifth, known by the defendant to be false;

Sixth, with intent to cheat or defraud.

Statutory Authority: 21 O.S. 1991, § 1542.

Committee Comments

Sections 1542 through 1545 were codified in the same legislation in 1910. In 1913, section 1541, now replaced by sections 1541.1 through 1541.5, was added to the Oklahoma law. The Court of Criminal Appeals has stated that the impetus for the passage of section 1541, even though section 1542 already provided a crime of false pretense, was to dispel any doubt as to whether giving a false check was a false representation. The court intimated that use of a false check to obtain property would have constituted the crime of false pretense anyway under section 1542, especially in light of the definition of false token given by section 1545. *Douglas v. State*, 15 Okl. Cr. 648, 179 P. 947 (1919). Through the years, therefore, the court has interpreted sections 1541 and 1542 to be almost identical in coverage. Since most false-pretense crimes were covered by both statutes, the court held that the State was permitted to elect under which statute the charge would be prosecuted. *State v. Layman*, 357 P.2d 1022 (Okl. Cr. 1960), *overruled on other grounds*, *Broadway v. State*, 818 P.2d 1253, 1255 n.1 (Okl.Cr. 1991); *Riddle v. State*, 97 Okl. Cr. 206, 261 P.2d 469 (1953). It is safe to assume that the prosecutor would generally elect to prosecute under section 1541.1 through 1541.4, because corroborating evidence is not required for conviction under these sections but is required under section 1542. *See Nix v. State*, 453 P.2d 309 (Okl. Cr. 1969) (construing section 743 of title 22).

The elements of false pretense under either element instruction for section 1542 are therefore substantially similar to the elements of the felony and misdemeanor false pretense crimes outlined *supra*.

It should be noted that, in terms of coverage, section 1542 is not as broad as sections 1541.1 through 1541.3 because of the absence of the "valuable thing" language in the statute. Under section 1542, it has been held that it is not a crime to obtain professional services by means of false representations, because services are not money or personal property. *Ex parte Wheeler*, 7 Okl. Cr. 562, 124 P. 764 (1912). A different result seemingly would be reached under section 1541.1. *Cf. Stokes v. State*, 366 P.2d 425 (Okl. Cr. 1961) (telephone service protected).

An alternate element instruction for section 1542 has been drafted to indicate that the prohibited activity of section 1542 not only includes obtaining title to money or personal property, but also obtaining a signature to a

written instrument. Thus, if a defendant lies to another in order to obtain the signature of the other to a negotiable instrument, the defendant has committed the crime created by this section. *Phenis v. State*, 28 Okl. Cr. 142, 229 P. 652 (1924). It would seem that obtaining another's signature to a real estate deed would also be covered by this section.

Section 1542 makes no distinctions based on the value of the property obtained. Thus, no element on value is present in either instruction. Conviction under section 1542 is a felony in all instances.

The fourth element lists the alternative means given in the statute by which the deception can be accomplished. A false token and false writing could be considered specific kinds of false representation, but the Commission has included all the statutory alternatives. It is the opinion of the Commission, however, that the deceptive means under section 1542 are coextensive with the deceptive means listed in section 1541.1.

The statutory language of section 1542 indicates that the defendant must "designedly" use a false representation to obtain the property or signature. The Commission has interpreted the word "designedly" to mean that the defendant must know that the representation is false. Hence, the fifth element in both section 1542 instructions requires a known false representation. *See* R. Perkins, *Criminal Law* 309 (2d ed. 1969).

OUJI-CR 5-46

FALSE PRETENSE FOR ALLEGED CHARITABLE PURPOSES (FELONY) - ELEMENTS

No person may be convicted of the felony of false pretense for alleged charitable purposes unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtaining;

Second, to **money/property**;

Third, of another;

Fourth, by means of a false **token/writing/representation**;

Fifth, known by the defendant to be false;

Sixth, for an alleged charitable purpose;

Seventh, with intent to defraud.

OUJI-CR 5-47

FALSE PRETENSE FOR ALLEGED CHARITABLE PURPOSES (FELONY, ALTERNATE) - ELEMENTS

No person may be convicted of the felony of false pretense for alleged charitable purposes unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtaining;

Second, a signature to any written instrument;

Third, of another;

Fourth, by means of a false **token/writing/representation**;

Fifth, known by the defendant to be false;

Sixth, for an alleged charitable purpose;

Seventh, with intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1543.

Committee Comments

The Commission has interpreted section 1544 to create a crime which has identical elements to the crime created by section 1542 except that the false representation must be to obtain property for an alleged charitable purpose. The statutory language does not indicate that the defendant must have the intent to defraud, but the Commission has concluded that the Legislature did not intend to delete the specific mens rea.

OUJI-CR 5-48

FALSE PRETENSE BY

FALSE NEGOTIABLE PAPER (FELONY) - ELEMENTS

No person may be convicted of the felony of false pretense by false negotiable paper unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtaining title;

Second, to **money/property**;

Third, of another;

Fourth, by means of a false negotiable paper of a nonexistent banking **company/corporation**;

Fifth, known by the defendant to be false;

Sixth, with intent to defraud.

OUJI-CR 5-49

FALSE PRETENSE BY

FALSE NEGOTIABLE PAPER (FELONY, ALTERNATE) - ELEMENTS

No person may be convicted of the felony of false pretense by false negotiable paper unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtaining;

Second, a signature to any written instrument;

Third, of another;

Fourth, by means of a false negotiable paper of a nonexistent banking **company/corporation**;

Fifth, known by the defendant to be false;

Sixth, with intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1544.

Committee Comments

The Commission has interpreted section 1544 to create a crime with identical elements to the crime created by section 1542 except that the deception must be accomplished by means of a false negotiable paper purportedly issued on a bank which is, in fact, nonexistent.

OUJI-CR 5-50

FALSE PERSONATION - ELEMENTS

No person may be convicted of false personation unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant falsely assumed the identity of another person;

Second, the impersonation of that identity was intentional;

[Third, under that false identity the defendant **subscribed/verified/ published/acknowledged/proved** a written instrument;

Fourth, with the intent that the instrument be **delivered/used** as true].

OR

[Third, under that false identity the defendant did any act that might have made the other person liable to **(any lawsuit or prosecution)/(pay any money)/ (incur any charge/forfeiture/penalty)**;

Fourth, if the act had been done by the other person].

OR

[Third, under that false identity the defendant **obtained/received** any benefit;

Fourth, as a result of impersonating the other person].

OR

[Third, under that false identity the defendant received any **money/property**;

Fourth, knowing that it was intended to be delivered to the other person;

Fifth, with the intent to convert the money/property to (the defendant's own use)/(the use of another person who was not entitled to it); and

Sixth, the value of the **money/property** was **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**).

[A written instrument is every instrument (partly printed and partly written)/(wholly printed with a written signature thereto), and every signature of a/an individual/firm/ corporation/(officer of a firm/corporation) and every writing purporting to be such signature].

Statutory Authority: 21 O.S. 2011 & Supp. 2019, §§ 1531, 1532,1625.

Notes on Use

This instruction covers the third and fourth subdivisions of 21 O.S. ~~1991~~ 2011, § 1531, and 21 O.S. Supp. 2019, § 1532. The court should select among the alternatives according to the evidence at trial. For prosecutions of other types of false personation, the trial court will need to draft appropriate instructions based on the proof at trial.

Committee Comments

This Instruction follows *Barkus v. State*, 1996 OK CR 45, ¶ 4, 926 P.2d 312, 313, which overruled *Friday v. State*, 1992 OK CR 39, 833 P.2d 1257-in part. Under *Barkus*, no overt act is required for a conviction if the defendant obtained any benefit as a result of the false impersonation. *See also Camren v. State*, 1991 OK CR 75, ¶¶ 4-5, 815 P.2d 1194, 1195 (defendant falsely personated his dead brother in order to reclaim his own suspended driver's license).

The bracketed definition of "written instrument" is taken from 21 O.S. 2011, § 1625.

(2019 Supp.)

OUJI-CR 5-51

ASSAULT WHILE MASKED - ELEMENTS

No person may be convicted of the felony of assault while masked unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(entered upon the premises of another)/(demanded entry into the house/enclosure of another)**;

Second, with the intent to inflict **(bodily injury)/(injury to property)**;

Third, while **masked/(in disguise)**.

OR

First, assaulted another;

Second, with a dangerous **weapon/(instrument of punishment)**;

Third, while **masked/(in disguise)**.

[You may, but are not required to, regard proof that the defendant (entered upon the premises of another)/(demanded entry into the house/enclosure of another) as sufficient evidence of the defendant's intent to inflict (bodily injury)/(injury to property). The existence of this intent must be proved beyond a reasonable doubt].

Statutory Authority: 21 O.S. 1991, §§ 1302-1303.

Notes on Use

The first option is for felony prosecutions for assault with intent to commit a felony under 21 O.S. 1991, § 1302, and the second option is for felony prosecutions under 21 O.S. 1991, § 1303. The last sentence should be given only with the first option in prosecutions under 21 O.S. 1991, § 1302; it is phrased in terms of a permissive presumption under 12 O.S. 1991, § 2304(C).

The trial court will need to draft an appropriate instruction for a prosecution for the unlawful wearing of a mask under 21 O.S. 1991, § 1301.

For a definition of "assault", see OUJI-CR 4-2.

OUJI-CR 5-52

FALSE CLAIM FOR INSURANCE - ELEMENTS

No person may be convicted of making a false claim for insurance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **presented/(caused to be presented);**

Second, **[proof in support of]** a **false/fraudulent** claim;

Third, for payment of a loss;

Fourth, upon a contract for insurance.

OR

First, **prepared/made/subscribed**;

Second, **a/an account/certificate/(survey affidavit)/(proof of loss)/book/paper/ writing**;

Second, with the intent to **(present/use it)/(allow it to be presented/used)**;

Second, in support of a **false/fraudulent** claim;

Third, for payment of a loss;

Fourth, upon a contract for insurance.

Statutory Authority: 21 O.S. 1991, § 1662.

OUJI-CR 5-53

HOME REPAIR FRAUD - ELEMENTS

No person may be convicted of the **felony/misdemeanor** of home repair fraud unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/(with reason to know)**;

Second, entered into a consumer transaction for home repair; and

Third, **knowingly/(with reason to know)**;

Fourth, [misrepresented a material fact relating to the **(terms of the consumer transaction)/(the preexisting/existing condition of any portion of the property involved)**]; **OR**

[**created/confirmed** an impression of the consumer which was false and which the defendant did not believe to be true]; **OR**

[promised performance which the defendant **(did not intend to perform)/(knew would not be performed)**]; **OR**

[**used/employed** any **deception/(false pretense/promises)** in order to **induce/encourage/solicit** a consumer to enter into a consumer transaction]; **OR**

[required payment for the home repair at a price which unreasonably exceeded the value of the services and materials needed for the home repair];

[Fifth, **(when the value received for the performance of the consumer transaction exceeded $500.00)/(the defendant had a prior conviction for home repair fraud)**].

OR

First, **knowingly/(with reason to know)**;

Second, damaged the property of another;

Third, with the intent to enter into a consumer transaction for home repair;

[Fourth, **(when the value received for the performance of the consumer transaction exceeded $500.00)/(the defendant had a prior conviction for home repair fraud)**].

OR

First, **knowingly/(with reason to know)**;

Second, **misrepresented himself/herself/(another person)** to be an **employee/agent of (the federal/State/county/municipal government)/(a public utility)**;

Third, with the intent to cause a person to enter into a consumer transaction for home repair with **himself/herself/(another person)**;

[Fourth, **(when the value received for the performance of the consumer transaction exceeded $500.00)/(the defendant had a prior conviction for home repair fraud)**].

Statutory Authority: 15 O.S. 1991, § 765.3, 15 O.S. Supp. 1995, § 761.1.

Notes on Use

The last element of each option should be omitted in misdemeanor prosecutions.

OUJI-CR 5-54

CREDIT/DEBIT CARD THEFT - ELEMENTS

No person may be convicted of **credit/debit** card theft unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking a **credit/debit** card;

Second, from the **possession/custody/control** of another;

Third, without the cardholder's consent.

OR

First, receiving a **credit/debit** card;

Second, with the intent to **(use/sell it)/(transfer it to a person other than the issuer or the cardholder)**;

Third, knowing that the **credit/debit** card was taken;

Fourth, from **[the possession/custody/control of]** another;

Fifth, without the cardholder's consent.

OR

First, **receiving/holding/concealing** a **credit/debit** card;

Second, which had been **lost/mislaid**;

Third, under circumstances which gave **him/her knowledge/cause** to inquire as to the true owner;

Fourth, and appropriating the **credit/debit** card to **his/her use/(the use of another not entitled to it)**.

[You may, but are not required to, regard proof that the defendant had (in his/her possession)/(under his/her control) another's credit/debit card as sufficient evidence of credit/debit card theft. The defendant's guilt of credit/debit card theft must be proved beyond a reasonable doubt.]

Statutory Authority: 21 O.S. 1991, §§ 1550.22, 1550.23.

Notes on Use

This instruction is drafted to cover prosecutions under 21 O.S. 1991, §§ 1550.22, 1550.23 only, and the following instruction covers prosecutions under 21 O.S. 1991, § 1550.28(b). The trial court will need to draft its own instructions for prosecutions of other crimes involving credit or debit cards. Definitions for various terms may be found in 21 O.S. 1991, §§ 1550.1, 1550.21.

The last bracketed paragraph should be given only with prosecutions under 21 O.S. 1991, § 1550.22; it is phrased in terms of a permissive presumption under 12 O.S. 1991, § 2304(C).

OUJI-CR 5-55

POSSESSION OF **CREDIT/DEBIT** CARD OF ANOTHER - ELEMENTS

No person may be convicted of possession of **credit/debit** card of another unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, possession of a **credit/debit** card;

Second, by a person other than the cardholder or a person authorized by the cardholder.

Statutory Authority: 21 O.S. 1991, § 1550.28(b).

Committee Comments

The Committee calls attention to the ambiguity in the reference by 21 O.S. 1991 § 1550.28(b) to the punishment in 21 O.S. 1991 § 1550.33.

OUJI-CR 5-56

FALSE PRETENSE - DEFINITIONS

Confidence Game - Operation by means of which advantage is taken of the confidence placed by one person in another through false representation, deception, or device.

Reference: Rucker v. State, 88 Okl. Cr. 15, 19, 195 P.2d 299, 304 (1948). See also Lane v. State, 742 P.2d 577, 580 (Okl. Cr. 1987) (setting out material elements of crime of "Confidence Game").

False Token - Matured check or other order used, with knowledge that the drawer is not authorized to draw the sum stated, as a means for obtaining any signature, money, or property.

Reference: 21 O.S. 1991, § 1545.

Intent to Defraud - Scheme to take property so as permanently to deprive the owner.

References: Dunaway v. State, 561 P.2d 103 (Okl. Cr. 1977); Armstrong v. State, 74 Okl. Cr. 42, 122 P.2d 823 (1942).

Obtaining Title - Inducing the owner to part with **his/her** rights in property permanently.

Reference: Warren v. State, 93 Okl. Cr. 166, 173, 226 P.2d 320. 325 (1951).

Property - Property includes:

(a) Real Property - Every estate, interest and right in lands, including structures or objects permanently attached to the land;

(b) Personal Property - Money, goods, chattels, effects, evidence of rights in action, and written instruments effecting a monetary obligation or right or title to property.

References: 21 O.S. 1991, §§ 102, 103, 104.

Spurious Coin - Any token, disk, blank, slug, washer, or sweated, mutilated, false, or counterfeited coin or other device, used in substitution for lawful coin of the United States.

Reference: 21 O.S. 1991, § 1848.

Valuable Thing - Includes not only physical objects but also intangible substances and services.

Reference: Stokes v. State, 366 P.2d 425 (Okl. Cr. 1961).

OUJI-CR 5-57

FORGERY - INTRODUCTION

The defendant is charged with forgery in the **first/second** degree of **[Alleged Document, Record, etc., Forged, Uttered, Possessed]** on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is meant for use with regard to sections 1561 through 1626, Title 21, Chapter 63, entitled Forgery and Counterfeiting. Several kinds of activities are prohibited by the statutes contained in Chapter 63, such as forgery of various documents, falsification of certain records, counterfeiting, uttering of forged instruments, and possession of forged instruments. The instructions are therefore classified by groupings. No matter the precise conduct prohibited, however, the crimes contained in 21 O.S. 1991, §§ 1561-1626, are denominated either forgery in the first degree or forgery in the second degree. Hence, the introductory instruction is applicable to the several crimes whatever the precise conduct prohibited.

Section 1621 sets forth the penalties for forgery in the first degree and forgery in the second degree. Sections 1622 through 1626 are statutes of classification that do not create new crimes. Therefore, no instructions were drafted for these statutes.

Several forgery statutes create more than one crime and require more than one instruction. Such statutes are therefore classified under more than one grouping with an instruction prepared for the statute under each appropriate grouping. One should be aware that if an instruction for a particular statute does not seem to cover the conduct with which he/she is concerned, it will probably be included under another grouping.

OUJI-CR 5-58

FORGERY IN THE FIRST DEGREE (WILLS, DEEDS) - ELEMENTS

No person may be convicted of forgery in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/signing/(altering to make)**;

Second, a false **will/(will codicil)/deed/(instrument affecting an interest in real property)/(acknowledgement of an instrument that may be recorded or given in evidence)/(certificate of proof of a deed/will/[will codicil]/ [instrument that may be recorded/given in evidence])**;

Third, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1561.

OUJI-CR 5-59

FORGERY IN THE FIRST DEGREE

(PUBLIC SECURITIES) - ELEMENTS

No person may be convicted of forgery in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/signing/(altering to make)**;

Second, a false **(public security for the payment of money)/(public security for the receipt of money/property)/(public stock certificate/option/ right)/(instrument evidencing public debt/liability)/(transfer instrument of a public security/stock/[stock option/right])/(transfer instrument of an instrument evidencing public debt/liability)**;

Third, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1562.

OUJI-CR 5-60

FORGERY IN THE SECOND DEGREE (SEALS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, making;

Second, a false **(Great Seal of Oklahoma)/(seal of a public office)/(seal of a Court of record)/(seal of an Oklahoma corporation)/(seal of another State/government/country)/(public seal recognized by the laws of Oklahoma)/(impression of any seal recognized by the laws of Oklahoma)**;

Third, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1571.

OUJI-CR 5-61

FORGERY IN THE SECOND DEGREE

(COURT DOCUMENTS, ETC.) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/(altering/marking to make)**;

Second, a false **(judicial process)/(pleading/bond/instrument filed in any court)/(license recognized by the laws of Oklahoma)/(writing having legal significance)**;

Third, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1585.

OUJI-CR 5-62

FORGERY IN THE SECOND DEGREE

(PUBLIC TRANSPORTATION TICKETS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/(altering to make)**;

Second, a false ticket for transportation by a common carrier;

Third, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1587.

OUJI-CR 5-63

FORGERY IN THE SECOND DEGREE

(STOCK CERTIFICATES) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **signing/(procuring to be signed)**;

Third, by an **officer/agent** of **a/an corporation/association**;

Fourth, of a false **(document of ownership)/(stock certificate/(transfer document)** of the **corporation/association;**

Fifth, with the intent to **issue/sell/pledge/(cause to be issued/sold/pledged**.

Statutory Authority: 21 O.S. 1991, § 1580.

OUJI-CR 5-64

FORGERY IN THE SECOND DEGREE

(EVIDENCE OF DEBT) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **signing/(procuring to be signed)**;

Third, by an **officer/agent** of **a/an corporation/association**;

Fourth, of a false **bond/(evidence of debt)** of the **corporation/association**;

Fifth, with the intent to **issue/sell/pledge/(cause to be issued/sold/pledged)**.

Statutory Authority: 21 O.S. 1991, § 1582.

Committee Comments

Sections 1561, 1562, 1571, 1580, 1582, 1585, and 1587 create, in the opinion of the Commission, crimes similar to the common law crime of forgery. Despite the wordiness of the statutes, the Commission has endeavored to simplify the instructions through the use of as few and as ordinary words as possible, based on the common law elements of forgery. The crimes created by these sections are hereafter referred to as "classic" forgery.

Common law forgery should be contrasted with common law false pretense. For the crime of false pretense, a person must use a false representation, *i.e.*, a lie. Forgery also involves a lie, but the lie concerns the genuineness of the document not what is stated in the document. Thus, if X were to make a deed purporting to sell Blackacre, even though X did not own Blackacre, the deed would be valid but filled with lies. X could not be convicted of forgery, though he might be convicted of false pretense if the other elements of that crime existed. If X made a deed purporting to be the deed of Y, the deed would be void because not genuine; the lie is that the deed is genuine. X could be convicted of forgery if the other elements of the crime existed. Moreover, the crime of false pretense is not committed unless the lie is believed and title to property is transferred as a result. By contrast, forgery is committed whenever the nongenuine document is created with an intent to defraud on the part of the creator, whether or not the nongenuine document is used or fools anyone into parting with property. False pretense is a crime against the ownership of property. The forgery statutes are intended to promote the genuineness of written documents. W. LaFave & A. Scott, *Criminal Law* § 90, at 671-71 (1972); R. Perkins, *Criminal Law* 339-56 (2d ed. 1969).

The first element for sections 1561, 1562, 1571, 1585, and 1587 and the second element for sections 1580 and 1582 indicate the conduct that is prohibited by these statutes when dealing with "classic" forgery. Although the statutory language varies from "forges, counterfeits or falsely alters" in sections 1561, 1562 and 1587, to "forges or counterfeits" in section 1571, and "falsely marks, alters, forges or counterfeits" in section 1585, the Commission has concluded that the word "making" more simply and clearly expresses the conduct prohibited. The word "forge" or "counterfeit" seems immediately to demand definition, especially since the crime attempted to be defined by elements is called "forgery." Thus, the Commission has decided not to use the words "forge" and "counterfeit." However, whenever the word "making" might not clearly convey to the jury the kinds of

conduct prohibited, the Commission has used additional words such as "altering," "marking," and "signing," which indicate common methods of "making" a false document. As for the second element in the instructions for sections 1580 and 1582, the Commission has decided to use the words "signing" and "procuring to be signed," since these are the statutory words and they are clear, ordinary words.

The third element for sections 1580 and 1582 simply conforms the instructions to a limitation stated by the statutes. This additional element, in contrast to the other five sections under consideration, does not affect the basic thrust of sections 1580 and 1582 as "classic" forgery statutes.

The second element of sections 1561, 1562, 1571, 1585, and 1587 and the fourth element of sections 1580 and 1582 set forth the particular kinds of documents that are protected by these statutes from being forged. Section 1585(2) further provides a general protection to any document subject to forgery, which is reflected in the instruction by the phrase "a false writing having legal significance." *Sweat v. State*, 69 Okl. Cr. 229, 101 P.2d 648 (1940).

The second and fourth elements also delineate the limitations on the kinds of documents which can be forged. If a particular kind of document can affect legal rights and is apparently valid on its face, that document is a forgery, even though the ordinary person would not be deceived by the false document. *Lacy v. State*, 33 Okl. Cr. 161, 242 P. 296 (1926); *Nix v. State*, 20 Okl. Cr. 373, 202 P. 1042 (1922); *McDonald v. State*, 12 Okl. Cr. 144, 152 P. 610 (1916); *Wishard v. State*, 5 Okl. Cr. 610, 115 P. 796 (1911). However, a document void on its face or a document that cannot affect legal rights does not subject one to the charge of forgery. *Bell v. State*, 12 Okl. Cr. 453, 148 P. 402 (1916); *Territory v. De Lena*, 3 Okl. 573, 41 P. 618 (1895). Although the statements of the court in *Bell* and *De Lena* are correct, the precise holdings in both cases, in the opinion of the Commission, are questionable. *See generally, State ex rel. Nesbitt v. Liberty Nat'l Bank and Trust Co.*, 414 P.2d 281 (Okl. 1966); *Gooch v. Natural Gas Supply Co.*, 175 Okl. 153, 51 P.2d 932 (1935).

It should again be emphasized, however, that a genuine document even though it contains lies does not constitute a forged document. Thus, a valid document signed by a person in an agency capacity, although no agency exists or the authority of the agent has been exceeded, does not subject that person to a charge of forgery, although the crime of false pretense may well have been committed. *Schulte v. State*, 41 Okl. Cr. 173, 271 P. 1045 (1928); *Ex parte Offutt*, 29 Okl. Cr. 401, 234 P. 222 (1925). The second and fourth elements therefore require "a false" document.

The mens rea elements of the instructions simply conform to the statutory language. With regard to the mens rea element set forth in the third element for sections 1561, 1562, 1571, 1585 and 1587 and the fifth element of sections 1580 and 1582, it is not necessary to allege or prove that the accused had any particular person in mind as the person to defraud or to whom to sell, issue, or pledge the forged document. The mens rea element is simply an intent to defraud or an intent to sell, issue, or pledge, and no specific focus of the intent need exist. *Raybourn v. State*, 339 P.2d 539 (Okl. Cr. 1959).

OUJI-CR 5-65

FORGERY IN THE SECOND DEGREE

(COUNTERFEITING COINS, SECTION 1583) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, making;

Second, a false coin of **(the United States)/[Give Name of Foreign Country]**;

Third, with intent to **sell/utter/use/circulate** as genuine;

Fourth, within Oklahoma.

Statutory Authority: 21 O.S. 1991, § 1583.

OUJI-CR 5-66

FORGERY IN THE SECOND DEGREE

(COUNTERFEITING COINS, SECTION 1584) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, making;

Second, a false coin of **(the United States)/[Give Name of Foreign Country]**;

Third, with intent to export to injure or to defraud.

Statutory Authority: 21 O.S. 1991, § 1584.

OUJI-CR 5-67

FORGERY IN THE SECOND DEGREE

(COUNTERFEITING STAMPS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, **making/(altering to make)**;

Third, a false **postage/revenue** stamp of the United States.

Statutory Authority: 21 O.S. 1991, § 1588.

OUJI-CR 5-68

FORGERY IN THE SECOND DEGREE

(COUNTERFEITING BANK NOTE PLATES) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/engraving/(causing to be made/engraved)**;

Second, without authority;

Third, a plate of a **(promissory note)/(bill of exchange)/draft/check/(certificate of deposit)/(evidence of debt)**;

Fourth, issued by a bank;

Fifth, with the intent to **use/(permit it to be used)** for the purpose of taking therefrom any impression to be **passed/sold/altered**.

Statutory Authority: 21 O.S. 1991, § 1575.

Committee Comments

The crimes created by sections 1583 and 1584 are very similar in their elements to the crimes created by the statutes discussed under forgery in the first degree and prior second-degree forgery crimes. The Commission did not classify sections 1583 and 1584 under the earlier instructions because making false coins is generally thought of as a distinct crime called "counterfeiting," rather than the crime of forgery. Sections 1583 and 1584 are forgery crimes, however, because of the mens rea element indicated in the third element. In addition, since no Oklahoma cases have construed these two sections, it seemed more appropriate to deal with the sections separately to avoid cluttering the discussion of the forgery statutes normally used in Oklahoma.

Section 1588 creates a "classic" counterfeiting crime, *i.e.*, making a false stamp. Whether the maker intends the stamp as a joke or as a specimen of his artistic skills, he has committed a crime. Section 1588 has never been construed in Oklahoma for the probable reason that the federal government has the paramount interest in protecting the manufacture of currency and stamps.

Section 1575 also seems to create a counterfeiting crime whereby the authority of a bank to issue certain types of documents is protected. Section 1576 is a definitional statute that indicates when a plate has sufficient resemblance to an authorized plate so as to come within the prohibition of section 1575. No Oklahoma cases have construed sections 1575 and 1576.

OUJI-CR 5-69

FORGERY

(UTTERING NOTES, ETC.) - ELEMENTS

No person may be convicted of forgery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, intentionally;

Second, **selling/exchanging/delivering/(receiving upon a sale/exchange/ delivery)/(offering for sale/exchange/delivery)**;

Third, for any consideration;

Fourth, a false **(promissory note)/check/bill/ draft/(instrument evidencing a debt)/(instrument promising payment of money)**;

Fifth, with a value of **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99)/($15,000 or more**);

Sixth, known by the defendant to be false.

Statutory Authority: 21 O.S. Supp. 2019, § 1577.

Notes on Use

If the prosecution seeks to aggregate the value of multiple offenses, OUJI-CR 5-90A, *infra,* should also be used.

(2019 Supp.)

OUJI-CR 5-70

FORGERY IN THE SECOND DEGREE

(UTTERING PUBLIC TRANSPORTATION TICKETS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **selling/exchanging/delivering/(keeping for sale/exchange/delivery)/ (offering for sale/exchange/delivery)/(receiving upon a purchase/ exchange/delivery)**;

Second, a false ticket for transportation by common carrier;

Third, known by the defendant to be false;

Fourth, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1587.

OUJI-CR 5-71

FORGERY IN THE SECOND DEGREE

(UTTERING STAMPS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **selling/(offering to keep for sale)**;

Second, a false **postage/revenue** stamp of the United States;

Third, known by the defendant to be false.

Statutory Authority: 21 O.S. 1991, § 1588.

OUJI-CR 5-72

FORGERY

(UTTERING IN GENERAL) - ELEMENTS

No person may be convicted of forgery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **offering/publishing** as genuine;

Second, a false **(writing having legal significance)/coin**;

Fourth, known by the defendant to be false;

Fifth, with the intent to defraud.

[A series of offenses may be aggregated into one offense when they are the result of the formulation of a plan or scheme or the setting up of a mechanism which, when put into operation, results in the taking or diversion of money or property on a recurring basis. When all acts result from a continuing course of conduct, they may be aggregated into one crime. Acts forming an integral part of the first taking which facilitate subsequent takings, or acts taken in preparation of several takings which facilitate subsequent takings, are relevant to determine the intent of the party to commit a continuing crime.]

Statutory Authority: 21 O.S. Supp. 2019, § 1592.

Notes on Use

If the value of the instrument or coin is less than $1,000, the third element should be deleted, and the remaining elements should be renumbered.

(2019 Supp.)

OUJI-CR 5-73

FORGERY IN THE SECOND DEGREE

(UTTERING STOCK CERTIFICATES) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **issuing/selling/pledging/(causing to be issued/sold/pledged)**;

Third, by an **officer/agent** of **a/an corporation/association**;

Fourth, of a false **(document of ownership)/(stock certificate)/(stock transfer document)** of the **corporation/association**.

Statutory Authority: 21 O.S. 1991, § 1580.

OUJI-CR 5-74

FORGERY IN THE SECOND DEGREE

(UTTERING CANCELED STOCK CERTIFICATES) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **reissuing/selling/pledging**;

Third, by an **officer/agent** of **a/an corporation/association**;

Fourth, of a surrendered or canceled **(document of ownership)/(stock certificate)/(stock transfer document)** of the **corporation/association**;

Fifth, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1581.

OUJI-CR 5-75

FORGERY IN THE SECOND DEGREE

(UTTERING AN EVIDENCE OF DEBT) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **issuing/selling/pledging/(causing to be issued/sold/pledged)**;

Third, by an **officer/agent** of **a/an corporation/association**;

Fourth, of a false **bond/(evidence of debt)** of the **corporation/association**.

Statutory Authority: 21 O.S. 1991, § 1582.

Committee Comments

The crimes created by sections 1577, 1580, 1581, 1582, 1587, 1588, and 1592, classified under "Forgery in the second degree sale or exchange - uttering," are distinguishable from the crimes for which instructions have been given under previous forgery groupings. Under the previous forgery groupings, the conduct punished relates to making the forged instrument or counterfeited coin. The conduct prohibited by the crimes under the present grouping relates to selling, exchanging, delivering, receiving, offering, or publishing the forged instrument or counterfeit coin, regardless of whether the person doing these acts was the creator or maker of the forgery or the counterfeit. A case construing section 1577 clearly holds that "making" is not an element of the offense under section 1577, and that the crime is complete when the person passes or exchanges the instrument. *Acuff v. State*, 283 P.2d 856 (Okl. Cr. 1955). Another case under section 1592 also makes it clear that uttering a forged instrument is a separate and distinct offense from the crime of making the false instrument. *Burns v. State*, 72 Okl. Cr. 409, 117 P.2d 144 (1941). Hence, the crimes under the present grouping are not lesser included offenses of "classic" forgery under the previous groupings.

Section 1592 uses the language "utter," which the Commission has translated into "offer" for purposes of the instruction. "Offer" is a more common word, and the Court of Criminal Appeals has defined "utter" to mean "offer as genuine" under a similar statute. *Hill v. State*, 266 P.2d 979 (Okl. Cr. 1954), (*construing* 63 O.S. 1951, § 417 (repealed 1971)).

The third element of the section 1577 crime indicates that the sale, exchange, or offer of the false instrument must be for consideration. The Court of Criminal Appeals has interpreted consideration broadly to include past consideration and forbearance from taking legal action to collect a debt. *Wilborn v. State*, 26 Okl. Cr. 437, 224 P. 214 (1924). The definition of "consideration" for section 1577 should be contrasted with the definition of "property" or "valuable thing" under the false-pretense statutes, where the court has held that past consideration is not property or a valuable thing. Thus, giving a valid but worthless check for a past debt does not constitute the crime of false pretense. *Foster v. State*, 15 Okl. Cr. 216, 175 P. 944 (1918); *Jones v. State*, 9 Okl. Cr. 621, 132 P. 914 (1913).

The fourth and fifth elements of section 1577 and the second and third elements of section 1592 indicate that the defendant must know that the instrument he sells, exchanges, or offers is a forged instrument or a counterfeit coin. Hence, the instrument or coin must be an instrument or coin that is nongenuine, has legal significance, and is

not void on its face. If the instrument or coin is genuine but contains lies, if the instrument or coin does not affect legal rights, or if the instrument or coin is void on its face, the instrument or coin would not be a subject of forgery. *Jones v. State*, 69 Okl. Cr. 244, 101 P.2d 860 (1940); *Moss v. Arnold*, 63 Okl. Cr. 343, 75 P.2d 491 (1938). Refer also to the cases cited on this point in the discussion of "classic" forgery under the previous groupings.

It is not necessary for the prosecution to allege or to prove any particular person as the target of the sale, exchange, or offer, nor any particular person as the party to be defrauded. *Burns*, *supra*; *Snider v. State*, 71 Okl. Cr. 98, 108 P.2d 552 (1940). Nor is it necessary that the defendant have obtained anything, so long as the defendant offered the false instrument as genuine (§ 1592), or for consideration (§ 1577). *Dickerson v. State*, 74 Okl. Cr. 229, 124 P.2d 750 (1942). Finally, it is not a defense that the defendant intended to pay the false instrument later.

Only sections 1577 and 1592 have been construed with regard to the sale or exchange, or the uttering crimes. Sections 1580, 1581, 1582, 1587, and 1588 have not been discussed, although instructions have been drafted for these statutes.

OUJI-CR 5-76

FORGERY IN THE SECOND DEGREE

(POSSESSION OF BANK NOTE PLATES) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, possesses;

Second, without authority;

Third, a plate of a **(promissory note)/(bill of exchange)/draft/check/(certificate of deposit)/(evidence of a debt)**;

Fourth, issued by a bank;

Fifth, with the intent to make an impression of the plate for **sale/exchange/alteration**.

Statutory Authority: 21 O.S. 1991, § 1575.

OUJI-CR 5-77

FORGERY IN THE SECOND DEGREE (POSSESSION OF BANK NOTE PLATE IMPRESSIONS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, possesses;

Second, without authority;

Third, an impression made from a plate of a **(promissory note)/(bill of exchange)/draft/check/(certificate of deposit)/(evidence of a debt)**;

Fourth, issued by a bank;

Fifth, with the intent to **sell/exchange/alter** the impression.

Statutory Authority: 21 O.S. 1991, § 1575.

OUJI-CR 5-78

FORGERY

(POSSESSION OF EVIDENCE OF A DEBT) - ELEMENTS

No person may be convicted of forgery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, possesses;

Second, a false **(negotiable note)/bill/draft/(evidence of debt)**;

Third, with a value of **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**);

Fourth, of a **corporation/company**;

Fifth, known by the defendant to be false;

Sixth, with the intent to defraud; and

Seventh, with the intent to **(utter as true or as false)/(cause to be uttered as true or as false)**.

Statutory Authority: 21 O.S. Supp. 2019, § 1578.

Notes on Use

If the prosecution seeks to aggregate the value of multiple offenses, OUJI-CR 5-90A, *infra,* should also be used.

(2019 Supp.)

OUJI-CR 5-79

FORGERY

(POSSESSION IN GENERAL) - ELEMENTS

No person may be convicted of forgery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, possesses/(causes another person to possess);

Second, a false writing having legal significance;

Third, with a value of **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**);

Fourth, known by the defendant to be false;

Fifth, with the intent to injure or defraud.

Statutory Authority: 21 O.S. Supp. 2019, § 1579.

Notes on Use

If the prosecution seeks to aggregate the value of multiple offenses, OUJI-CR 5-90A, *infra,* should also be used.

(2019 Supp.)

OUJI-CR 5-80

FORGERY IN THE SECOND DEGREE

(POSSESSION OF COUNTERFEIT COINS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, possesses;

Second, a false coin of **(the United States)/[Give Name of Foreign Country]**;

Third, known by the defendant to be false;

Fourth, with the intent to **sell/use/circulate/export/(cause to be offered/passed)**.

Statutory Authority: 21 O.S. 1991, § 1591.

Committee Comments

Sections 1575 and 1591 have not been construed by the Court of Criminal Appeals. Very few cases have mentioned or construed sections 1578 and 1579. The court has made it clear that possession is a separate crime from "classic" forgery or uttering, although the possession charge is a lesser included offense and thereby merged in "classic" forgery or uttering, if the defendant is charged with either of the latter crimes. If the defendant has not made the forgery or has not uttered the forgery, however, the possession crimes are available for prosecution. *Ballew v. State*, 55 Okl. Cr. 247, 28 P.2d 993 (1934); *Hamilton v. State*, 53 Okl. Cr. 281, 10 P.2d 734 (1932). Section 1579 is a general possession statute, as opposed to the limited coverage of section 1578. In the opinion of the Commission, both have the same basic elements. *State v. Schave*, 72 Okl. Cr. 75, 113 P.2d 203 (1941), sets forth the "main ingredients" of section 1578 as possession, intent, and knowledge. Moreover, it is not necessary to allege a specific person as the target of the fraud. *Williams v. State*, 11 Okl. Cr. 82, 142 P. 1181 (1914).

OUJI-CR 5-81

FORGERY IN THE SECOND DEGREE

(FALSIFYING RECORDS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **destroying/falsifying**;

Second, a **(recorded will)/(recorded will codicil)/conveyance/(recorded instrument which is by law evidence)/(judgment of a court of record)/ (return of process)**;

Third, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1572.

OUJI-CR 5-82

FORGERY IN THE SECOND DEGREE

(FALSIFYING ENTRIES TO RECORDED DOCUMENTS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/(altering to make)**;

Second, a false entry in a **(book of records)/(recorded will)/(recorded will codicil)/conveyance/(recorded instrument which is by law evidence)/ (judgment of a court of record)/(return of process)**;

Third, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1573.

OUJI-CR 5-83

FORGERY IN THE SECOND DEGREE

(FALSIFYING BY ABSTRACTER) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/(altering to make)**;

Second, by an abstracter;

Third, of a false entry in an abstract;

Fourth, with intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1573.

OUJI-CR 5-84

FORGERY IN THE SECOND DEGREE

(FALSIFYING ENTRIES IN BOOK OF ACCOUNTS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/(altering to make)**;

Second, a false entry in a book of accounts of the **(State auditor/treasurer)/(County treasurer)**;

Third, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1586.

OUJI-CR 5-85

FORGERY IN THE SECOND DEGREE (FALSIFYING ENTRIES IN CORPORATE BOOK OF ACCOUNTS) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **making/(altering to make)**;

Second, a false entry in a book of accounts of a corporation;

Third, with the intent to defraud.

Statutory Authority: 21 O.S. 1991, § 1589.

OUJI-CR 5-86

FORGERY IN THE SECOND DEGREE (FALSIFYING ENTRIES IN BOOK OF ACCOUNTS BY OFFICER, MEMBER, EMPLOYEE) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **altering/obliterating/falsifying/destroying /erasing**;

Second, by **a/an officer/member/employee** of a **corporation/partnership/ association**;

Third, of any **account/(book of accounts)/records** of the **corporation/ partnership/association**;

Fourth, with the intent to **defraud/(conceal embezzlement/misconduct)**.

Statutory Authority: 21 O.S. 1991, § 1590.

OUJI-CR 5-87

FORGERY IN THE SECOND DEGREE

(FALSIFYING BY MAKING ENTRIES IN BOOK OF ACCOUNTS

BY OFFICER, MEMBER, EMPLOYEE) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, making;

Second, by **a/an officer/member/employee** of **a/an corporation/partnership/ association**;

Third, of a false entry in any **account/(book of accounts)/records** of the **corporation/partnership/association**;

Fourth, with the intent to **defraud/(conceal embezzlement/misconduct)**.

Statutory Authority: 21 O.S. 1991, § 1590.

OUJI-CR 5-88

FORGERY IN THE SECOND DEGREE

(FALSIFYING BY KEEPING FALSE ACCOUNT) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, keeping;

Second, by **a/an officer/member/employee** of **a/an corporation/partnership/ association**;

Third, any false account of the **corporation/partnership/association**;

Fourth, with the intent to **defraud/(conceal embezzlement/misconduct)**.

Statutory Authority: 21 O.S. 1991, § 1590.

Committee Comments

The crimes created by sections 1572, 1573, 1586, 1589, and 1590 differ from the "classic" forgery crimes discussed above because the lie involved relates to the entries in and content of documents, and not to the genuineness of documents. It is not "classic" forgery for the county treasurer to make incorrect entries into the records in his office because the records are genuine even though the entries are false. R. Perkins, *Criminal Law* 345 (2d ed. 1969). Nor would the county treasurer be guilty of false pretense unless the treasurer used the records, as falsified, to obtain property. Hence, there is need for statutes to fill the gap between "classic" forgery and false pretense.

Section 1586 fills the gap by making it a crime for a county treasurer, among others, to make false entries into the treasurer's own records. *Vahlberg v. State*, 96 Okl. Cr. 102, 249 P.2d 736 (1952). Moreover, in *Collins v. State*, 70 Okl. Cr. 340, 106 P.2d 273 (1940), interpreting section 1590, the Court of Criminal Appeals stated that the Legislature intended by the statute to create a new crime when an officer of a corporation falsifies the corporation's records. These statutes, therefore, fill the gap between "classic" forgery and false pretense, and are meant to protect the accuracy, rather than the genuineness, of certain records.

OUJI-CR 5-89

FORGERY IN THE SECOND DEGREE

(FALSE CERTIFICATION) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, certification;

Second, by an authorized officer;

Third, of a false **acknowledgment/attestation**;

Fourth, known by the officer to be false.

Statutory Authority: 21 O.S. 1991, § 1574.

Committee Comments

Only one case has mentioned section 1574. *Kelly v. State*, 12 Okl. Cr. 208, 153 P. 1094 (1916), held that section 1574 is not a lesser included offense of section 1561. In the opinion of the Commission, section 1574 is meant to insure the authenticity of certifications of acknowledgments and attestations by notaries public and is not directed at forged certifications of notaries public.

OUJI-CR 5-90

FORGERY IN THE SECOND DEGREE

(FALSELY OBTAINING SIGNATURES) - ELEMENTS

No person may be convicted of forgery in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, obtaining;

Second, the signature of another;

Third, to a writing having legal significance;

Fourth, by a false representation concerning the kind of writing signed.

Statutory Authority: 21 O.S. 1991, § 1593.

Committee Comments

Section 1592 has been interpreted by the courts to cover the situation wherein a person is tricked into signing an instrument different from the instrument the person intended to sign. *Brashears v. State*, 38 Okl. Cr. 175, 259 P. 665 (1927) (defendant got another to agree to sign an oil and gas lease but substituted a warranty deed as the instrument that the other actually signed). *See also Woolridge v. Powers*, 178 Okl. 56, 61 P.2d 734 (1936); *First Nat'l Bank and Trust Co. v. United States Fidelity and Guaranty Co.*, 347 F.2d 945 (10th Cir. 1965).

The crime created by section 1593 should be distinguished from the crime created by 21 O.S. 1991, § 1541.1, the crime of false-pretenses. Under section 1541.1, the crime has been committed when a person signs a written instrument with knowledge of what he is signing, but does so in response to a false representation. An example of the crime defined in section 1541.1 would be a situation where a person signs over title to a car, knowing he is signing a title certificate, in exchange for a coin the defendant has falsely represented as a rare and a valuable coin. Of course, in this last example, the defendant must also know that the representation is false and make the representation with intent to defraud. *See generally*, R. Perkins, *Criminal Law* 348-50 (2d ed. 1969).

OUJI-CR 5-90A

DETERMINATION OF VALUE

The value of multiple **acts/occurrences/transactions** may be added together into one total value. In determining value, you may consider only **acts/occurrences/transactions** resulting from a continuing course of conduct in a common plan or scheme, or the setting up of a mechanism which, when put into operation, results in the taking or diversion of money or property on a recurring basis. You may consider **acts/occurrences/transactions** forming an integral part of the first taking which facilitate subsequent takings, or **acts/occurrences/ transactions** taken in preparation of several takings which facilitate subsequent takings, to determine the intent of the party to commit a continuing crime.

(2019 Supp.)

OUJI-CR 5-91

FORGERY - DEFINITIONS

"Altering" to Make - Materially changing a document, check or instrument.

References: Willingham v. State. 549 P.2d 350 (Okl. Cr. 1976); State v. Liberty Nat'l Bank & Trust Co., 414 P.2d 281 (Okl. 1966); Boyer v. State, 68 Okl. Cr. 220, 97 P.2d 779 (1939); Moss v. Arnold, 63 Okl. Cr. 343, 75 P.2d 491 (1938).

Intent to Defraud - Scheme for obtaining property without authorization.

Reference: State v. McCray, 15 Okl. Cr. 313, 176 P. 418 (1919).

Property - Property includes:

(a) Real Property - Every estate, interest, and right in lands, including structures or objects permanently attached to the land;

(b) Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

References: 21 O.S. 1991 §§ 102, 103, 104.

Public Security - Negotiable or transferable instrument issued or purporting to have been issued under the authority of this State, by virtue of any law thereof, which promises the payment of money.

Reference: 21 O.S. 1991, § 1562.

Utter - To offer a forged instrument with the representation, by words or action, that the same is genuine.

Reference: Fields v. State, 515 P.2d 1402, 1403 (Okl. Cr. 1973). See also Johnson v. State, 564 P.2d 664, 666 (Okl. Cr. 1977) (knowledge of falsity of forged instrument must be shown).

H. LARCENY

OUJI-CR 5-92

LARCENY - INTRODUCTION

The defendant is charged with:

[grand/petit larceny]

[grand larceny in (a dwelling/vessel)/(the nighttime)]

[larceny of domestic animals/fowls]

[larceny of an automotive driven vehicle]

[larceny from a house]

[grand/petit larceny of (oil products)/merchandise]

[entering with the intent to steal copper]

of **[Description of Property Allegedly Stolen]** in the possession of **[Name of Possessor]** on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

The above instruction is meant for use with reference to the more common crimes listed in Chapter 68 of Title 21 entitled Larceny. It presents the relevant facts normally detailed in the information. The instructions for receiving or concealing stolen property, section 1713, are included later in this chapter.

Section 1702 does not create a separate crime but simply indicates a factual situation which establishes the crime of larceny as defined by section 1701. *Berry v. State*, 4 Okl. Cr. 202, 111 P. 676 (1910).

Sections 1705, 1706, and 1724 are statutes setting forth the punishment for grand larceny, petit larceny, and larceny from the house.

Sections 1709, 1710 and 1711 provide definitions of value for written instruments, passenger tickets, and securities not yet issued. These sections are meant to clarify the early common law, which had difficulty in assigning a value to written instruments. If an item did not have value at common law, the item could not be personal property. The definitions of value given by these sections therefore insure that written instruments, passenger tickets, and securities not yet issued can be subject to larceny. Written instruments, passenger tickets, and securities not yet issued are also made personal property subject to larceny by the definition of personal property given in 21 O.S. 1991, § 103. *State v. McCray*, 15 Okl. Cr. 374, 177 P. 127 (1919).

Section 1712 resolves a problem presented by the common law decisions with regard to fixtures or parts of realty. At common law, theft of timber, for example, is not larceny because the timber has never been personal property in the possession of the owner or tenant. Section 1712 makes it clear that a person who cuts the timber and carries it away has committed larceny, because section 1712 defines severed timber as personal property. Similarly, sections 1717 and 1718 make dogs personal property. At common law, certain base animals such as dogs and cats are not considered personal property.

One final question is presented by section 1732 concerning larceny of trade secrets. At common law, trade secrets are not personal property subject to larceny because a trade secret is considered an intangible idea or

plan. *Commonwealth v. Engleman*, 336 Mass. 66, 142 N.E.2d 406 (1957). It is the opinion of the Commission, however, that section 1732 does not create a separate crime, larceny of trade secrets, but simply clarifies the meaning of personal property as given by 21 O.S. 1991, § 103. Hence, the element instructions on grand and petit larceny encompass larceny of trade secrets. *Cf. ABC Coating Co. v. J. Harris & Sons Ltd.*, 747 P.2d 271, 273 n.8 (Okla. 1987) ("criminal penalty for larceny of personal property also applies to larceny of trade secrets").

OUJI-CR 5-93

GRAND LARCENY - ELEMENTS

No person may be convicted of grand larceny unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, of (personal property)/(one or more firearms);

Fourth, of another;

Fifth, **(valued at ($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more)/(from the person of another)**;

Sixth, by **fraud/stealth**;

Seventh, with the intent to deprive permanently.

Statutory Authority: 21 O.S. Supp. 2019, §§ 1701, 1704, 1705.

Notes on Use

If the property that was taken was firearms, the Fifth Element should be deleted, and the remaining elements should be renumbered.

Committee Comments

The statutory language seems relatively clear as to the elements of grand larceny. The case law, however, has added the technical element of "carrying away": asportation. Although any slight carrying-away motion after possession has been acquired by the thief will be sufficient to satisfy the second element, basic research indicates "carrying away" to be a distinct element of the crime of larceny. *Turner v. State*, 1973 OK CR 430, ¶ 4, 515 P.2d 1167, 1168; *Hutchinson v. State*, 1967 OK CR 48, ¶ 6, 427 P.2d 112, 114; *Mercer v. State*, 1950 OK CR 89, 219 P.2d 1035, 92 Okl. Cr. 37.

When discussing the element "of another," the cases usually speak of the other as the owner of the property. Ownership of the personal property by the other person is not required, however, and larceny has been committed if another's possession has been disturbed. Hence, the owner of personal property can be convicted of larceny of his property if the owner were to take the property from the lawful possession of another with intent to deprive the possessor of his property right permanently. *Borrelli v. State*, 1969 OK CR 135, ¶ 6, 453 P.2d 312, 314 (possession of car by owner's wife was sufficient ownership to justify charge of larceny of automobile). Grand larceny is thus a crime against lawful possession. *Pershica v. State*, 1974 OK CR 154, ¶ 17, 525 P.2d 1374, 1377.

The fifth element lists the two alternatives which distinguish grand larceny from petit larceny in accordance with section 1704.

The word "stealth," one of the two alternative means by which the personal property must be obtained for larceny, will encompass the situation illustrated by section 1702 concerning lost property. As previously mentioned in the commentary to the introductory instruction, section 1702 does not create a separate crime but

simply illustrates one factual situation which can, in certain instances, constitute larceny. Taking the property by fraud or stealth simply indicates that the taking is trespassory.

The mens rea as stated in section 1701 is "intent to deprive." Case law indicates that it is more appropriate to describe the mens rea as "intent to deprive permanently." *Tate v. State*, 1985 OK CR 116, ¶ 9, 706 P.2d 169, 171; *Barnes v. State*, 1963 OK CR 102, 10, 387 P.2d 146, 148. The seventh element reflects the case law on the mens rea element of larceny. *See Phipps v. State*, 1977 OK CR 337, ¶ 10, 572 P.2d 588, 591; *Simmons v. State*, 1976 OK CR 89, ¶ 15, 549 P.2d 111, 116.

(2019 Supp.)

OUJI-CR 5-94

PETIT LARCENY - ELEMENTS

No person may be convicted of petit larceny unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, personal property;

Fourth, of another;

Fifth, of value;

Sixth, by **fraud/stealth**;

Seventh, with the intent to deprive permanently.

Statutory Authority: 21 O.S. 2001, §§ 1701, 1704.

Committee Comments

The elements of the crime of petit larceny are identical to the elements of grand larceny with the exception of the fifth element. Section 1704 sets out two facts - value of more than $500, and taking from the person of another - that distinguish grand larceny from petit larceny, and then simply states that all other larceny is petit larceny. The property taken must have some value, and such value remains an element of proof. *Holland v. State*, 29 Okl. Cr. 69, 232 P. 454 (1925). Hence, if a prosecutor charges a defendant with petit larceny and the proof at trial indicates the property was actually valued at more than $500, a conviction for the misdemeanor of petit larceny is still appropriate. The defendant simply has been convicted of a lesser crime than the proof might have sustained.

Although the Commission has realized that the common practice is to allege in a petit larceny charge that the property was valued at $500 or less, the allegation is not necessary.

(2003 Supp.)

OUJI-CR 5-95

GRAND LARCENY IN A DWELLING OR VESSEL - ELEMENTS

No person may be convicted of grand larceny of a dwelling/vessel unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, personal property;

Fourth, of another;

Fifth, **(valued at more than $50/500)/(from the person)**;

Sixth, committed in a **dwelling/vessel**;

Seventh, by **fraud/stealth**;

Eighth, with the intent to deprive permanently.

Statutory Authority: 21 O.S. 1991 & Supp. 1995, §§ 1704, 1705, 1707.

Committee Comments

The distinction between this crime and grand larceny is that the crime is committed in specified structures. Notice that the statute uses the words "dwelling house." The Commission has used the term "dwelling" rather than "house" or "dwelling house," because "dwelling" is more descriptive of the concept meant to be conveyed.

OUJI-CR 5-96

GRAND LARCENY IN THE NIGHTTIME - ELEMENTS

No person may be convicted of grand larceny in the nighttime unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, personal property;

Fourth, of another;

Fifth, from the person;

Sixth, in the nighttime;

Seventh, by **fraud/stealth**;

Eighth, with the intent to deprive permanently.

Statutory Authority: 21 O.S. 1991, § 1708.

Committee Comments

This instruction is meant to cover the crime that provides a greater penalty when the crime of grand larceny is committed in the nighttime from the person of another. Since the crime must be larceny from the person, and larceny from the person under section 1704 is one of the two alternatives which makes larceny grand larceny, no requirement that the value of the property exceed $50 exists. Hence, the alternative language on value present in the instruction on grand larceny and grand larceny in a dwelling or vessel is not needed. In addition, the condition warranting the heavier punishment, nighttime, has been added as an element. Except for these two changes, the instruction is identical to the basic grand larceny instruction.

OUJI-CR 5-97

LARCENY FROM THE HOUSE - ELEMENTS

No person may be convicted of larceny from the house unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, unlawful;

Second, entry;

Third, taking;

Fourth, carrying away;

Fifth, personal property;

Sixth, of another;

Seventh, from a **house/(railroad car)/tent/booth/(temporary building)**;

Eighth, by **fraud/stealth**;

Ninth, with the intent to deprive permanently.

Statutory Authority: 21 O.S. 1991, § 1723.

Committee Comments

This crime contains two concepts: entry and theft. It is apparently meant to cover the situation in which the accused has stolen property from a house but cannot be convicted of burglary because no evidence of breaking exists. *See Grandbury v. State*, 64 Okl. Cr. 408, 81 P.2d 874 (1938). Although the accused could be convicted of larceny, the Legislature evidently decided that the entry deserved a felony penalty regardless of the value of the property taken. This statute does not apply to the situation wherein the person lawfully enters a house and then decides to steal property. The entry must be an unlawful or trespassory entry. *Ex parte Wright*, 73 Okl. Cr. 167, 119 P.2d 97 (1941). Nor does this statute apply to the situation wherein a person unlawfully enters with the intent to steal, but leaves without stealing. *Potts v. State*, 72 Okl. Cr. 91, 113 P.2d 839 (1941).

Although the language used in section 1723 differs from the language used in the general larceny statutes, the Commission is of the opinion that the Legislature intended that section 1723 be interpreted like the general larceny statutes in regard to the theft concept. Thus, the elements for larceny from the house are generally identical to the elements of petit larceny, with the additional elements of entry and the specified structures in which the larceny is committed. *Gransbury*, *supra*, supports the conclusion of the Commission in dicta. *See also Edgmon v. State*, 485 P.2d 774 (Okl. Cr. 1971).

Compare the crime created by 21 O.S. 1991, § 1723, with the crime created by 21 O.S. 1991, § 1438(A), discussed in the Committee Comments after OUJI-CR 5-16.

OUJI-CR 5-98

LARCENY OF (DOMESTIC ANIMALS)/(AN IMPLEMENT OF HUSBANDRY) - ELEMENTS

No person may be convicted of larceny of **(domestic animals)/(an implement of husbandry)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, **(domestic animals)/(an implement of husbandry);**

Fourth, of another;

Fifth, with the intent to steal.

Statutory Authority: 21 O.S. 2011, § 1716; 1730.

Notes on Use

For a definition of domestic animals, see OUJI-CR 5-106, *infra*. The judge should consult 47 O.S. 2011, § 1-125 for a definition of an implement of husbandry that is appropriate for the case.

Committee Comments

See the Committee Comments to OUJI-CR 5-100, *infra.*

2015 SUPPLEMENT

OUJI-CR 5-99

LARCENY OF DOMESTIC FOWLS - ELEMENTS

No person may be convicted of larceny of **domestic fowls** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, **domestic fowls**;

Fourth, of another;

Fifth, with the intent to steal.

Statutory Authority: 21 O.S. 2011, § 1719; 1730.

Committee Comments

See the Committee Comments to OUJI-CR 5-100, *infra.*

2015 SUPPLEMENT

OUJI-CR 5-100

LARCENY OF AUTOMOTIVE DRIVEN VEHICLE - ELEMENTS

No person may be convicted of larceny of an automotive driven vehicle unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, an **automobile/aircraft/(automotive driven vehicle)/ (construction/farm equipment))**;

Fourth, of another;

Fifth, with a value of $50,000 or more;

Sixth, with the intent to steal.

Statutory Authority: 21 O.S. 2011 & Supp. 2019, §§ 1720, 1730.

Notes on Use

If the value of the vehicle is less than $50,000, the fifth element should be deleted, and the sixth element should be renumbered.

Committee Comments

Prior versions of OUJI-CR 5-98, 5-99, and 5-100 included "trespassory" as the first element. *See Grissom v. State*, 2011 OK CR 3, ¶ 49, 253 P.3d 969, 987. The reason for including the element of "trespassory" was that 21 O.S. 2011, § 1716, 1719, and 1720 use the term "steal", and stealing was distinguished from larceny in *Sneed v State*, 1937 OK CR 52, 65 P.2d 1245, 1247, 61 Okl.Cr. 96, 101. The distinction between stealing and larceny was eliminated by 21 O.S. 2011, § 1730, which provides that they mean the same thing, and therefore, the element of "trespassory" has been deleted from OUJI-CR 5-98, 5-99, and 5-100.

(2019 Supp.)

OUJI-CR 5-101

GRAND LARCENY OF OIL PRODUCTS - ELEMENTS

No person may be convicted of grand larceny of oil products unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, oil products;

Fourth, of another;

Fifth, valued at **$500/$1,000** ;

Sixth, from a **pipe/pipeline/tank/(tank car)/receptacle/container**;

Seventh, by **fraud/stealth**;

Eighth, with the intent to deprive permanently.

(2003 Supp.)

OUJI-CR 5-102

PETIT LARCENY OF OIL PRODUCTS - ELEMENTS

No person may be convicted of petit larceny of oil products unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, oil products;

Fourth, of another;

Fifth, valued at less than $500;

Sixth, from a **pipe/pipeline/tank/(tank car)/receptacle/container**;

Seventh, by **fraud/stealth**;

Eighth, with the intent to deprive permanently.

Statutory Authority: 21 O.S. Supp. 2001, § 1722.

Committee Comments

Although the language of the statute is somewhat different from the language of the general larceny statutes, the Commission has concluded that the elements of the crimes are identical, except that the property taken must be an oil product and must be taken from specified structures. Section 1722 uses the word "unlawfully," but the Commission interpreted the word to mean that the property was obtained without the consent of the owner/possessor. Hence, the word "unlawfully" should have the same definition as "by fraud or stealth." For the sake of consistency in language, the Commission has used "fraud or stealth," as opposed to "unlawfully," as an element of the instructions. Moreover, section 1722 uses the word "owner," but in light of decisions under other larceny statutes which speak in terms of "owner" but define "owner" to include possessors, the Commission has concluded that the person from whom the property is taken should be stated as "of another," not "of the owner." Thus, the crimes of section 1722 and sections 1701 and 1704 are substantially similar.

The prosecuting attorney is apparently permitted to elect to prosecute under either section 1722 or the general grand and petit larceny statutes. *See Ex parte Scherer*, 60 Okl. Cr. 195, 62 P.2d 660 (1936); *Bingham v. State*, 44 Okl. Cr. 258, 280 P. 636 (1929).

(2003 Supp.)

OUJI-CR 5-103

LARCENY OF MERCHANDISE - ELEMENTS

No person may be convicted of larceny of merchandise unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, taking;

Second, carrying away;

Third, merchandise;

Fourth, from a **retailer/wholesaler**;

Fifth, with a value of **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**);

Sixth, by **fraud/stealth**;

Seventh, with the intent to deprive permanently.

Statutory Authority: 21 O.S. Supp. 2019, § 1731.

Committee Comments

The Commission has interpreted the word "larceny" as used in section 1731 to have the same basic meaning as "larceny" under sections 1701 and 1704, except that the property taken must be merchandise. Since the crime is the larceny of merchandise from a retail or wholesale establishment, the Commission has used the terms "retailer" or "wholesaler" rather than "of another" in the fourth element.

(2019 Supp.)

OUJI-CR 5-104

THIS INSTRUCTION SHOULD BE DELETED

(2019 Supp.)

OUJI-CR 5-105A

[GRAND] LARCENY OF LOST PROPERTY - ELEMENTS

No person may be convicted of **[grand]** larceny of lost property unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, finding lost property;

Second, valued at **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99/($15,000 or more**);

Third, under circumstances that the person knew or was able to determine who was the true owner;

Fourth, and taking the property for the **(person's own use)/(use of another person who was not entitled to the property)**;

Fifth, without first making such an effort to find the owner and return the property to the owner as would be reasonable and just under the circumstances.

Statutory Authority: 21 O.S. Supp. 2019, §§ 1702.

(2019 Supp.)

OUJI-CR 5-105

ENTERING WITH THE INTENT TO STEAL COPPER - ELEMENTS

No person may be convicted of entering with the intent to steal copper **wire/tubing/cable** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, entering;

Second, **a/an premises/easement/(right of way)**;

Third, with the intent to **steal/(remove without the consent of the owner)**;

Fourth, copper **wire/tubing/cable**;

Fifth, of another;

Sixth, from an appurtenance on the **premises/easement/(right of way)**.

Statutory Authority: 21 O.S. 1991, § 1727.

Committee Comments

The conduct punished by section 1727 is entry upon property with intent to steal copper wiring, tubing, or cable, even though the larceny is not completed. The first two elements of the instruction, therefore, present the distinctive conduct being punished. The third element indicates that the accused must have entered with the intent to steal or remove without the consent of the owner. Under section 1730, however, the word "steal" as used in section 1727 is defined as larceny under sections 1701 and 1704; "steal" does not have the meaning in section 1727 that it has under sections 1716, 1719, and 1720. The fourth and sixth elements indicate the specific property protected by this particular statute and that the intent must be to take the copper from an appurtenance on the property entered.

Section 1730 states an intent that this be a separate crime from larceny and that one could be properly charged both with this offense and with larceny if the copper is, in fact, stolen.

OUJI-CR 5-106

LARCENY - DEFINITIONS

Appurtenance - Any structure or improvement permanently attached to the land.

References: Anthony v. Barton, 196 Okla. 260, 264, 164 P.2d 642, 645 (1945); 60 O.S. 1991, § 8; Black's Law Dictionary 94 (5th ed. 1979).

Carrying Away - Removing an article for the slightest distance. Carrying away is more than a mere change of position; it is a movement for purposes of permanent relocation.

References: Cunningham v. District Ct. of Tulsa Co., 432 P.2d 992 (Okl. Cr. 1967); Hutchison v. State, 427 P.2d 114 (Okl. Cr. 1967); Brinkley v. State, 60 Okl. Cr. 106, 61 P.2d 1025 (1936).

Domestic Animals - Horses, jackasses, jennets, mules, cattle, hogs, dogs, sheep or goats.

Reference: 21 O.S. 1991, § 1716.

Dwelling - Note: If necessary to give a definition, see OUJI-CR 5-18, Burglary.

Easement - The limited right to use the land of one person for the benefit of another.

References: Story v. Hefner, 540 P.2d 562 (Okl. 1975); Frater Okla. Realty Corp. v. Allen Laughon Hdwe. Co., 206 Okl. 666, 245 P.2d 1144 (1952); 60 O.S. 1991, § 49.

Fraud - False representation intended to cause a surrender of personal property from the person in rightful possession.

Reference: Black's Law Dictionary 594 (5th ed. 1979).

Intent to Deprive Permanently - Purpose forever to deny the person in rightful possession of the use or value or property.

References: Simmons v. State, 549 P.2d 111 (Okl. Cr. 1976); Home, Fire & Marine Ins. Co. v. McCollum & Co., 201 Okl. 595, 207 P.2d 1094 (1949); R. Perkins, Criminal Law 266 (2d ed. 1969).

Intent to Steal - Purpose forever to deny the person in rightful possession of the use or value of property.

References: Darnell v. State, 369 P.2d 470 (Okl. Cr. 1962); 21 O.S. 1991, § 1730, referring to 21 O.S. 1991, § 1701; R. Perkins, Criminal Law 265 (2d ed. 1969).

Merchandise - Goods offered for sale by one who deals in goods of that kind.

Reference: 12A O.S. 1991, § 2-104(1).

Nighttime - Period between sunset and sunrise.

Reference: 21 O.S. 1991, § 1440.

Of Another - One who has lawful possession as against the rights of a taker, without regard to ownership.

Reference: Davidson v. State, 330 P.2d 607 (Okl. Cr. 1958).

Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right of title to property.

Reference: 21 O.S. 1991, § 103.

Right of Way - The limited right to travel across the land of another.

References: 60 O.S. 1991, § 50; Black's Law Dictionary 1191 (5th ed. 1979).

Stealth - Without right; secretly and without leave or consent of the owner.

Reference: Roach v. State, 23 Okl. Cr. 280, 214 P. 563 (1923).

Taking - The exercise of complete possession or control.

References: Cunningham v. District Ct. of Tulsa Co., 432 P.2d 992 (Okl. Cr. 1967); Hutchinson v. State, 427 P.2d 112 (Okl. Cr. 1967); Brinkley v. State, 60 Okl. Cr. 106, 61 P.2d 1023 (1936).

Value - Fair market value or reasonable selling price of property.

References: Gilbreath v. State, 555 P.2d 69 (Okl. 1976); Morris v. State, 491 P.2d 784 (Okl. Cr. 1971); Carson v. State, 30 Okl. Cr. 438, 236 P. 627 (1925).

Vessel - A ship of any kind, and any structure adapted to be navigated from place to place.

Reference: 21 O.S. 1991, § 98.

(2003 Supp.)

OUJI-CR 5-107

MALICIOUS MISCHIEF - INTRODUCTION

The defendant is charged with malicious mischief by **[Alleged Injury or Damage]** of **[Description of Property]** owned by **[Name of Owner]** on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

Title 21, Chapter 69, is entitled Malicious Mischief. The chapter contains 45 sections. Many of the sections have never been the subject of appellate decision; many other sections have been the subject of one or of very few appellate decisions. Hence, the Commission has drafted introductory and element instructions solely for the general malicious-mischief statute, section 1760. It is the only section which has been the subject of numerous prosecutions and of numerous decisions by the Court of Criminal Appeals.

With regard to the other 44 sections, the Commission has simply stated the purpose of a specific section and cited the case or cases, if any, that have either cited or construed that section. To draft instructions for these 44 sections appears a tedious task, because no uniformity of language or consistency of subject matter exists. The elements of the specific crimes created by these sections differ substantially. Many of the sections which simply provide protection for specified types of property can clearly be considered malicious-mischief statutes. Section 1755 is an example.

If the defendant is charged under one of the 44 sections for which no instruction has been drafted, the Commission makes the following recommendation to the trial judge in drafting an instruction: If the section under which the defendant is charged is a malicious-mischief statute similar to the crime created by section 1760, except that the section is limited to specific types of property, the trial judge need only use the elements of section 1760 with one change. The trial judge will need to change the third element of section 1760, "property," to reflect the specific type of property protected by the section under which the defendant is charged. If the section under which the defendant is charged is not a malicious-mischief statute, the Commission would urge that the pattern of the element instructions adopted by the Commission be drafted by the trial judge.

OUJI-CR 5-108

MALICIOUS MISCHIEF (SECTION 1760) - ELEMENTS

No person may be convicted of malicious mischief unless the State has proved beyond a reasonable doubt each element of the crime. These element are:

First, maliciously;

Second, **injuring/defacing/destroying**;

Third, property;

Fourth, of another;.

[Fifth, causing a loss with a total value of $1,000 or more.]

Statutory Authority: 21 O.S. 2021, § 1760.

Notes on Use

The bracketed language concerning the aggregate value of the loss should be included if the defendant is charged with a felony.

Committee Comments

The gravamen of the offense of malicious mischief is the mens rea element "maliciously." A person acts maliciously when that person acts without justification or excuse in doing damage or harm to the legal rights of another. Thus, a person who randomly slashes automobile tires, or who randomly breaks windows, is acting maliciously, even though the person slashing the tires or breaking the windows has no idea whose tires or windows are being damaged. *McDaris v. State*, 1973 OK CR 2, ¶ 5, 505 P.2d 502. The word "maliciously" does not connote ill-will or hatred of the owner of the property on the part of the person doing the damage. *See McDaris, supra, overruling expressly Moran v. State*, 1957 OK CR 79, 316 P.2d 876, and *Colbert v. State*, 1912 OK CR 194, 124 P. 78, 7 Okl. Cr. 401, on the issue of the mens rea requirement for the crime created by section 1760. *McDaris* also inferentially overruled *Thissen v. State*, 1922 OK CR 143, 209 P. 224, 21 Okl. Cr. 437, on this same point. Malicious mischief is, therefore, a crime meant for the protection of property per se, as opposed to protection of the property owner.

The conduct prohibited by the malicious-mischief statute is presented in the alternate language for the second element.

In contrast with the other property crimes, such as arson, larceny, embezzlement, and false pretenses, the statutory language of section 1760 indicates specifically that both real and personal property are protected. The third element, therefore uses the word "property."

Section 1760 is the general malicious-mischief statute. In accordance with the statutory language, section 1760 is to be used "in cases other than such as are specified in the following sections." **Hence, if another statute covers a specific type of property, prosecution for damage to that type of property must be brought under the specific statute.** *Jackson v. State*, 1991 OK CR 103, ¶ 14, 818 P.2d 910, 912 ("if another statute covers a specific type of property, prosecution for damage to that property must be brought under the specific statute"); *Church v. State*, 1965 OK CR 117, ¶ 7 406 P.2d 517, 519 (damage to an automobile must be brought under 21 O.S. 2021, § 1787, or 47 O.S. 2021, § 4-104); 21 O.S. 2021, § 11.

Besides the general malicious-mischief statute in section 1760, there are a large number of specific statutes at 21 O.S. 2021, §§ 1751-1789 with special provisions that protect a wide variety of particular types of property, such as 21 O.S. 2021, §§ 1751-1752.2 (railroad property); 21 O.S. 2021, § 1755 (toll houses); 21 O.S. 2021, § 1770-1773 (crops, trees, fruit, and flowers); and 21 O.S. 2021, § 1786 (utility pipes and lines).

(2024 Supp.)

OUJI-CR 5-109

MALICIOUS MISCHIEF - DEFINITIONS

Maliciously - With a wish to injure property.

Reference: McDaris v. State, 505 P.2d 502 (Okl. Cr. 1973).

Property - Property includes:

(a) Real Property - Every estate, interest and right in lands, including structures or objects permanently attached to the land;

(b) Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

References: 21 O.S. 1991, §§ 102, 103, 104.

J. RECEIVING/CONCEALING STOLEN PROPERTY

OUJI-CR 5-110

RECEIVING/CONCEALING STOLEN PROPERTY - INTRODUCTION

The defendant is charged with **receiving/concealing** stolen property of **[Description of Alleged Stolen Property] received/concealed** from **[Person From Whom Allegedly Received or Concealed]** on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is to be used with respect to the crimes created by 21 O.S. 1991, § 1713, commonly known as the "receiving stolen property" statute.

The statute actually creates two crimes, receiving stolen property and concealing stolen property, as is reflected in the alternate language of the introductory instruction.

When the crime charged is receiving stolen property, it is not necessary to allege the ownership of the property, or from whom the property was stolen. *Woodruff v. State*, 56 Okl. Cr. 409, 41 P.2d 129 (1935); *Lordi v. State*, 47 Okl. Cr. 102, 287 P. 1083 (1930). However, it is necessary to allege the person from whom the stolen property was received, or that the person from whom the stolen property was received is unknown. *McGill v. State*, 6 Okl. Cr. 512, 120 P. 297 (1912); *Hartgraves v. State*, 5 Okl. Cr. 266, 114 P. 343 (1911). **A variance between the allegation in the information as to from whom the property was received and the evidence at trial as to from whom the property was actually received is a fatal variance requiring reversal of conviction.** *Bogess v. State*, 29 Okl. Cr. 234, 233 P. 239 (1925). This pleading requirement, concerning from whom the stolen property was received, relates to procedural due process requirements, mandating the pleading of sufficient information to enable the defendant to prepare a defense. The name of the person from whom the stolen property was received is not an element of the crime.

When the crime charged is concealing stolen property, it would seem to be necessary to allege the name either of the owner of the property or of the person having possessory rights in the property. Although the statutory language indicates that the crime of concealing stolen property is concealment from the owner, it is the opinion of the Commission that the word "owner" should not be interpreted literally. The word "owner" should also include a person who has possessory rights in the property that is being concealed. This construction is in accord with the concept that larceny is a crime against possession, regardless of ownership. *See Davidson v. State*, 330 P.2d 607 (Okl. Cr. 1958); *Sherfield v. State*, 96 Okl. Cr. 223, 252 P.2d 165 (1952).

OUJI-CR 5-111

RECEIVING STOLEN PROPERTY - ELEMENTS

No person may be convicted of receiving stolen property unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(receiving in exchange for anything of value**)/buying;

Second, **stolen/embezzled/(fraudulently/feloniously obtained) personal property**;

Third, with a value of **(less than $1,000)/($1,000-$2,499.99)/($2,500-$14,999.99)/($15,000 or more**);

Fourth, **(known/believed by the defendant)/(that the defendant reasonably should have known/believed) to have been stolen/embezzled/ (fraudulently/feloniously obtained)**;

Fifth, with the intent to **(deprive permanently)/(aid the thief)/ (obtain some gain/reward for restoring the property to the owner)/(derive a benefit/profit)**.

Statutory Authority: 21 O.S. Supp. 2019, § 1713.

Committee Comments

The conduct prohibited by the receiving-stolen-property statute is the receipt or purchase of stolen property. Receiving stolen property is a separate and independent crime from other property crimes, particularly larceny. *Palmer v. State*, 1951 OK CR 26, 228 P.2d 391, 93 Okl. Cr. 357. **A person who is charged with receiving stolen property is, therefore, not an accessory of the person who feloniously obtains the property.** As a consequence, a person charged with receiving stolen property can be convicted of the charge regardless of the status of the criminal proceedings against the thief. A discussion of the historical development of the crime of receiving stolen property is found in W. LaFave & A. Scott, *Criminal Law* § 93, at 682 (1972). On the other hand, **a person who participates in the theft of the property cannot properly be charged with receiving stolen property because a thief cannot receive property from himself or from his accomplices. When a person is a participant in the theft, the proper charge is for the theft crime and an additional charge for receiving stolen property will not lie.** *Hair v. State*, 1956 OK CR 28, ¶ 8, 294 P.2d 846, 850.

Receipt of property means that the receiver has gained possession of the property. A transfer of possession of stolen property must occur. *McGee v. State*, 1937 OK CR 29, 65 P.2d 207, 1937 OK CR 29; *Sipes v. State*, 1926 OK CR 412, 251 P. 511, 36 Okl. Cr. 1. Receipt can also be established by the exercise of dominion and control over the property by the defendant, regardless of whether the defendant has manual possession of the stolen property. *Price v. State*, 1913 OK CR 118, 131 P. 1102, 9 Okl. Cr. 359. *See Hunsucker v. State*, 1970 OK CR 140, ¶ 17, 475 P.2d 618, 621. Furthermore, **due to the statutory language "buys," if an agreed-upon bargain has been struck, the crime of receiving stolen property seemingly has been committed, even though no dominion and control or physical possession has been exercised by the purchaser. The agreement to buy substitutes for the transfer of possession.**

Section 1713 specifies "upon any consideration" as an element of the crime of receiving stolen property. The concept of consideration is contained in the conduct of buying, which is an alternative in the first element, and therefore this element does not need to be separately stated if evidence is presented that the defendant bought the stolen property. Where the stolen property is not bought, the trial court must specify the type of consideration that the defendant is alleged to have given for it. As the Oklahoma Court of Criminal Appeals

noted in *Hunsucker v. State*, 1970 OK CR 140, ¶ 17, 475 P.2d 618, 621, "the consideration referred to in the statute may be of many different types." In *Hunsucker*, for example, the Court of Criminal Appeals affirmed a conviction where there was no evidence that the defendant had paid for the stolen property; instead, the consideration consisted of the defendant's promise to pay for it. *Id.* at ¶ 5, 475 P.2d at 619-20.

The receiving-stolen-property statute is meant to discourage commerce in stolen property and to provide a criminal sanction against "fences." Thus, for the crime to have been committed, the property must have been stolen. Moreover, property which has been stolen but has now lost its stolen taint does not qualify for the protection of the receiving-stolen-property statute. *Booth v. State*, 1964 OK CR 124, ¶ 6, 398 P.2d 863, 868. To discuss stolen property only, however, is not completely accurate because the statutory language indicates that property that has been embezzled, obtained by false pretense, or "otherwise feloniously obtained" is also covered by section 1713. The language "otherwise feloniously obtained" would seem to cover property obtained as a result of forgery, extortion, burglary, and other crimes. The language of the second element in the instruction reflects the broad language of the statute.

The language of section 1713 limits the coverage of the statute to personal property. The second element has been drafted accordingly. The definition of personal property under Oklahoma statutes and case law is broader, however, than the definition of personal property under common law. *State v. McRay*, 1919 OK CR 7, 177 P. 127, 15 Okl. Cr. 374; 21 O.S. 2011, §§ 103, 1712. Value is an inherent attribute of personal property. If the prosecutor proves that what has been received or purchased is personal property, the prosecutor has also proven value. Hence, the statutory language "any value whatsoever" does not, in the opinion of the Commission, create a separate element of the crime.

The third element presents the mens rea element for the crime of receiving stolen property. Prior to the 1961 amendments to section 1713, the cases had clearly held that the defendant had either to know or to believe that the property was stolen. Acquisition of property without knowledge or belief as to the character of the property would preclude conviction for the crime. *Camp v. State*, 1939 OK CR 30, 89 P.2d 378, 66 Okl. Cr. 20; *Weaver v. State*, 1925 OK CR 258, 235 P. 635, 30 Okl. Cr. 309; *Pickering v. United States*, 1909 OK CR 48, 101 P. 123, 2 Okl. Cr. 197. Of course, the mens rea element could be proved by circumstantial evidence. *Walker v. State*, 1946 OK CR 61, 170 P.2d 261, 82 Okl. Cr. 352; *Lewis v. State*, 1945 OK CR 90, 162 P.2d 201, 81 Okl. Cr.; *Davis v. State*, 1920 OK CR 228, 193 P. 745, 18 Okl. Cr. 112.

In 1961, the Legislature amended section 1713 by adding the words "or having reasonable cause to believe" in subsection 1 and by adding subsection 2. **The court has held that the presumption of subsection 2 is unconstitutional insofar as knowledge of the stolen character of the property is presumed solely from possession of property that is stolen.** *Payne v. State*, 1967 OK CR 194, ¶ 25, 435 P.2d 424, 428. *Compare Humphrey v. State*, 1969 OK CR 90, ¶ 4, 452 P.2d 590, 592. *See also Barnes v. United States*, 412 U.S. 837 (1973).

The Court of Criminal Appeals determined the issue of whether the 1961 amendment enlarged the mens rea element of receiving stolen property to include a reasonable-person standard in *Richardson v. State*, 1976 OK CR 24, ¶ 13, 545 P.2d 1292, 1295, and held that actual knowledge by the defendant of the stolen nature of the property was not required; "reasonable cause to believe" would suffice. See also *Hutton v. State*, 1972 OK CR 66, ¶ 9, 494 P.2d 1246, 1247 (instruction reading "knew or had reasonable cause to believe" held appropriate); *Jackson v. State*, 1973 OK CR 79, ¶¶ 12-13, 508 P.2d 277, 279-280. The 1961 amendment was intended to cover the situation in which a person should have made inquiry concerning the origin and title to the property because a reasonable person would have made inquiry. Failure to act as a reasonable person would have acted subjects one to criminal liability.

The Commission has decided to use the language "reasonably should have known" or "reasonably should have believed," rather than "reasonable cause to believe" in order to prevent a possible misunderstanding on the part of the jurors. The language "reasonable cause to believe" implies that, if the defendant reasonably believes the

property is stolen, the crime has been committed, whether or not the property in fact is stolen. The Commission has concluded that the Legislature did not intend to subject persons to criminal liability solely because they believe they are receiving stolen property, when in fact they are not. What the Legislature intended to do by the amendments, in the opinion of the Commission, was to make a person inquire, when a reasonable person would have inquired, as to the character of the property. Failure to act as a reasonable person would have acted would then subject one to criminal liability, if the property is, in fact, stolen.

The "intent to deprive permanently" alternative in the fifth element presents a second mens rea requirement for the crime of receiving stolen property. Although this second mens rea element is not specifically mentioned in the statute, the Committee believes it is needed to prevent a person from being subjected to criminal penalty when the person receives stolen property knowing it to be stolen but with the intent to return the property to its owner/possessor or to deliver it to the police. The language of the instruction was chosen because the intent to deprive permanently is a mens rea element common to several property crimes which must have been present in order for the property to have acquired a felonious taint, as reflected in the second element.

The other alternatives in the fifth element are taken from *Hanlon v. State*, 1968 OK CR 89, ¶ 16, 441 P.2d 486, 489; and *Pickering v. United States*, 1909 OK CR 48, 101 P.123, 2 Okl. Cr. 197 (Syllabus 3 by the Court).

(2019 Supp.)

OUJI-CR 5-112

RECEIVING STOLEN PROPERTY - EXPLANATION OF POSSESSION

The possession of recently stolen property found in the possession of one alleged to have received it, knowing at the time or having reasonable cause to believe that it was stolen property, may be explained, but such possession is a circumstance, which, if unsatisfactorily explained to the jury, may be considered in determining the guilt or innocence of the person charged with concealing stolen property. the mere possession of property recently stolen is not alone sufficient to convict the possessor of knowingly concealing stolen property, but when such fact is supplemented with other facts inconsistent with the idea that the possession is honest, it then becomes a question of fact for the jury to pass upon as to the guilt of innocence of the defendant, of knowingly concealing stolen property.

Notes on Use

The bracketed last paragraph of the instruction should be given in prosecutions for receiving stolen property only if the State is relying on the presumption in 21 O.S. 1991, § 1713(2).

Committee Comments

The Oklahoma Court of Criminal Appeals approved the language of this instruction in *Luman v. State*, 626 P.2d 869, 870-71 (Okl. Cr. 1981).

OUJI-CR 5-113

CONCEALING STOLEN PROPERTY - ELEMENTS

No person may be convicted of concealing stolen property unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **concealing/withholding**;

Second, **stolen/embezzled/(fraudulently/feloniously obtained)** personal property;

Third, from the **owner/(person having possessory rights)**;

Fourth, **(known/believed by the defendant)/(that the defendant reasonably should have known/believed)** to have been **stolen/embezzled/ (fraudulently/feloniously obtained)**;

Fifth, with the intent to deprive permanently.

Statutory Authority: 21 O.S. 1991, § 1713.

Committee Comments

Except for the first element and the additional element, designated as the third element, the crimes of receiving stolen property and concealing stolen property have identical elements.

The first element sets forth the distinctive conduct prohibited by the concealing-stolen-property crime. **Because the conduct of concealment is sufficiently distinct from the conduct of acquisition of the property, a thief can be charged and convicted of both the theft crime and the concealing stolen property crime.** *Walls v. State*, 491 P.2d 320 (Okl. Cr. 1971). It should be remembered that a thief cannot be charged with the crimes of receiving stolen property and for stealing the same property. Concealing stolen property was not meant primarily, however, to provide criminal sanctions against the thief. Concealing stolen property was intended to cover two situations that would not otherwise be covered by the receiving-stolen-property crime. First, a person receives property without knowledge that the property is stolen. The person later learns that the property is stolen, but, rather than return the property, the person conceals the property from the owner or rightful possessor. *See* W. LaFave & A. Scott, *Criminal Law* § 93, at 684 (1972). Second, a thief retains possession of the stolen property, but another person aids the thief by concealing the property and thereby prevents recovery of the property. *See* R. Perkins, *Criminal Law* 324 (2d ed. 1969).

The third element indicates, in accordance with the statutory language, that the crime of concealing stolen property is committed only if the property is concealed from the owner or from a person having possessory rights in the property. No comparable element exists in the receiving-stolen-property crime.

RECEIVING/CONCEALING STOLEN PROPERTY - DEFINITIONS

Concealing - Hiding or secreting to prevent discovery.

References: Brewer v. State, 554 P.2d 18 (Okl. Cr. 1976); Black's Law Dictionary at 261 (5th ed. 1979).

Embezzled - Obtained through embezzlement. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted.

Reference: 21 O.S. 1991, § 1451.

Feloniously Obtained - Obtained at the commission of a felony. Under the law **[Name Crime]** is a felony. Its elements are:

[List Elements for Applicable Crime]

Fraudulently Obtained - Obtained through false pretense. False pretense is the obtaining of title to property of another by false representation, which is known by the maker to be false, with the intent to defraud.

References: Hutton v. State, 494 P.2d 1246 (Okl. Cr. 1972); 21 O.S. 1991, §§ 1541.1, 1542.

Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

Reference: 21 O.S. 1991, § 103.

Receiving - Gaining possession of property through an exercise of dominion and control over the property, without regard to whether there is manual possession.

References: Hunsucker v. State, 475 P.2d 618 (Okl. Cr. 1970); McGee v. State, 60 Okl. Cr. 436, 65 P.2d 207 (1937); Price v. State, 9 Okl. Cr. 359, 131 P. 1102 (1913).

Stolen - Obtained through larceny. Larceny is the taking and carrying away of personal property of another by fraud or stealth, and with the intent to deprive permanently.

Reference: 21 O.S. 1991, § 1701.

Withholding - Keeping property from its owner or rightful possessor.

References: Smith v. State, 1977 OK CR 315, 573 P.2d 713; Black's Law Dictionary 1437 (5th ed. 1979).

With Intent to Deprive Permanently - Purpose to deny property to its rightful owner or possessor forever.

Reference: Hanlon v. State, 1968 OK CR 89, 441 P.2d 486.

(2000 Supp.)

OUJI-CR 5-114A

RECEIVING UNLAWFUL PROCEEDS - ELEMENTS

No person may be convicted of receiving unlawful proceeds unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/intentionally**;

Second, **receiving/acquiring** proceeds;

Third, knowing that the proceeds were derived from **[Specify Nature of Unlawful Activity as Defined in 21 O.S. Supp. 2014, § 2001(F), e.g., racketeering]**; and

Fourth, **knowingly/intentionally**;

[Fifth, concealing the proceeds].

OR

[Fifth, engaging in transactions involving the proceeds].

Statutory Authority: 21 O.S. Supp. 2014, § 2001.

(2014 Supp.)

OUJI-CR 5-115

UNLAWFUL POSSESSION OR USE OF VEHICLE - INTRODUCTION

The defendant is charged with:

[unauthorized use of a vehicle]

[possession of a stolen vehicle]

[tampering with a vehicle]

[interfering with vehicle]

[joyriding]

on **[Date]** in **[Name of County]** County, Oklahoma.

Committee Comments

This introductory instruction is appropriate for use with the offenses found in 47 O.S. 1991, § 4-102 (unauthorized use of a vehicle), *id.*, § 4-103 (possession of a stolen vehicle), *id.*, § 4-104 (tampering with a vehicle), 21 O.S. 1991, § 1787 (interfering with vehicle and joyriding).

(2000 Supp.)

OUJI-CR 5-116

UNAUTHORIZED USE OF VEHICLE - ELEMENTS

No person may be convicted of unauthorized use of a vehicle unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **taking/using/driving**;

Second, a vehicle;

Third, by the defendant;

Fourth, without the consent of the owner;

Fifth, with the intent to deprive the owner, temporarily or otherwise, of the vehicle or its possession.

Statutory Authority: 47 O.S. Supp. 2019, § 4-102 (A).

Committee Comments

This offense proscribes a broad range of conduct with respect to interference with rights of ownership or possession of vehicles. The Court of Criminal Appeals has rejected the contention that this statute constitutes little more than a temporary larceny statute, and thus requires an actual "taking" and "asportation" of the vehicle from the true owner in order to sustain a conviction. In *Magness v. State*, 1970 OK CR 157, ¶ 8, 476 P.2d 382, 383, the court noted the existence of a conflict of authorities concerning this point, but, construing Oklahoma law, determined to "follow the general rule that the word `or' in penal statutes is seldom used other than as a disjunctive. We find that it is not necessary that the defendant took the vehicle from the actual owner if he drove or used the same without consent with the intent to deprive him of its possession." *See also Payton v. State*, 1972 OK CR 306, 503 P.2d 570 (defendant's admission that he took car without owner's permission sufficient to sustain conviction under "temporarily" language of statute, regardless of whether defendant intended to return car).

Whether the defendant's conduct in the vehicle in question was sanctioned by its owner is a question of fact to be resolved by the jurors. *Frederick v. State*, 1975 OK CR 88, ¶ 8, 535 P.2d 708, 710.

Failure to instruct the finder of fact with respect to the lesser included offenses of molesting or tampering with a vehicle, or of joy riding, will not be considered error unless the record reflects evidence which would justify such an instruction. Where the State's evidence demonstrates a direct and uncontroverted taking, using, or driving of a motor vehicle by the defendant, it is not incumbent on the trial court to instruct regarding lesser included offenses. *Holt v. State*, 1973 OK CR 7, ¶ 5, 505 P.2d 500, 501; *Connell v. State*, 1972 OK CR 153, ¶ 8, 497 P.2d 1106, 1107; *Magness*, *supra*. *But see Atterberry v. State*, 1976 OK CR 257, ¶ 9, 555 P.2d 1301, 1303-1304 (error to refuse lesser-included instruction where State's proof raised inferences justifying conviction either for unauthorized use or for tampering with a vehicle).

(2019 Supp.)

OUJI-CR 5-116A

UNAUTHORIZED USE OF IMPLEMENT OF HUSBANDRY - ELEMENTS

No person may be convicted of unauthorized use of an implement of husbandry unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **taking/using/driving**;

Second, an implement of husbandry;

Third, by the defendant;

Fourth, without the consent of the owner;

Fifth, with the intent to deprive the owner, temporarily or otherwise, of the vehicle or its possession.

Statutory Authority: 47 O.S. Supp. 2019, § 4-102 (B).

Notes on Use

For the definition of "implement of husbandry", see 47 O.S. 2011, § 47-1-125.

(2019 Supp.)

OUJI-CR 5-117

POSSESSION OF STOLEN VEHICLE - ELEMENTS

No person may be convicted of possession of a stolen vehicle unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person not entitled to possession of a vehicle;

Second, **received/possessed/concealed/(disposed of)** the vehicle;

[Third, knowing it was stolen.]

OR

[Third, knowing it was converted under **[Specify Circumstances Constituting a Crime]**.]

Statutory Authority: 47 O.S. Supp. 2018, § 4-103 (A).

Notes on Use

If the second alternative is used, the trial judge should specify the elements of the alleged crime.

(2019 Supp.)

OUJI-CR 5-117A

POSSESSION OF STOLEN IMPLEMENT OF HUSBANDRY - ELEMENTS

No person may be convicted of possession of a stolen implement of husbandry unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person not entitled to possession of an implement of husbandry;

Second, **received/possessed/concealed/(disposed of)** the implement of husbandry;

[Third, knowing it was stolen.]

OR

[Third, knowing it was converted under **[Specify Circumstances Constituting a Crime]**.]

Statutory Authority: 47 O.S. Supp. 2019, § 4-103 (B).

Notes on Use

For the definition of "implement of husbandry", see 47 O.S. 2011, § 47-1-125.

(2019 Supp.)

OUJI-CR 5-118

TAMPERING WITH VEHICLE - ELEMENTS

No person may be convicted of the misdemeanor of tampering with a vehicle unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, intentionally;

Second, **injured/(tampered with)/damaged**;

Third, any **part/portion** of **a/an vehicle/(implement of husbandry)**;

Fourth, without having a right to do so.

OR

First, with the intent to commit a crime;

Second, **[(climbed into/upon a/an vehicle/(implement of husbandry)]/ [attempted to manipulate any of the levers/(starting mechanism)/ brakes/mechanisms/devices of a/an vehicle/(implement of husbandry) while it was at rest and unattended]/[set in motion a/an vehicle/ (implement of husbandry) while it was at rest and unattended]**;

Third, without having a right to do so.

Statutory Authority: 47 O.S. 1991, § 4-104.

OUJI-CR 5-119

INTERFERING WITH VEHICLE - ELEMENTS

No person may be convicted of interfering with vehicle unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **(loitered in/upon)/defaced/injured/(manipulated/meddled with any machinery/appliances of)**;

Second, **a/an automoble/(motor vehicle)**;

Third, without the consent of the owner of the **automobile/(motor vehicle)**.

Statutory Authority: 21 O.S. 1991, § 1787.

OUJI-CR 5-120

JOYRIDING - ELEMENTS

No person may be convicted of joyriding unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **molested/drove/(attempted to drive)**;

Second, **a/an automoble/(motor vehicle)**;

Third, without the consent of the owner;

Fourth, for the purpose of joyriding or any other purpose.

Statutory Authority: 21 O.S. 1991, § 1787.

OUJI-CR 5-121

UNAUTHORIZED USE OF VEHICLE - DEFINITION

Vehicle - Every device in, upon, or by which person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks. Unless a title or registration has been issued, vehicles moved solely by animal power, implements of husbandry, special mobilized machinery, or self-propelled wheel chairs or tricycles for invalids are also excluded.

Reference: 47 O.S. 1991, §§ 1-186, 4-101.

OUJI-CR 5-122

REMOVING VEHICLE IDENTIFICATION NUMBERS - ELEMENTS

No person may be convicted of destruction/removal/ covering/alteration/defacing vehicle identification numbers, unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant intentionally;

Second, **destroyed/removed/covered/altered/defaced/ (caused to be destroyed/ removed/covered/altered/defaced)**;

Third, **(the engine)/(any distinguishing)** number of any vehicle in this State;

Fourth, without first giving notice of the **destruction/removal/covering/ alteration/defacing** of the number to the Oklahoma Tax Commission upon a form prescribed by the Oklahoma Tax Commission.

Statutory Authority: 47 O.S. 1991, § 4-107(a).

OUJI-CR 5-123

GIVING WRONG DESCRIPTION OF VEHICLE IN APPLICATION FOR REGISTRATION - ELEMENTS

No person may be convicted of giving a wrong description of a vehicle in an application for registration, unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant gave a wrong description of a vehicle;

Second, in an application for registration;

Third, for the purpose of **concealing/hiding** the identity of the vehicle.

Statutory Authority: 47 O.S. 1991, § 4-107(a).

OUJI-CR 5-124

POSSESSION OF A VEHICLE WITH A REMOVED/FALSIFIED IDENTIFICATION NUMBER - ELEMENTS

No person may be convicted of the felony/misdemeanor of possession of a vehicle with a removed/falsified identification number, unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant **possessed/bought/received/sold/(dispos ed of)**;

Second, **[an engine for]** a vehicle;

Third, **knowing/(with knowledge)** that the identification number of the **vehicle/ engine**;

Fourth, had been **removed/falsified/defaced/covered/dest royed/altered/forged**;

[Fifth, **and with the intent to conceal/misrepresent the identity of the vehicle/ engine]**.

Statutory Authority: 47 O.S. 1991, § 4-107(b),(c).

Notes on Use

The Fifth Element should be included only for felony prosecutions under 47 O.S. 1991, § 4-107(c).

OUJI-CR 5-125

MAKING FALSE STATEMENT IN AN APPLICATION FOR A CERTIFICATE OF TITLE - ELEMENTS

No person may be convicted of making a false statement in an application for **[an assignment of]** a certificate of title, unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant knowingly;

Second, made a false statement;

Third, of a material fact;

Fourth, in his/her application for **[an assignment of]** a certificate of title.

Statutory Authority: 47 O.S. 1991, § 4-108.

OUJI-CR 5-126

TRANSFER OF STOLEN VEHICLE - ELEMENTS

No person may be convicted of transfer of a stolen vehicle, unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant **received/transferred** possession of a motor vehicle **from/to** another person;

Second, with the intent to procure/pass title to the vehicle;

Third, which **he/she knew/(had reason to believe)** was stolen;

Fourth, and the defendant was not an officer of the law engaged at the time in the performance of his/her official duties.

Statutory Authority: 47 O.S. 1991, § 4-108.

Committee Comments

The Committee concluded that the language of 47 O.S. 1991, § 4-108 required that the fourth element must be proved by the State, rather than asserted as an affirmative defense.

OUJI-CR 5-127

OFFERING/SALE OF UNREGISTERED SECURITIES - ELEMENTS

No person may be convicted of the offering/sale of unregistered securities, unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the willful;

Second, **offering/sale**;

Third, of a security;

Fourth, that was not registered with the Oklahoma Securities Commission.

Statutory Authority: 71 O.S. 1991, §§ 301, 407.

Notes on Use

This Instruction covers prosecutions for violations of 71 O.S. 1991, § 301. For prosecutions of other violations of the Oklahoma Securities Act, the trial court will need to draft its own instructions.

For definitions of "security", see 71 O.S. Supp. 1996, § 2(s).

Committee Comments

The Committee did not include the requirement that the security or transaction was not exempt as an element, because the burden of proving an exemption from the registration requirement under 71 O.S. 1991, § 301 is on the defendant. 71 O.S. 1991, § 401(e). *See* OUJI-CR 5-128, *infra*.

OUJI-CR 5-128

THE DEFENSE OF EXEMPTION

It is not unlawful to **offer/sell** any security in this State if the **security/ transaction** is exempt from registration requirements. Evidence has been introduced of an exemption from registration as a defense to the charge that the defendant committed the crime of the **offering/sale** of unregistered securities.

The following offerings/sales of securities are exempted from registration:

> **[Set Out the Exemption(s) Listed in 71 O.S. Supp. 1996, § 401(a) or (b) That Is/Are Claimed by the Defendant]**.

If, after considering all the evidence in this case, you have a reasonable doubt as to whether the security allegedly **offered/sold** by the defendant was exempt from registration, then you must find the defendant not guilty.

Statutory Authority: 71 O.S. Supp. 1996, § 401.

Committee Comments

> In *Armstrong v. State*, 811 P.2d 593, 596 (Okl.Cr. 1991), the Oklahoma Court of Criminal Appeals held that an instruction placing the burden of proving an exemption from registration on the defendant was a correct statement of the law. *See also* 71 O.S. Supp.1996, § 401(e); *State v. Hoephner*, 574 P.2d 1079, 1081 (Okl. Cr. 1978) (exemption from registration is affirmative defense); *Nelson v. State*, 355 P.2d 413, 419 (Okl.Cr. 1960) (same). The Committee reviewed § 401(e) and *Armstrong*, *supra*, and it concluded that this instruction is consistent with the statutory requirement that the defendant has the burden of raising the defense of exemption. The Committee decided that the State, retaining its burden of proving the defendant's guilt beyond a reasonable doubt, would then have the burden of overcoming that defense.

OUJI-CR 5-129

BURDEN OF INVESTIGATION

A person who sells securities has the burden of investigation whether the securities can legally be sold before attempting to sell them. It is no excuse if **he/she** failed to ascertain whether they could legally be sold before selling them.

Notes on Use

This Instruction should be used only if the defendant claims that he or she did not know that the securities could not be legally sold.

Committee Comments

Syllabus 4 in *Nelson v. State*, 355 P.2d 413, 415 (Okl. Cr. 1960), states: "The law puts the burden of investigation upon the party selling securities and it is no excuse if he fails to ascertain if such security cannot in fact be legally sold. He is bound to make such investigation before attempting to make a sale thereof."

OUJI-CR 5-130

COMPUTER CRIMES - ELEMENTS

No person may be convicted of violating the Oklahoma Computer Crimes Act, unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, without authorization;

Third, **gained/(attempted to gain)** access to;

Fourth, and **damaged/modified/altered/deleted/destroyed/copied/(made use of)/disclosed/(took possession of)**;

Fifth, **[a computer/(computer system/network)]/[computer property]**.

OR

First, used;

Second, **[a computer/(computer system/network)]/ [computer property]**;

Third, for the purpose of **devising/executing** a **scheme/artifice**;

Fourth, **(with the intent to defraud/deceive/extort)/(for the purpose of controlling/obtaining money/property/services/(any thing of value)** by means of a **false/fraudulent pretense/representation**.

OR

First, willfully;

Second, exceeded the limits of authorization;

Third, and **damaged/modified/altered/deleted/destroyed/copied/(made use of)/ disclosed/(took possession of)**;

Fourth, **[a computer/(computer system/network)]/[computer property]**.

OR

First, willfully;

Second, without authorization;

Third, **gained/(attempted to gain)** access to;

Fourth, **[a computer/(computer system/network)]/[computer property]**.

OR

First, willfully;

Second, without authorization;

Third, **used/(caused to be used)** computer services.

OR

First, willfully;

Second, without authorization;

Third, **[disrupted/(caused the disruption of) computer services]/[denied/ (caused the denial of) access/(computer services)** to an authorized user of a **computer/(computer system/network)]**.

OR

First, willfully;

Second, without authorization;

Third, **provided/(assisted in providing)** a means of accessing a **computer/ (computer system/network)**;

Fourth, in **[Specify Elements of Violation of 21 O.S. § 1953]**.

OR

First, **(communicated with)/(stored/retrieved data in/from)**;

Second, a computer **system/network**;

Third, for the purpose of using the access;

Fourth, to **[Specify Elements of Violation of the Oklahoma Statutes]**.

Statutory Authority: 21 O.S. 1991, §§ 1953, 1958.

OUJI-CR 6-1

DRUG OFFENSES - INTRODUCTION, GENERAL

The defendant is charged with

[manufacturing/distributing/dispensing the controlled dangerous substance of (Name of Substance)]

[possessing with intent to manufacture/distribute/dispense the controlled dangerous substance of (Name of Substance)]

[knowingly and intentionally possessing the controlled dangerous substance of (Name of Substance)]

[distributing under Sec. 2-401(E) the controlled dangerous substance of (Name of Substance)]

[possession of drug paraphernalia]

[cultivation of (Name of Substance)]

[maintaining a place where controlled dangerous substances are kept]

[trafficking in illegal drugs]

on **[Date]** in **[Name of County]** County, Oklahoma.

Notes on Use

This introductory instruction is appropriate for use with the most commonly charged drug-abuse offenses delineated at 63 O.S. 1991 & Supp. 1995, §§ 2-401 through 2-407. The schedules which define controlled dangerous substances are set forth at 63 O.S. 1991 & Supp. 1995, §§ 2-204 through 2-212.

OUJI-CR 6-2

DRUG OFFENSES: DISTRIBUTING - ELEMENTS

No person may be convicted of distributing a controlled dangerous substance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/intentionally**;

Second, **distributing/(transporting with the intent to distribute)/([soliciting the use]/[using the services] of a person less than 18 years of age to cultivate/distribute/manufacture/(attem pt to manufacture)**;

Third, the controlled dangerous substance of **[Name of Substance]**.

Statutory Authority: 63 O.S Supp. 1995, § 2-401(A)(1).

Committee Comments

Section 2-401(A)(1) prohibits unlawful transfer and delivery of the controlled dangerous substances defined in Schedules I through V of Article II of the Uniform Controlled Substances Act, enacted in 1971. Schedules I through V are codified at 63 O.S. 1991 & Supp. 1995, §§ 2-203 through 2-212. The statute prescribes no minimum quantity of any contraband substances that must exist in order to invoke the statutory prohibitions. The State is not required to establish that any traceable or specific usable quantity of a prohibited narcotic substance was involved. The quantity of the drug involved need not be sufficient to produce a stimulating or depressing effect on the nervous system, so long as the substance is within the statutory proscription of controlled dangerous substances. *Whitehorn v. State*, 561 P.2d 539 (Okl. Cr. 1977); *Cox v. State*, 551 P.2d 1125 (Okl. Cr. 1976); *Spriggs v. State*, 511 P.2d 1139 (Okl. Cr. 1973); *Doyle v. State*, 511 P.2d 1133 (Okl. Cr. 1973).

It must be noted that the statutory language, which prohibits distributing illegal narcotic substances, does not specifically refer to "sale" as a proscribed type of transfer. The statutory definitions of these transactions, set forth at 63 O.S. Supp. 1995, § 2-101, illustrate the legislative intent to incorporate the sale of unlawful drugs into the described conduct while not requiring the element of compensation. For example, "distribute" is defined at 63 O.S. Supp. 1995, § 2-101(12) as follows: "'Distribute' means to deliver other than by administering or dispensing a controlled substance." "Dispensing," defined at 63 O.S. Supp. 1995, § 2-101(11), also incorporates use of the term "deliver," which is defined at 63 O.S. Supp. 1995, § 2-101(10) as follows: "'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from one person to another of a controlled dangerous substance, whether or not there is an agency relationship."

The statutory definition of "dispense" in 63 O.S. Supp. 1996, § 2-101(11) is as follows:

> "Dispense" means to deliver a controlled dangerous substance to an ultimate user or human research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling or compounding necessary to prepare the substance for such distribution. "Dispenser" is a practitioner who delivers a controlled dangerous substance to an ultimate user or human research subject"

After reviewing this definition, the Committee concluded that the inclusion of "dispense" in 63 O.S. Supp. 1996, § 2-401 as a prohibited act was not appropriate, because "dispense" is clearly a lawful act based on the definition. Therefore, the Committee has eliminated "dispense" or "dispensing" from the list of unlawful acts included in OUJI-CR 6-2, 6-4, and 6-5.

Thus, the conduct prohibited by section 2-401(A)(1) includes not only dealing and selling, but also sharing with or dividing among persons any contraband drug. The element of compensation is immaterial. *Goodner v. State*, 546 P.2d 653 (Okl. Cr. 1976); *Woodruff v. State*, 539 P.2d 28 (Okl. Cr. 1975).

The statutory definition of "distribute" precludes use of the "procuring agent" defense which once flourished in Oklahoma. *See Yetter v. State*, 528 P.2d 345 (Okl. Cr. 1974); *Posey v. State*, 507 P.2d 576 (Okl. Cr. 1973); *Jones v. State*, 481 P.2d 169 (Okl. Cr. 1971). As delineated in those decisions, the "procuring agent" defense was available where an individual acted solely in the capacity of an agent for the purchaser or recipient in a narcotics transaction, and had neither a part in prearranging the sale on behalf of the seller nor a personal or financial interest in the sale. The underlying theory was that the agent of the buyer or recipient who acted in no capacity other than that of agency did not partake in a transaction tantamount to a sale, barter, exchange, or gift, all of which were prohibited by the narcotics laws at that time. The protection of the "procuring agent" defense did not extend to the agent of the seller.

Statutory revision of the narcotics laws in 1971 rendered the agency issue irrelevant. *Tipton v. State*, 528 P.2d 1115, 1117 (Okl.Cr. 1974). *See also Banks v. State*, 654 P.2d 631, 632 (Okl.Cr. 1982). Any person who unlawfully distributes a dangerous controlled substance, regardless of agency or personal or financial stake in the transaction, is within the purview of section 2-401(A)(1). *Crow v. State*, 551 P.2d 279 (Okl. Cr. 1976); *Harwood v. State*, 543 P.2d 761 (Okl. Cr. 1975); *Yetter*, *supra*.

Although it is axiomatic that in every case the possession of a controlled substance by the defendant precedes the actual distribution of the drug, or the intent to distribute, an instruction on the lesser included offense of simple possession, as delineated at 63 O.S. Supp. 1996, § 2-402, is not warranted in every case. Rather, the evidence must reasonably tend to prove that the defendant's contact with a proscribed drug constituted simple possession, and must not raise the inference that the defendant's conduct constituted either distribution, intent to distribute, or no crime at all. For example, in *McKee v. State*, 531 P.2d 343 (Okl. Cr. 1975), the defendant urged on appeal from his conviction for unlawful distribution of marijuana that the trial court's refusal to instruct the jury concerning the lesser included offense of possession was error. Upon reviewing the record, the Court of Criminal Appeals noted that the State's evidence proved the defendant to be guilty of unlawful distribution of marijuana, or of nothing at all, whereas the defendant's evidence, if credited, established that the defendant merely happened to be in the vicinity of a narcotics transaction, unaware of the presence of the unlawful drug and lacking any dominion or control of it. The court held such evidence insufficient to support a conviction for simple possession, and affirmed the refusal to give an instruction inapposite to the proof adduced at trial. *See also Wilson v. State*, 568 P.2d 1323 (Okl. Cr. 1977); *King v. State*, 562 P.2d 902 (Okl. Cr. 1977); *Capehart v. State*, 559 P.2d 861 (Okl. Cr. 1977); *Massengale v. State*, 556 P.2d 282 (Okl. Cr. 1976); *Price v. State*, 546 P.2d 632 (Okl. Cr. 1976); *Morgan v. State*, 545 P.2d 1265 (Okl. Cr. 1976).

OUJI-CR 6-3

DRUG OFFENSES: MANUFACTURING - ELEMENTS

No person may be convicted of **manufacturing/(attempting to manufacture)** a controlled dangerous substance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/intentionally**;

Second, **manufacturing/(attempting to manufacture)**;

Third, the controlled dangerous substance of **[Name of Substance]**.

Statutory Authority: 63 O.S Supp. 2001, § 2-401 (G).

(2003 Supp.)

OUJI-CR 6-3A

DRUG OFFENSES: POSSESSION OF PRECURSOR SUBSTANCE WITH INTENT TO MANUFACTURE

No person may be convicted of possessing precursor substance with the intent to manufacture a controlled dangerous substance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/intentionally**;

Second, possessing;

Third, the following precursor **substance/substances:** [**Names of Precursor Substances listed in 63 O.S 2001, § 2-322 or 2-401(G)**].

Fourth, with the intent to use the precursor **substance/substances** to manufacture;

Fifth, the controlled dangerous substance of [**Name of Substance**].

[You may, but are not required to, regard proof that the defendant **knowingly/intentionally** possessed (anhydrous ammonia in an unauthorized container) as sufficient evidence that the defendant intended to use the anhydrous ammonia to manufacture **[Name of Controlled Dangerous Substance].** The defendant's intent to use the anhydrous ammonia to manufacture **[Name of Controlled Dangerous Substance]** must be proved beyond a reasonable doubt.]

Statutory Authority: 63 O.S Supp. 2004, § 2-401 (G).

Notes on Use

The bracketed sentences after the elements should be included with the instruction if evidence has been introduced that the defendant possessed anhydrous ammonia in an unauthorized container.

(2005 Supp.)

DRUG OFFENSES: ENDEAVORING TO MANUFACTURE - ELEMENTS

No person may be convicted of **offering/soliciting/ attempting/endeavoring/conspiring** to manufacture a controlled dangerous substance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/intentionally**;

Second, **offering/soliciting/attempting/endeavoring/conspiring**;

Third, to manufacture;

Fourth, the controlled dangerous substance of [**Name of Substance**].

Statutory Authority: 63 O.S 2001, § 2-408.

(2005 Supp.)

OUJI-CR 6-3C

DRUG OFFENSES: AGGRAVATED MANUFACTURING - ELEMENTS

No person may be convicted of aggravated manufacturing a controlled dangerous substance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/intentionally**;

Second, **manufacturing/(attempting to manufacture)**;

Third, **[Specify Name and Amount of Substance Listed in 63 O.S. Supp. 2004, § 2-401(G)(3)]** .;

_____

Statutory Authority: 63 O.S. Supp. 2004, § 2-401(G)(3).

(2005 Supp.)

_____

Statutory Authority: 63 O.S. 2001, § 2-408.

(2003 Supp.)

OUJI-CR 6-4

DRUG OFFENSES: POSSESSION WITH INTENT TO

MANUFACTURE/DISTRIBUTE - ELEMENTS

No person may be convicted of possession with intent to manufacture/distribute a controlled dangerous substance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowing and intentional;

Second, possession;

Third, of the controlled dangerous substance of **[Name of Substance]**;

Fourth, with an intent to **manufacture/distribute [Name of Substance]**.

Statutory Authority: 63 O.S. Supp. 2000, § 2-401(A)(1).

Committee Comments

The gravamen of the possession offense defined in section 2-401(A)(1) is dual: (1) knowing and intentional possession, and (2) specific intent. These elements are distinct and independent; neither can be proved by presumption. *Brown v. State*, 1971 OK CR 55, 481 P.2d 475.

The parameters of the element of "possession" have been refined by the Court of Criminal Appeals through a series of decisions. *Brown*, *supra*, established that the bare fact of physical proximity between the defendant and the contraband was insufficient to establish the "dominion and control" requisite to a finding of possession. The court stated:

> Guilty knowledge and control cannot be presumed. Defendant did not have the burden of establishing lack of knowledge or control. There must be some link or circumstance in addition to the presence of the marijuana which indicates defendant['s] knowledge of its presence and his control of it. Absent this additional independent factor the evidence is insufficient to support conviction.

Id. ¶ 12, 481 P.2d at 477. *See also McCarty v. State*, 1974 OK CR 158, 525 P.2d 1391; *Sturgeon v. State*, 1971 OK CR 128, 483 P.2d 335.

The seminal case delineating the parameters of the requirement of possession is *Staples v. State*, 1974 OK CR 208, 528 P.2d 1131, wherein the court articulated the following principles for determining whether "possession" existed. A summary follows.

> (1) Actual physical custody of a controlled substance is not required; the State meets the requisite burden of proof by demonstrating constructive possession of a narcotic substance. Constructive possession entails both knowledge of its presence as well as the power and intent to control its use or disposition. The element of possession is established where contraband is found on premises possessed by the defendant and under his exclusive control. (2) Possession need not be exclusive. An individual may be deemed to be in "joint possession" of a drug which is in the physical custody of a companion, if the two willfully and knowingly share the right to control the narcotic substance. (3) As held in *Brown*, however, mere proximity to contraband is insufficient to establish control. Whether the State alleges sole or joint possession, evidence in addition to the defendant's presence

> at a place where narcotics are possessed or used must be adduced to demonstrate knowledge and control. (4) Since the mens rea aspect of knowing possession is rarely susceptible of direct proof, the defendant's knowledge and right of control may be established by circumstantial evidence. Circumstantial proof may permit an inference of knowledge and control that is sufficient to permit the case to go to the jury. (5) Although the court declared in *Brown* that mere presence, absent additional independent factors, is insufficient to raise an inference of knowledge and control, such independent factors may be plumbed from a variety of sources, such as the defendant's incriminating statements or conduct, or prior police investigation. However, the threshold test of independent factors remains unfulfilled where the only factor adduced in addition to the defendant's physical proximity to the narcotic substance is the fact that the drug was located in an extremely confined area such as the interior of a motor vehicle.

See also Miller v. State, 1978 OK CR 54, 579 P.2d 200 (possession not established where proof failed to demonstrate that bedroom where contraband found belonged to defendant, who claimed defendant's brother had dominion and control over contraband); *Hishaw v. State*, 1977 OK CR 276, 568 P.2d 643 (proof that marijuana cigarette found on floor adjacent to feet of defendant, a passenger in an automobile, insufficient to establish possession); *Clarkson v. State*, 1974 OK CR 217, 529 P.2d 542 (fact that person carrying drugs was apprehended after exiting from defendant's residence insufficient to establish control and access).

The element of possession may be established, however, regardless of the insufficiency of the State's proof of dominion and control, by the defendant's evidence during trial. *Johnson v. State*, 1977 OK CR 188, 564 P.2d 664, *overruled on other grounds*, *Omalza v. State*, 1996 OK CR 80, n.29, 911 P.2d 286, 310; *Walker v. State*, 1973 OK CR 369, 512 P.2d 208.

In addition to possession, the specific intent of the defendant to distribute or dispense the contraband substance must be established. The element of specific intent to disseminate the drugs possessed involves a question of fact to be determined by the jury. In many instances, the sheer quantity of the narcotic substance found, as well as the presence of sale paraphernalia, or the fact of individual packaging, is deemed sufficient circumstantial evidence of intent to allow presentation of the case to the jury. *King v. State*, 1977 OK CR 136, 562 P.2d 902; *Massengale v. State*, 1976 OK CR 265, 556 P.2d 282; *Davis v. State*, 1973 OK CR 416, 514 P.2d 1195; *Reynolds v. State*, 1973 OK CR 284, 511 P.2d 1145.

(2000 Supp.)

OUJI-CR 6-5

DRUG OFFENSES: DISTRIBUTING/MANUFACTURING

UNDER SEC. 2-401(F) - ELEMENTS

No person may be convicted of **distributing/manufacturing** a controlled dangerous substance near a **[Specify Location Listed in 63 O.S Supp. 2004, § 2-401(F)]** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/intentionally**;

Second, **(transporting with the intent to distribute)/distributing/(possessing with the intent to distribute) /(manufacturing)/ (attempting to manufacture)**;

Third, the controlled dangerous substance of **[Name of Substance]**;

OR

Third, [**If Aggravated Manufacturing, Specify Name and Amount of Substance Listed in 63 O.S Supp. 2004, § 2-401(G)(3)**];

Fourth, to a person **in/on/(within 2,000 feet of) [the real property comprising] [Specify Location Listed in 63 O.S Supp. 2004, § 2-401(F)]**.

Statutory Authority: 63 O.S Supp. 2004, § 2-401(F).

(2005 Supp.)

OUJI-CR 6-6

DRUG OFFENSES: POSSESSION - ELEMENTS

No person may be convicted of possession of a controlled dangerous substance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowing and intentional;

Second, possession;

Third, of the controlled dangerous substance of **[Name of Substance]**.

Statutory Authority: 63 O.S. Supp. 2000, § 2-402(A).

Committee Comments

Section 2-402(A) defines the offense of simple possession, often a lesser included offense of the crimes delineated in section 2-401(A)(1). The element of knowing and intentional possession must be established by the State in accordance with the guidelines articulated by the Court of Criminal Appeals in *Staples v. State*, 1974 OK CR 208, 528 P.2d 1131, discussed in the Committee Comments accompanying the instruction on the offense of possession with intent to distribute, *supra*. Possession of any quantity of contraband is sufficient to invoke the statutory prohibitions, regardless of whether the quantity was usable or capable of producing hallucinogenic effects. *Whitehorn v. State*, 1977 OK CR 65, 561 P.2d 539; *Cox v. State*, 1976 OK CR 156, 551 P.2d 1125; *Spriggs v. State*, 1973 OK CR 275, 511 P.2d 1139; *Doyle v. State*, 1973 OK CR 282, 511 P.2d 1133.

(2000 Supp.)

OUJI-CR 6-7

DRUG OFFENSES: DRUG PARAPHERNALIA - ELEMENTS

No person may be convicted of **use/possession**/delivery/manufacture of drug paraphernalia unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **knowingly/intentionally**;

Second, **using/possessing** drug paraphernalia;

Third, to **plant/propagate/cultivate/grow/harvest/manufacture/compound/convert/produce/process/prepare/test/analyze/pack/repack/store/contain/conceal/ingest/inhale/(introduce into the human body)**;

Fourth, the controlled dangerous substance of **[Name of Substance]**.

OR

First, **delivering/possessing/manufacturing** drug paraphernalia;

Second, knowing that it was to be used;

Third, to **plant/propagate/cultivate/grow/harvest/manufacture/compound/convert/produce/process/prepare/test/analyze/pack/repack/store/contain/conceal/ingest/inhale/(introduce into the human body)**;

Fourth, the controlled dangerous substance of **[Name of Substance]**.

OR

First, delivering drug paraphernalia;

Second, to a person under 18 years of age;

Third, who was at least 3 years younger than the defendant;

Fourth, knowing that it was to be used;

Fifth, to **plant/propagate/cultivate/grow/harvest/manufacture/compound/convert/produce/process/prepare/test/analyze/pack/repack/store/contain/conceal/ingest/inhale/(introduce into the human body)**;

Sixth, the controlled dangerous substance of **[Name of Substance]**.

Statutory Authority: 63 O.S Supp. 2000, § 2-405.

Notes on Use

For the definition of drug paraphernalia, see OUJI-CR 6-16, *infra*.

(2000 Supp.)

OUJI-CR 6-8

DRUG OFFENSES - DEFENSE OF

POSSESSION FOR RELIGIOUS USE

NO INSTRUCTION SHOULD BE GIVEN

Committee Comments

The United States Supreme Court decided in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the First Amendment's Free Exercise Clause does not protect religiously-motivated behavior that conflicts with a neutral law of general applicability. Congress attempted to override the *Smith* decision by enacting the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 101-141, 107 Stat. 1488, codified at 42 U.S.C. §§ 2000bb (1995), *et seq.*, but in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court struck down the RFRA on the grounds that it exceeded Congress' enforcement powers.

(2000 Supp.)

OUJI-CR 6-9

DRUG OFFENSES: CULTIVATION - ELEMENTS

No person may be convicted of **cultivation/production/(knowingly permitting the cultivation/production/[wild growing])** of any species of plant from which a controlled dangerous substance is derived unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, **cultivating/producing/(permitting the cultivation/production/[wild growing] of)**;

Third, any species of plant from which is derived the controlled dangerous substance **[Name of Substance]**;

Fourth, on land **owned/(controlled by)** the defendant.

Statutory Authority: 63 O.S. Supp. 2000, § 2-509.

Committee Comments

Although relatively few reported judicial decisions have construed the provisions of section 2-509, the Court of Criminal Appeals has determined that, given the legislative intent in enacting the statute wholly to prohibit cultivation of certain species of plants, particularly marijuana, its proscriptions extend to forbidden plants grown in greenhouses, window boxes, pots, and upstairs-apartment rooftop gardens, as well as those cultivated in the soil. *Capehart v. State*, 1977 OK CR 34, 559 P.2d 861; *Box v. State*, 1975 OK CR 194, 541 P.2d 262.

(2000 Supp.)

OUJI-CR 6-10

DRUG OFFENSES - MARIJUANA DEFINED

The controlled dangerous substance of marijuana includes all parts of the plant Cannabis Sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks [except the resin extracted therefrom], fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination.

The substance "Cannabis Sativa L." includes all forms, varieties, and species of the plant genus "cannabis".

Statutory Authority: 63 O.S. Supp. 2000, § 2-101(23).

Committee Comments

This instruction conforms to the suggestions articulated by the Court of Criminal Appeals in several cases. *Goodner v. State*, 1976 OK CR 29, 546 P.2d 653; *Winters v. State*, 1976 OK CR 4, 545 P.2d 786. In both cases, the defendants argued that the State had failed to sustain its burden of proof in charging offenses concerning marijuana, because the expert witnesses at trial established only that tetrahydrocannibinol (THC) was identified in the substance within the defendant's possession, and that the substance was cannabis, without specifically identifying the substance in the statutory terms of "cannabis sativa." The court rejected this argument, and declared that, so long as the State establishes that the substance in question is a proscribed portion of the plant cannabis, and further establishes that the substance tests positive for the presence of THC, the State's evidence is sufficient to sustain its burden of proof.

(2000 Supp.)

OUJI-CR 6-11

DRUG OFFENSES - DRUG POSSESSION DEFINED

The law recognizes two kinds of possession, actual possession and constructive possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing, is then in constructive possession of it.

The possession prohibited by the law is not only that of actual physical custody of a controlled dangerous substance but also the constructive possession of it.

[The law recognizes that possession may be sole or joint. In other words, possession need not be exclusive. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint. A person may be deemed to be in joint possession of a controlled dangerous substance which is in the physical custody of an associate if he/she willfully and knowingly shares with that other person the right to control the disposition or use of such substance.]

However, mere proximity to a substance is insufficient proof of possession. There must be additional evidence of the defendant's knowledge and control. Such knowledge and control may be established by circumstantial evidence. Each fact necessary to prove the guilt of the defendant must be established by the evidence beyond a reasonable doubt. All of the facts and circumstances, taken together, must establish to your satisfaction the defendant's knowledge and control beyond a reasonable doubt.

If you find from the evidence beyond a reasonable doubt that the defendant, either alone or jointly with another, had constructive possession of **[Specify Controlled Dangerous Substance]** then you may find that such substance was in the possession of the defendant within the meaning of the word "possession" as used in these instructions.

Notes on Use

This instruction should be used if there is evidence that the defendant had constructive, rather than actual, possession of a controlled dangerous substance. The fifth paragraph should be given only if there is evidence that the defendant had joint possession of the controlled dangerous substance.

Committee Comments

The Oklahoma Court of Criminal Appeals summarized the principles of constructive possession of drugs in *Staples v. State*, 1974 OK CR 208, ¶¶ 8-9, 528 P.2d 1131, 1133, as follows:

> It has been frequently held in this State that the possession prohibited by the drug laws need not be actual physical custody of the controlled substance; it is sufficient that the State prove the accused to have been in constructive possession of the contraband material by showing that he had knowledge of its presence and the power and intent to control its disposition or use. [Citations omitted.] Further, possession need not be exclusive; a person may be deemed to be in joint possession of a drug which is in the physical custody of a companion, if he willfully and knowingly shares with the other the right to control the contraband. [Citation omitted.] We have, however, repeatedly held that proof of mere proximity to a prohibited substance is insufficient. Whether the case is tried on the theory of sole or joint possession, proof that the accused was present at a place where drugs were being used or possessed is, in and of itself, insufficient to justify a finding of possession. There must be additional evidence of knowledge and control. [Citations omitted.]

> Guilty knowledge is rarely susceptible of direct proof. The fact that the accused knew of the presence of the contraband and had the right to control its disposition or use may be established by circumstantial evidence. [Citation omitted.] Nevertheless, it is the law of this jurisdiction that a conviction upon circumstantial evidence cannot be sustained if the proof does not exclude every reasonable hypothesis but that of guilt, and proof amounting only to a strong suspicion or mere probability is insufficient. [Citation omitted.] We have held that circumstantial evidence which shows that a narcotic substance was found on premises possessed by the accused and under his exclusive control, permits an inference of knowledge and control of that substance which is sufficient to carry the case to the jury. [Citations omitted.]

See also Johnson v. State, 1988 OK CR 246, ¶ 18, 764 P.2d 530, 535 (approving sixth paragraph of the above instruction as fairly stating the applicable law); *Doyle v. State*, 1988 OK CR 147, ¶ 7, 759 P.2d 223, 224 ("Constructive possession of a controlled dangerous substance is a showing that the accused had knowledge of its presence and the power or intent to control its disposition or use."); *Miller v. State*, 1978 OK CR 54, ¶ 9, 579 P.2d 200, 202.

In *Easlick v. State*, 2004 OK CR 21, ¶ 4, 90 P.3d 556, the Court of Criminal Appeals abolished the reasonable hypothesis test in Oklahoma, and accordingly, the former requirement of excluding every reasonable hypothesis but that of guilt has been deleted from this instruction. *See also* OUJI-CR 9-5, *infra*.

(2010 Supp.)

OUJI-CR 6-12

MAINTAINING A PLACE WHERE CONTROLLED DANGEROUS SUBSTANCES ARE KEPT - ELEMENTS

No person may be convicted of maintaining a place where controlled dangerous substances are kept unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly or intentionally;

Second, keeping or maintaining;

Third, any **store/shop/warehouse/(dwelling house)/building/vehicle/boat/ aircraft/place**;

Fourth, **(where persons using controlled dangerous substances in violation of the law often/customarily/generally go for the purpose of using such substances)/(used for the keeping or selling of controlled dangerous substances in violation of the law)**.

The phrase "keeping or maintaining" as used in this instruction requires the defendant to have **control/ownership/management** of the **residence/structure/vehicle**, as distinguished from other persons resorting to it to **buy/use** controlled dangerous substances in violation of the law.

A conviction of the crime of maintaining a place where controlled dangerous substances are kept requires that the activity giving rise to the charge must be more than a single, isolated activity. Rather, the term implies an element of some degree of habitualness.

A conviction of the crime of maintaining a place where controlled dangerous substances are kept requires that a substantial purpose, and not necessarily the sole purpose, of the **residence/ structure/vehicle** is for **(the keeping or selling of controlled dangerous substances)/(the using of by persons resorting to the place for using controlled dangerous substances in violation of the law)**.

The mere possession of limited quantities of a controlled dangerous substance by the person keeping or maintaining the **residence/structure/vehicle** for that person's personal use within that **residence/structure/vehicle** is insufficient to support a conviction of the crime of maintaining a place where controlled dangerous substances are kept.

Statutory Authority: 63 O.S. Supp. 2000, § 2-404(A)(6).

Committee Comments

In *Meeks v. State*, 1994 OK CR 20, ¶ 7, 872 P.2d 936, 939, the Oklahoma Court of Criminal Appeals directed trial courts to instruct the jury substantially as specified in this instruction. *See also Howard v. State*, 1991 OK CR 76, ¶ 9, 815 P.2d 679, 683 (requiring maintenance of the place to have been for the purpose of keeping, selling, or using drugs and also that there have been more than a single, isolated activity).

(2000 Supp.)

OUJI-CR 6-13

TRAFFICKING IN ILLEGAL DRUGS - ELEMENTS

You are instructed that no person may be convicted of trafficking in illegal drugs unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, **distributed/manufactured/(brought into Oklahoma)/possessed**;

Third, **[Specify Amount of Controlled Dangerous Substance from 63 O.S. Supp. 2000, § 2-415(C)]** of **[Specify Controlled Dangerous Substance]**.

OR

First, possessed;

Second, **[Specify Controlled Dangerous Substance]**;

Third, with the intent to manufacture;

Fourth, **[Specify Amount of Controlled Dangerous Substance from 63 O.S. Supp. 2000, § 2-415(C)] of [Specify Controlled Dangerous Substance]**.

OR

First, **used/(solicited the use of)**;

Second, services of a person less than 18 years of age;

Third, to **distribute/manufacture**;

Fourth, **[Specify Amount of Controlled Dangerous Substance from 63 O.S. Supp. 2000, § 2-415(C)]** of **[Specify Controlled Dangerous Substance]**.

[If you find that the defendant represented the amount of the (Specify Controlled Dangerous Substance) to be (Specify Amount of Controlled Dangerous Substance from 63 O.S. Supp. 2000, § 2-415(C)), then you may find the defendant guilty of trafficking in illegal drugs regardless of the actual amount.]

Statutory Authority: 63 O.S. Supp. 2000, § 2-415.

Notes on Use

The trial court should select the appropriate option, and the bracketed last sentence should be given only if appropriate.

(2000 Supp.)

OUJI-CR 6-14

DRUG OFFENSES: PUBLIC DRUNKENNESS/INTOXICATION – INTRODUCTION

The defendant is charged with public **drunkenness/intoxication** on [**Date**] in [**Name of County**] County, Oklahoma.

Notes on Use

This introductory instruction is appropriate for use with the offense of public drunkenness under 37A O.S.2021, § 6-101(A)(8); (D).

(2024 Supp.)

OUJI-CR 6-15

(PUBLIC DRUNKENNESS/INTOXICATION)/
(DISTURBING THE PEACE) - ELEMENTS

No person may be convicted of public **drunkenness/ intoxication** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, that the defendant was intoxicated; and

Second, in a public place.

OR

First, that the defendant was **drunk/intoxicated;** and

Second, disturbed the peace of any person.

Statutory Authority; 37A O.S. 2021, § 6-101(A)(8); (D).

Notes on Use

The trial court should modify this instruction as appropriate for prosecutions for public consumption of alcohol or other intoxicants. 37A O.S. 2021, § 6-101(A)(8); (D)

(2024 Supp.)

DRUG OFFENSES - DEFINITIONS

Cultivating - Note: See Committee Comments at OUJI-CR 6-9.

Dispensing - Delivering a controlled dangerous substance to an ultimate user or human research subject by or pursuant to the lawful order of a practitioner.

Reference: 63 O.S. Supp. 2001, § 2-101(11).

Distribute - "Distribute" means to deliver other than by administering or dispensing a controlled dangerous substance.

Reference: 63 O.S. Supp. 2001, § 2-101(12).

Drug Paraphernalia - Any kind of equipment, products, or materials that are **used/(intended for use)** in **planting/propagating/cultivating/growing/harve sting/ manufacturing/compounding/converting/producing/ processing/preparing/testing/ analyzing/packaging/repackaging/storing/contain ing/concealing/injecting/ ingesting/inhaling/(introducing into the body)** a controlled dangerous substance. It includes, but is not limited to **[Specify Applicable Item Listed in 63 O.S. 2001, § 2-101(36)]**. **[However, drug paraphernialia does not include (Specify Applicable Item Listed at the End of 63 O.S. 2001, § 2-101(36)).]**

Reference: 63 O.S. 2001, § 2-101(36). Note -- The last bracketed sentence should be given only when applicable.

Endeavoring - Endeavoring means any effort to do or accomplish the evil purpose that the law was enacted to prevent.

References: *United States v. Russell*, 255 U.S. 138, 143 (1921); *United States v. Ogle*, 613 F.2d 233, 241-42 (10th Cir. 1979).

Knowing - Being aware of the existence of facts that cause the act or omission to be criminal in nature. A person need not be aware of the applicable law to do an act "knowingly," but only needs to be aware of the applicable facts.

Reference: 21 O.S. 2001, § 96.

Manufacturing - Production, preparation, propagation, compounding, or processing a controlled dangerous substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis; or a combination of extraction and chemical synthesis.

Reference: 63 O.S. Supp. 2001, § 2-101(22).

Possession - Actual physical custody, or knowledge of the substance's presence, as well as power and intent to control its use or disposition.

References: Miller v. State, 579 P.2d 200 (Okl. Cr. 1978); Staples v. State, 528 P.2d 1131 (Okl. Cr. 1974). *See also* OUJI-CR 6-11, *supra*.

Willfully - Purposefully. Willfully does not require any intent to violate the law, or to injure another or to acquire any advantage.

Reference: 21 O.S. 2001, § 92.

(2003 Supp.)

OUJI-CR 6-17

DRIVING A MOTOR VEHICLE

WHILE UNDER THE INFLUENCE, ETC. - INTRODUCTION

The defendant is charged with

[driving a motor vehicle (while under the influence of (alcohol/(an intoxicating substance)/(with a blood/breath alcohol concentration of .08 or more)]

[being in actual physical control of a motor vehicle while under the influence of alcohol/(an intoxicating substance)]

[(being involved in)/causing an accident while under the influence of alcohol/(an intoxicating substance)]

[driving a motor vehicle with impaired ability]

[being in actual physical control of a motor vehicle while under the influence of alcohol/(an intoxicating substance)]

[leaving the scene of an accident with (personal injury)/death]

[failure to submit to drug and alcohol testing after an accident involving immediate death]

[driving under suspension/revocation]

upon **[Description of Road, Highway, etc.]** on **[Date]** in **[Name of County]** County, Oklahoma.

Notes on Use

This instruction is to be used for a number of crimes in Title 47 involving the use of a motor vehicle, including driving under the influence and being in actual physical control of a motor vehicle.

Committee Comments

The Court of Criminal Appeals has pointed out that section 11-902(A) creates two separate and distinct offenses: driving under the influence, which involves motion; and physical control of a motor vehicle while under the influence of intoxicating alcohol, which does not require proof of motion. *Crane v. State*, 1969 OK CR 267,461 P.2d 986; *Parker v. State*, 1967 OK CR 7, 424 P.2d 997.

2012 SUPPLEMENT

OUJI-CR 6-18

DRIVING A MOTOR VEHICLE

(WHILE UNDER THE INFLUENCE OF ALCOHOL)/(WITH ALCOHOL

CONCENTRATION OF .08 OR MORE) - ELEMENTS

No person may be convicted of driving a motor vehicle **(while under the influence of alcohol)/(with a blood/breath alcohol concentration of .08 or more)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, driving;

Second, **(with a blood/breath alcohol concentration of 0.08 or more)/(while under the influence of alcohol)**;

Third, a motor vehicle;

Fourth, on a **(public road/street/highway/turnpike/place)/(private road/street/alley/lane which provides access to one or more single or multi-family dwellings)** ;

[Fifth, **the blood/breath alcohol test was administered on a sample taken from the defendant (within 2 hours after arrest)/(as soon as practical after the fatality/injury accident).**]

Statutory Authority: 47 O.S. 2011, §§ 11-101, 11-902.

Notes on Use

The Fifth Element should be read only for prosecutions under 47 O.S. 2011, § 11-902(A)(1). Read literally, section 11-902(A)(1) would make it a crime for a person to have a blood or breath alcohol concentration of .08 or more at the time of a test administered within two hours after a person's arrest, even if the arrest occurred long after the person had ceased driving and there was evidence that the person had consumed additional alcohol between the driving and the time of the test. To avoid such a result, the Committee has drafted the instruction to require a nexus between the driving and the excessive blood or breath alcohol concentration. In *Sanders v. State*, 2002 OK CR 42, ¶ 15, 60 P.3d 1048, 1050, the Oklahoma Court of Criminal Appeals held that section 11-902(A)(1) applied in a situation where a defendant is arrested at an accident scene or soon after an accident, but not where the arrest occurs long after the accident.

Driving under the influence of alcohol must be defined if the prosecution is under 47 O.S. 2011, § 11-902(A)(2). *Bernhardt v. State*, 1986 OK CR 76, ¶ 4, 719 P.2d 832, 833 . For the definition of "under the influence," see OUJI-CR 6-35, *infra*. The *Bernhardt* case also held that driving while impaired is a lesser included offense for driving under the influence of alcohol. 1986 OK CR 76, ¶ 3, 719 P.2d at 833.

The instruction on sentencing (see OUJI-CR 10-13 *infra*) should include the sentencing options for alcohol treatment and community services that are provided for in 47 O.S. 2011, § 11-902(A)(1). *See Hicks v. State*, 2003 OK CR 10, ¶ 4, 70 P.3d 882, 883.

2012 SUPPLEMENT

OUJI-CR 6-18A

AGGRAVATED DRIVING UNDER THE INFLUENCE - ELEMENTS

No person may be convicted of aggravated driving a motor vehicle unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, driving;

Second, with a **blood/breath** alcohol concentration of 0.15 or more;

Third, a motor vehicle;

Fourth, on a **(public road/street/highway/turnpike/**

place)/(private road/street/alley/lane which provides access to one or more single or multi family dwellings);

[Fifth, the **blood/breath** alcohol test was administered on a sample taken from the defendant **(within 2 hours after arrest)/(as soon as practical after the fatality/injury accident)**.]

Statutory Authority: 47 O.S. 2021, § 11-902(D).

(2024 Supp.)

OUJI-CR 6-19

DRIVING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING SUBSTANCE - ELEMENTS

No person may be convicted of driving a motor vehicle while under the influence of an intoxicating substance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, driving;

Second, a motor vehicle;

Third, on a **(public road/street/highway/turnpike/place)/(private road/street/alley/lane which provides access to one or more single or multi-family dwellings)**;

Fourth, while under the **(influence of any intoxicating substance other than alcohol)/(combined influence of alcohol and any other intoxicating substance)** which may render a person incapable of safely driving a motor vehicle.

2012 SUPPLEMENT

OUJI-CR 6-20

BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE

WHILE UNDER THE **[COMBINED] INFLUENCE OF**

ALCOHOL/(AN INTOXICATING SUBSTANCE) - ELEMENTS

No person may be convicted of being in actual physical control of a motor vehicle while under the influence of **alcohol/(an intoxicating substance)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, being in actual physical control of a motor vehicle;

Second, on a **(public road/street/highway/turnpike/street/place)/(private road/street/alley/lane which provides access to one or more single or multi-family dwellings)**;

Third, **(while having a blood/breath alcohol concentration of 0.08 or more)/(while under the influence of alcohol)/(while under the [influence of any intoxicating substance other than alcohol]/[combined influence of alcohol and any other intoxicating substance] which may render a person incapable of safely driving a motor vehicle)**;

[Fourth, the **blood/breath** alcohol test was administered within 2 hours after arrest).]

Statutory Authority: 47 O.S. 2011, § 11-902. See also 47 O.S. 2011, § 11-101.

Notes on Use

The Fourth Element should be read only for prosecutions under 47 O.S. 2011, § 11-902(A)(1).

Committee Comments

Although section 11-902(A) uses the language "drive, operate," the Court of Criminal Appeals has indicated that "drive" and "operate" are synonymous. *Bearden v. State*, 1967 OK CR 133, 430 P.2d 844;*Parker v. State*, 1967 OK CR 7, 424 P.2d 997.

It should be emphasized again, however, that the words "actual physical control" are not synonymous with "drive." The Court of Criminal Appeals has stated that, by adding the words "actual physical control," the Legislature intended to apply the law to persons who control a vehicle but who may not have put the vehicle into motion. A Montana case, *State v. Ruona*, 133 Mont. 243, 321 P.2d 615 (1958), involving an identical statute is cited as illustration. In *Ruona*, the defendant was found intoxicated behind the wheel of a vehicle with the motor running, but no evidence could be adduced that the defendant had driven the vehicle. The Oklahoma court indicated that the defendant could not have been convicted of driving while under the influence but could be convicted of being in actual physical control while under the influence. *See also Wofford v. State*, 1987 OK CR 148, 739 P.2d 543 (defendant was sleeping in driver's seat); *Kyle v. State*, 1986 OK CR 117, ¶ 7, 722 P.2d 1218, 1219 (evidence that defendant exited vehicle on the driver's side was sufficient for inference of actual physical control); *Mason v. State*, 1979 OK CR 132, ¶ 6, 603 P.2d 1146, 1147 (defendant was unconscious behind the steering wheel of a vehicle with its engine running); *Hughes v. State*, 1975 OK CR 83, 535 P.2d 1023 (defendant was unconscious behind steering wheel);*Cudjoe v. State*, 521 P.2d 409 (defendant was asleep behind wheel); *Crane v. State*, 1969 OK CR 267, 461 P.2d 986;*Parker v. State*, 1967 OK CR 7, 424 P.2d 997.

OUJI-CR 6-21

BEING INVOLVED IN ACCIDENT WHILE UNDER THE INFLUENCE

OF **ALCOHOL/(AN INTOXICATING SUBSTANCE)** - ELEMENTS

No person may be convicted of being involved in an accident while under the influence of **alcohol/(an intoxicating substance)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, being involved in a personal injury accident;

Second, while driving a motor vehicle;

Third, on a **(public road/street/highway/turnpike/place)/(private road/street/alley/lane which provides access to one or more single or multi-family dwellings)**;

Fourth, **(while having a blood/breath alcohol concentration of 0.08 or more)/(while under the influence of alcohol)/(while under the [influence of any intoxicating substance other than alcohol]/[combined influence of alcohol and any other intoxicating substance] which may render a person incapable of safely driving a motor vehicle)**;

[Fifth, the **blood/breath** alcohol test was administered within 2 hours after arrest).]

Statutory Authority: 47 O.S. 2011, § 11-904(A).

Notes on Use

The Fifth Element should be read only for prosecutions based on having a blood/breath alcohol concentration of 0.08 or more.

2012 SUPPLEMENT

OUJI-CR 6-22

CAUSING ACCIDENT WHILE UNDER THE INFLUENCE

OF **ALCOHOL/(AN INTOXICATING SUBSTANCE)** - ELEMENTS

No person may be convicted of causing an accident while under the influence of **alcohol/(an intoxicating substance)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, causing an accident;

Second, resulting in great bodily injury to another person;

Third, while driving a motor vehicle;

Fourth, on a **(public road/street/highway/turnpike/place/(private road/street/alley/lane which provides access to one or more single or multi-family dwellings)**;

Fifth, **(while having a blood/breath alcohol concentration of 0.08 or more)/(while under the influence of alcohol)/(while under the [influence of any intoxicating substance other than alcohol]/[combined influence of alcohol and any other intoxicating substance] which may render a person incapable of safely driving a motor vehicle)**;

[Sixth, the **blood/breath** alcohol test was administered within 2 hours after arrest).]

Statutory Authority: 47 O.S. 2011, § 11-904(B).

Notes on Use

For the definition of great bodily injury, see OUJI-CR 6-35, *infra*. The Sixth Element should be read only for prosecutions based on having a blood/breath alcohol concentration of 0.08 or more.

2012 SUPPLEMENT

OUJI-CR 6-23

DRIVING A MOTOR VEHICLE WITH IMPAIRED ABILITY - ELEMENTS

No person may be convicted of driving a motor vehicle with impaired ability unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, driving;

Second, a motor vehicle;

Third, with impaired ability;

Fourth, due to **alcohol/(an intoxicating substance)**.

Statutory Authority: 47 O.S. 2011, § 761.

Committee Comments

This instruction is limited to driving a motor vehicle with impaired ability, because 47 O.S. 2011, § 761 does not include being in actual physical control of a motor vehicle. However, if there is evidence that the defendant was driving a motor vehicle although charged only with being in actual physical control of a motor vehicle while under the influence of alcohol or another intoxicating substance, the defendant may be entitled to this instruction as a lesser included offense.

(2013 Supp.)

OUJI-CR 6-24

DRIVING **(UNDER THE INFLUENCE)/(WHILE IMPAIRED)** - CHEMICAL TEST EVIDENCE DEFINED

If you find that a chemical analysis of the defendant's **blood/breath** was performed on a sample taken from the defendant within two hours of **(within 2 hours after arrest) /(as soon as practical after the fatality/injury accident)** , then the results of this analysis may be considered by you as to the issue of whether **(the defendant was under the influence of alcohol)/(the defendant's ability to drive a motor vehicle was impaired)**.

[Use for Driving Under the Influence]

If you are convinced that the amount of alcohol, by weight or volume, in the defendant's blood was eight-hundredths of one percent (0.08%) or greater, then you may find the defendant to have been under the influence of alcohol. If, however, after considering the chemical analysis together with all other evidence in the case, you entertain a reasonable doubt as to whether the defendant was under the influence, then you should find **him/her** not to have been under the influence of alcohol.

[Use for Driving While Impaired]

If you are convinced that the amount of alcohol, by weight or volume, in the defendant's blood was more than five-hundredths of one percent (0.05%), then you may consider this evidence on the issue of whether the defendant's ability to drive a motor vehicle was impaired by alcohol. However, no person may be found to have been under impaired ability solely because of a blood alcohol count above 0.05%. You must find, in addition, and beyond a reasonable doubt, that the person's driving was affected by the consumption of alcohol to the extent that the public health and safety were threatened, or that the person's operation of a motor vehicle violated a State statute or local ordinance.

If you are convinced that the amount of alcohol, by weight or volume, in the defendant's blood was five-hundredths of one percent (0.05%) or less, then you must find the defendant not to have been under the influence of alcohol, unless you find by other competent evidence, and beyond a reasonable doubt, that the **(defendant's ability to drive a motor vehicle was impaired by alcohol)/(defendant was under the influence of alcohol)**.

Statutory Authority: 47 O.S. Supp. 2001, § 756.

Notes on Use

The second paragraph is for prosecutions for driving under the influence and the third paragraph is for prosecutions for driving while impaired.

Committee Comments

Section 756, as amended by the Legislature in 1972, sets forth the percent of alcohol in the blood which is evidence that the person (1) was not under the influence of alcohol; (2) was operating a motor vehicle with impaired ability; or, (3) was under the influence of alcohol. Section 11-902 punishes for the latter possibility, while section 756 creates a crime for the second possibility. Driving with impaired ability is a misdemeanor, although the fine is more harsh for second and subsequent offenses. Section 761 sets forth the punishment for the crime of driving a motor vehicle with impaired ability.

Under the literal terms of 47 O.S. Supp. 2002, § 11-902(A), the blood or breath alcohol concentration test must be administered within two hours after the defendant's arrest. Nevertheless, the Oklahoma Court of Criminal Appeals decided in Sanders v. State, 2002 OK CR 42, ¶¶ 6-7, 60 P.3d 1048, 1051, that this requirement was not applicable in the circumstances where a blood alcohol test was administered within two hours after a fatality accident in which the defendant could have been arrested at the scene, but was not arrested until approximately one month later.

Section 756 uses the word "operate," but in light of *Bearden v. State*, 1967 OK CR 133, 430 P.2d 844 , and *Parker v. State*, 1967 OK CR 7, 424 P.2d 997 , indicating that "drive" and "operate" are synonymous, the Commission has used the word "drive" as an element to promote consistency in language among the various instructions.

The crime created by section 756 is a lesser included offense of the crime created by 47 O.S. Supp. 2002, § 11-902. *Bernhardt v. State*, 1986 OK CR 76, 719 P.2d 832 , 833.

(2005 Supp.)

OUJI-CR 6-25

LEAVING THE SCENE OF AN ACCIDENT

WITH **(PERSONAL INJURY)/DEATH** - ELEMENTS

No person may be convicted of leaving the scene of an accident with **(personal injury)/death** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant drove a vehicle;

Second, involved in an accident;

Third, that resulted in **injury/death** of a person;

Fourth, **willfully/maliciously**;

Fifth, failed to immediately stop **his/her** vehicle **(at the scene of the accident)/ (as close to the accident as possible)** and remain there until:

(A) **he/she** had given **his/her** correct name, address, and the registration number of the vehicle **he/she** was driving and showed **his/her operator's/chauffeur's** license and security verification form to the **(person struck)/(driver or occupant of or person attending the vehicle he collided with)**; and

(B) **he/she** rendered reasonable assistance to any person injured in the accident.

Reasonable assistance may include taking or making arrangements to take the injured person to a physician/surgeon/hospital for **medical/surgical** treatment if **(it was apparent that such treatment was necessary)/(such treatment was requested by the injured person)**.

Statutory Authority: 47 O.S. Supp. 1995, §§ 10-102, 10-102.1, 10-104.

Notes on Use

The trial court should select "injury" in the Third Element for prosecutions under 47 O.S. Supp. 1995, § 10-102 and should select "death" in the Third Element for prosecutions under 47 O.S. Supp. 1995, § 10-102.1.

OUJI-CR 6-26

FAILURE TO SUBMIT TO DRUG AND ALCOHOL TESTING AFTER AN ACCIDENT INVOLVING IMMEDIATE DEATH - ELEMENTS

No person may be convicted of failure to submit to drug and alcohol testing after an accident involving immediate death unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant drove a vehicle;

Second, involved in an accident;

Third, that resulted in immediate death of a person;

Fourth, was cited for a traffic offense;

Fifth, **willfully/maliciously**;

Sixth, refused to submit to drug and alcohol testing requested by a law enforcement officer as soon as practicable after the accident occurred.

Statutory Authority: 47 O.S. Supp. 1995, §§ 10-102.1(B), 10-104(B), 752, 756.

OUJI-CR 6-27

DRIVING UNDER SUSPENSION/REVOCATION - ELEMENTS

No person may be convicted of driving under **suspension/revocation** unless the State has proven beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant drove a motor vehicle upon a public **road/street/highway/ turnpike/(public place)** in Oklahoma;

[Second, while **his/her (driver's/operator's license)/(privilege to drive a motor vehicle)** was **cancelled/denied/suspended/revoked.]**

OR

[Second, while **he/she** was disqualified from driving.]

Statutory Authority: 47 O.S. Supp. 1995, § 6-303(B).

ELUDING/(ATTEMPTING TO ELUDE) A **(PEACE OFFICER)/**

(GAME RANGER) - INTRODUCTION

The defendant is charged with

[eluding/(attempting to elude) a (peace officer)/(game ranger)]

[causing an accident while eluding/(attempting to elude) an officer]

on **[Date]** in **[Name of County]** County, Oklahoma.

ELUDING/(ATTEMPTING TO ELUDE) A **(PEACE OFFICER)/(GAME RANGER)** - ELEMENTS

No person may be convicted of **eluding/(attempting to elude)** a **(peace officer)/(game ranger)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a driver of a motor vehicle;

Second, received a red light and siren from a **(peace officer)/(game ranger)**;

Third, showing the **officer's/ranger**'s vehicle to be an official **police/ sheriff/(highway patrol)/(State game ranger)** vehicle and directing the driver to bring **his/her** vehicle to a stop; and

Fourth, willfully **[eluded the officer/ranger]/[attempted to elude the officer/ ranger (by increasing his/her speed)/(extinguishing his/her lights)/(in any manner)]**.

Statutory Authority: 21 O.S. 1991, § 540A.

Notes on Use

This instruction is for use in misdemeanor prosecutions under 21 O.S. 2001, § 540A(A). OUJI-CR 6-30 is for felony prosecutions under 21 O.S. 2001, § 540A(B and C). "Peace officer" is defined in OUJI-CR 6-35.

Committee Comments

Section 540A of Title 21 was amended in 1981 by adding game rangers as a classification of officials who could be the subjects of evasive action by vehicle drivers. *See Kellogg v. State*, 1988 OK CR 225, 762 P.2d 993 (affirming conviction for eluding game ranger). In addition, the maximum punishment by fine was increased from $1000 to $2000.

The Oklahoma Court of Criminal Appeals affirmed a conviction under section 540A even though the peace officer did not use a siren in *Aldridge v. State*, 1984 OK CR 7, 674 P.2d 553. The officer's patrol vehicle was not equipped with a siren, because it had been recently purchased, and so he flashed his emergency light and honked his horn at the defendant. There was also substantial evidence that the defendant knew that the person requesting her to stop was a peace officer. Under these circumstances, the Court of Criminal Appeals ruled that the prosecution met its burden of proof. Id. at ¶ 4, 674 P.2d at 553.

In *Hayes v. State*, 1977 OK CR 219, 566 P.2d 1172 , the Court of Criminal Appeals held that the fact that the police officer temporarily lost sight of the defendant when the car the defendant was driving disappeared over a hill was insufficient evidence to establish that a change of drivers could have occurred. In the civil case of *State ex rel. Oklahoma Dept. of Public Safety v. Ryan*, 1978 OK CIV APP 47, 591 P.2d 1187, the Court of Appeals held that one violating the provisions of this statute must have acted intentionally and not through negligence. Section 540A contains a specific attempt provision. For this reason, the general attempt statute, 21 O.S. 2001, § 44, is inapplicable. *See Ex parte Smith*, 95 Okl. Cr. 370, 246 P.2d 389 (1952).

(2005 Supp.)

(CAUSING AN ACCIDENT)/(ENDANGERING ANOTHER) WHILE **ELUDING/(ATTEMPTING TO ELUDE)** AN OFFICER - ELEMENTS

No person may be convicted of (**causing an accident)/ (endangering another) while eluding/(attempting to elude)** a **(peace officer)/(game ranger)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a driver of a motor vehicle;

Second, received a red light and siren from a **(peace officer)/ (game ranger)**;

Third, showing the **officer's/ranger**'s vehicle to be an official **police/sheriff/(highway patrol)/(State game ranger)** vehicle and directing the driver to bring **his/her** vehicle to a stop;

Fourth, willfully **[eluded the officer/ranger]/[attempted to elude the officer/ranger (by increasing his/her speed)/ (extinguishing his/her lights)/(in any manner)]**; and,

Fifth, while **eluding/(attempting to elude)** the **officer/ranger**;

[Sixth, the driver caused an accident;

Seventh, that resulted in great bodily injury to another person.]

OR

[Sixth, the driver endangered another person].

Great bodily injury means bodily injury **(that creates a substantial risk of death)/(causes [serious permanent disfigurement]/[protracted loss/ impairment of the function] of a bodily member/organ])**.

Statutory Authority: 21 O.S. 2001, § 540B and C.

Notes on Use

This instruction is for use in felony prosecut/ions under 21 O.S. 2001, § 540A (B and C). OUJI-CR 6-29 is for misdemeanor prosecutions under 21 O.S. 2001, § 540A(A). "Peace officer" is defined in OUJI-CR 6-35. The bracketed definition of great bodily injury should be used only for prosecutions under 21 O.S. 2001, § 540A©).

(2005 Supp.)

OUJI-CR 6-31

RECKLESS DRIVING - INTRODUCTION

The defendant is charged with reckless driving by **[Brief Statement of Facts Allegedly Constituting Violation]** on **[Date]** in **[Name of County]** County, Oklahoma.

Notes on Use

This introductory instruction is meant for use with respect to the misdemeanor crimes created by 47 O.S. 1991, § 11-901.

Committee Comments

The Commission has concluded that no criminal statute exists in Oklahoma that creates a crime denominated "careless driving." Section 11-801 by itself is not a penal statute. Violations of section 11-801 are criminal because of section 11-901, properly denominated "reckless driving," or because of section 11-807, properly denominated "speeding."

OUJI-CR 6-32

RECKLESS DRIVING - ELEMENTS

No person may be convicted of reckless driving unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, driving;

Second, a motor vehicle;

Third, in a careless or wanton manner;

Fourth, **(without regard for the safety of persons or property)/(that violated lawful speed limits)/(that [failed to attain]/exceeded the speed that a careful and prudent person would have considered reasonable and proper having due regard for the traffic, surface, and width of the highway, and other conditions)/(that exceeded the speed that a careful and prudent person would have considered reasonable and proper in order to stop within the assured clear distance ahead)**.

Statutory Authority: 47 O.S. 1991, § 11-901.

Committee Comments

The first and second elements of this misdemeanor present no difficulty and need no explanation. The gravamen of the crime of reckless driving is found in the third and fourth elements.

The fourth element lists four alternatives. Proof of any one of the alternatives is sufficient to permit conviction, if the other three elements of the crime can be shown.

The first alternative, "without regard for the safety of persons or property," restates the statutory language of section 11-901. This language seems to indicate that the defendant must have had a conscious awareness of dangers to the safety of persons or property. In the opinion of the Commission, no such subjective mens rea is required for conviction for the crime of reckless driving. To establish the first alternative, it is necessary to prove only that the acts and conduct of the defendant, as judged by an objective reasonable-and-prudent-person standard, created dangers for the safety of persons or property. *Lamb v. State*, 70 Okl. Cr. 236, 105 P.2d 799 (1940).

The three other alternatives of the fourth element list violations of the conditions of 47 O.S. 1991, § 11-801. Subdivision (a) of section 11-801 has a general rule concerning the expected appropriate conduct of drivers with regard to the speed at which they should drive. The provisions of the general rules are reflected in the last two alternatives of the fourth element. The remaining subdivisions of section 11-801 set specific speed limits for various situations and types of vehicles. Violation of speed limits is the second alternative. The Commission has stated the violations of section 11-801, rather than using the statutory language of section 11-901, in order to avoid the necessity for a separate definitional instruction for the violations of section 11-801.

It should be stressed that proof that the defendant has driven in a manner which disregards the safety of persons or property, or which violates the conditions of section 11-801, is not enough by itself to convict the defendant of the crime of reckless driving. The State must also prove that the defendant was driving in the "careless or wanton manner" of the third element. For example, the defendant must not only be speeding, but also must be speeding to such an extent that his conduct would constitute culpable negligence. A "careless or wanton manner" signifies more than simply a violation of the speeding laws; it signifies culpable negligence. *Chappell v. State*,

462 P.2d 325 (Okl. Cr. 1969); *Scott v. State*, 71 Okl. Cr. 54, 108 P.2d 189 (1941).

The Commission has decided that the best way to understand the coverage of the reckless-driving crime of section 11-901 was to compare the facts of cases in which the Court of Criminal Appeals has indicated that a reckless-driving conviction is proper with the facts of cases in which the Court of Criminal Appeals has reversed a reckless driving conviction for insufficient evidence. Conviction proper: *Wolf v. State*, 375 P.2d 283 (Okl. Cr. 1966) (intoxicated driver forcing other drivers off the road); *Matchen v. State*, 349 P.2d 28 (Okl. Cr. 1960) (speeding at 100-105 m.p.h.); *Hooper v. State*, 348 P.2d 191 (Okl. Cr. 1959) (driving up behind cars then skidding sideways and passing in face of oncoming traffic, thereby forcing other cars off the road); *Sullivan v. State*, 333 P.2d 591 (Okl. Cr. 1958) ("three beers" and 80-85 in a 55 m.p.h. zone, resulting in accident); *Allen v. State*, 273 P.2d 152 (Okl. Cr. 1954) ("three beers" and accident); *Hoover v. State*, 94 Okl. Cr. 227, 233 P.2d 327 (1951) (passing in the face of oncoming traffic, causing accident). Conviction not proper: *Herman v. City of Oklahoma City*, 501 P.2d 1111, 1112 (Okl. Cr. 1972) (no evidence of speed of vehicle); *Scott*, *supra*, (backing out of driveway into road and a collision occurred).

OUJI-CR 6-33

SPEEDING - INTRODUCTION

The defendant is charged with speeding by **[Brief Statement of Facts Allegedly Constituting Violation]** on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 6-34

SPEEDING - ELEMENTS

No person may be convicted of speeding unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, driving;

Second, a motor vehicle;

Third, **(in violation of lawful speed limits)/(in a manner that [failed to attain]/exceeded the speed that a careful and prudent person would have considered reasonable and proper having due regard for the traffic, surface, and width of the highway, and other conditions)/(in a manner that exceeded the speed that a careful and prudent person would have considered reasonable and proper in order to stop within the assured clear distance ahead)**.

Statutory Authority: 47 O.S. 1991, §§ 11-801, 11-807.

Committee Comments

Section 11-807 creates a misdemeanor crime when the conditions of section 11-801, relating to speed limits, are violated. The third element sets forth the possible violations of section 11-801 in the same language used in the fourth element of the reckless-driving instruction. The Commission has stated the violations of section 11-801, rather than using the statutory language of section 11-807, in order to avoid the necessity for a separate definitional instruction for the violations of section 11-801.

Although both sections 11-807 and 11-901 refer to violations of section 11-801, the crime of speeding is distinguishable from the crime of reckless driving. To convict for the crime of speeding, it is necessary to prove only that the defendant was in violation of the conditions of section 11-801. Nothing more needs to be proved by the prosecutor. It should be recalled that, for the crime of reckless driving, in addition to the violations of section 11-801, it is necessary to prove that the defendant drove in a "careless or wanton manner." Hence, the crime of reckless driving requires more blameworthy conduct by the defendant than does the crime of speeding.

OUJI-CR 6-35

VEHICLE RELATED OFFENSES - DEFINITIONS

Actual Physical Control - Directing influence, domination or regulation of any motor vehicle, whether or not the motor vehicle is being driven or is in motion.

References: Crane v. State, 461 P.2d 986 (Okl. Cr. 1969); Bearden v. State, 430 P.2d 884 (Okl. Cr. 1967); Parker v. State, 424 P.2d 997 (Okl. Cr. 1967).

Careless or Wanton Manner - In disregard of an unreasonable risk of danger to another, when it is known or should be known that harm is highly probable to result.

References: Carter v. State, 376 P.2d 351 (Okl. Cr. 1962); Black's Law Dictionary 1419 (5th ed. 1979).

Driving - Operating a motor vehicle while it is in motion.

Reference: Parker v. State, 424 P.2d 997 (Okl. Cr. 1967).

Elude - To avoid, escape from, or evade, as by cunning, daring or artifice.

Reference: The American Heritage Dictionary 425 (1969).

Great Bodily Injury - Bodily injury which **(creates a substantial risk of death)/ (causes serious, permanent disfigurement)/(causes prolonged loss/impairment of the function of any bodily member/organ)**.

Reference: 47 O.S. 2001, § 11-904(B)(2). .

Impaired Ability - See OUJI-CR 6-24, .

Reference: 47 O.S. Supp. 2001, § 756. .

Intoxicating Substance -- **[You are instructed that [Specify Controlled Dangerous Substance listed in 63 O.S. Supp. 2001, § 2-101 et seq.] is an intoxicating substance.]**

[You are instructed that an intoxicating substance is any substance, other than alcohol, which is capable of being ingested/inhaled/injected/absorbed into the human body and is capable of adversely affecting (the central nervous system)/ vision/hearing/(any sensory/motor functions).]

Reference: 47 O.S. Supp. 2001, § 1-140.1.

Notes on Use

The first paragraph should be used if the intoxicating substance is a controlled dangerous substance, and the second paragraph should be used for any other intoxicating substance.

Motor Vehicle - Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks. Unless a title or registration has been issued, vehicles moved solely by animal power, implements of husbandry, special mobilized machinery, or self-propelled wheel chairs or tricycles for invalids are also excluded.

Reference: 47 O.S. 2001, §§ 1-186, 4-101.

Public Parking Lot - A parking lot on a right-of-way that is **(dedicated to public use)/(owned by the State of Oklahoma or a political subdivision of the State of Oklahoma)**.

References: 47 O.S. 2001, § 1-142.*Houston v. State*, 1980 OK CR 63, ¶ 5, 615 P.2d 305, 306;*cf. Justus v. State ex rel. Dept. of Public Safety*, 2002 OK 46, ¶¶ 7-8, 61 P.3d 888, 890.

Peace Officer - Any sheriff, policeman, or any other law enforcement officer whose duity it is to enforce and preserve the public peace.

Reference: 21 O.S. Supp. 2001, § 99.

Property - Property includes:

(a) Real Property - Every estate, interest, and right in lands, including structures or objects permanently attached to the land;

(b) Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

References: 21 O.S. 2001, §§ 102, 103, 104.

Under the Influence - Condition in which **alcohol/(an intoxicating substance)/(a combination of alcohol and another/other intoxicating substance(s)) has/have** so far affected the nervous system, brain, or muscles of the driver as to hinder, to an appreciable degree, **his/her** ability to operate a motor vehicle in a manner that an ordinary prudent and cautious person, if in full possession of **his/her** faculties, using reasonable care, would operate or drive under like conditions.

References: Stanfield v. State, 1978 OK CR 34, 576 P.2d 772; 47 O.S. Supp. 2001, § 11-902.

(2003 Supp.)

OUJI-CR 6-36

UNLAWFUL POSSESSION OF A FIREARM - INTRODUCTION

The defendant is charged with

[unlawful possession of a firearm]

[transporting a loaded firearm]

[possessing a firearm while committing/(attempting to commit) a felony)]

[possessing a firearm after conviction of a felony]

on **[Date]** in **[Name of County]** County, Oklahoma.

(2000 Supp.)

OUJI-CR 6-37

UNLAWFUL POSSESSION OF A FIREARM - ELEMENTS

No person may be convicted of unlawful possession of a firearm unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowing;

Second, willful;

Third, **(possession of)/(having under one's immediate control)**;

Fourth, a **[Specify Type of Firearm]**;

Fifth, **[Specify Grounds for Unlawfulness of Possession, e.g., carrying a concealed pistol without a valid handgun license]**.

Notes on Use

The Fifth Element is not necessary for prosecutions of certain types of weapons (*e.g.*, sawed off shotguns and rifles, 21 O.S. Supp. 1999, § 1289.18) whose possession is unlawful in itself. For prosecutions where other grounds (*e.g.*, possession of a firearm by a convicted felon, 21 O.S. Supp. 1999, § 1283; possession of firearm on school property, 21 O.S. Supp. 1999, § 1280.1; carrying a concealed pistol without a handgun license, 21 O.S. Supp. 1999, § 1272) are required for possession of the firearm to be unlawful, these must be included in the Fifth Element.

For definitions of knowing and willful, see OUJI-CR 6-16, *supra*.

Committee Comments

The Oklahoma Self-Defense Act, 21 O.S. Supp. 1999, §§ 1290.1-1290.25, was adopted in 1995. It authorizes the issuance of licenses to carry concealed handguns for self-defense. Section 1290.25 provides that the "Oklahoma Self-Defense Act shall be liberally construed to carry out the constitutional right to bear arms for self-defense and self-protection." In addition to adopting the Oklahoma Self-Defense Act, the Legislature also extensively amended the Oklahoma Firearms Act of 1971, 21 O.S. Supp. 1999, §§ 1289.1-1289.17, in 1995.

The Oklahoma Court of Criminal Appeals held in *Williams v. State*, 1977 OK CR 119, ¶ 11, 565 P.2d 46, 49, *overruled on other grounds*, *Chapple v. State*, 1993 OK CR 38, ¶ 18, 866 P.2d 1213, 1217, *Williams v. State*, 1990 OK CR 39, ¶ 6, 794 P.2d 759, 763, and *Lenion v. State*, 1988 OK CR 230, ¶ 5, 763 P.2d 381, 383, that guilty intent and knowledge were essential elements of the crime of carrying a firearm after former conviction of a felony and that the terms "knowingly" and "willfully" should be explained in the jury instructions. *See also Dear v. State*, 1989 OK CR 18, ¶ 6, 773 P.2d 760, 761 (where the defendant offers evidence of lack of knowledge of a firearm and relies on it as a defense, an instruction covering it must be given to the jury if requested by the defendant).

(2000 Supp.)

OUJI-CR 6-37A

TRANSPORTING A LOADED FIREARM - ELEMENTS

No person may be convicted of transporting a loaded firearm unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, willfully;

Third, transporting;

Fourth, a **[Specify Type of Firearm]**;

Fifth, with a **(loaded clip/magazine)/(bullet/shell loaded in its chamber)**;

Sixth, in the **interior/(locked exterior compartment)/trunk**;

Seventh, of a motor vehicle;

Eighth, on a public **highway/roadway**.

Statutory Authority: 21 O.S. Supp. 2000, § 1289.13.

Notes on Use

It is not unlawful to transport a rifle or shotgun in the trunk of an automobile or an exterior locked compartment of a truck if there is not a round loaded in the chamber. 21 O.S. Supp. 2000, § 1289.13. Accordingly, the Fifth and Sixth Elements must specify where the firearm was located in the vehicle and whether the firearm had a bullet or shell loaded in its chamber.

(2000 Supp.)

OUJI-CR 6-38

POSSESSING A WEAPON WHILE COMMITTING OR ATTEMPTING TO COMMIT A FELONY - ELEMENTS

No person may be convicted of possessing a weapon while committing a felony unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowing;

Second, willful;

Third, possession of;

Fourth, **a/an pistol/shotgun/rifle/(Specify Offensive Weapon Listed in 21 O.S. Supp. 1996, § 1287)/(offensive weapon)**;

Fifth, while **committing/(attempting to commit)** the felony of **[Specify Underlying Felony]**;

Sixth, the elements of the felony of **[Specify Underlying Felony]** are: **[Specify Elements]**;

Seventh, the possession of the weapon was connected to the commission of or attempt to commit the felony.

Among the factors you may consider in determining whether the possession of the weapon was connected to the felony are: 1) the weapon was used to actually facilitate the commission of the felony; 2) the weapon was possessed or strategically located for use during the commission of the felony; 3) the weapon was intended to be used if a contingency arose or to make an escape; and 4) the weapon was to be used either offensively or defensively in a manner which would constitute a threat of harm.

Statutory Authority: 21 O.S. Supp. 1996, § 1287.

Notes on Use

If the offensive weapon is not specifically listed in 21 O.S. Supp. 1996, § 1287, the determination of whether the implement used by the defendant was an "offensive weapon" is a question for the jury.

Committee Comments

In *Pebworth v. State*, 855 P.2d 605, 607 (Okl. Cr. 1993), the Oklahoma Court of Criminal Appeals required a nexus between the possession and the felony. The factors listed in the last paragraph are taken from the *Pebworth* decision.

OUJI-CR 6-39

POSSESSING A FIREARM AFTER A FELONY CONVICTION - ELEMENTS

No person may be convicted of possessing a firearm after conviction of a felony unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly and willfully;

Second, **possessing/(having under one's immediate control)/(having in any vehicle one operates)/(having in any vehicle in which one is riding as a passenger)/(having at the place where the defendant resides)**;

Third, any **pistol/(imitation/homemade pistol)/(machine gun)/(sawed-off shotgun/rifle)/(dangerous/deadly firearm)**;

Fourth, the defendant was convicted of a felony by the **[Name of Court]** Court of **[Name of Jurisdiction]** on **[Date]**.

Statutory Authority: 21 O.S. Supp. 2005, § 1283.

Committee Comments

Section 1283 was amended by the Legislature in 1981 to change the crime from that of carrying a firearm to one of possessing a firearm. The language of the statute now reads "to have in his possession or under his or her immediate control...." The elements of this crime have been changed accordingly. It is the opinion of the Commission that this amendment prohibits a felon from knowingly and wilfully possessing firearms.

Section 1283, criminalizing the possession of designated firearms by persons adjudged guilty of a felony, has withstood numerous constitutional attacks based on due process and equal protection grounds.

Roberson v. State, 1972 OK CR 278, 502 P.2d 351; *Brown v. State*, 1969 OK CR 159, 456 P.2d 604; *Davis v. State*, 1962 OK CR 155, 377 P.2d 266. The prohibition extends to the possession of a specified firearm in one's own home. *Roark v. State*, 1970 OK CR 3, 465 P.2d 480. As long as the firearm is in a vehicle operated by the defendant, the ownership of the vehicle is immaterial. *Jones v. State*, 1978 OK CR 92, 584 P.2d 224. The Court of Criminal Appeals has articulated its position with respect to the constitutionality of section 1283 as follows:

> We not only do not believe provisions of ... § 1283 are unconstitutional, but to the contrary are of the opinion that it is a protective measure, beneficial to society. It is designed to prevent people of demonstrated irresponsibility from possessing instruments of death, or as device [sic] of aggressive law violation.

Renfro v. State, 1962 OK CR 58, ¶ 20, 372 P.2d 45, 50.

In several early cases, the court held, with little discussion, that former conviction of a felony is part of the substantive evidence that the State is required to demonstrate in order to establish the elements of the crime charged. Thus, a one-stage proceeding was deemed appropriate. *Brown v. State*, 1969 OK CR 159, 456 P.2d 604; *Anderson v. State*, 1963 OK CR 52, 381 P.2d 892. However, the court subsequently

established the rule that any reference whatsoever to the defendant's prior conviction, whether by way of prosecutorial allegation or by reading the language of the information, constituted reversible error. *Berry v. State*, 1970 OK CR 89, 476 P.2d 390, *overruled*, *Chapple v. State*, 1993 OK CR 38, ¶ 18, 866 P.2d 1213, 1217. More recently, though, the Oklahoma Court of Criminal Appeals overruled a number of prior cases and held in *Chapple v. State*, 1993 OK CR 28, ¶ 17, 866 P.2d 1213, 1216-17, that if "a defendant is charged with one count and a prior conviction is an element of the crime charged, the prior conviction shall be introduced in the guilt stage." The court also held that bifurcation is required when a defendant is charged with multiple counts, one or more of which require a prior conviction as an element of the crime, and one or more of which do not; the court prescribed that the counts which contain an element of prior conviction shall be tried to guilt or innocence and punishment in the second stage. *Id* at ¶ 18, 866 P.2d at 1217.

The Oklahoma Firearms and Oklahoma Self-Defense Acts, 21 O.S. 2001 & Supp. 2005, §§ 1289.1-1289.17, 1290.1-1290.25, specifically permit the carrying of firearms in many circumstances; thus, the fact of a prior felony conviction must be pleaded and proved during a one-stage proceeding when the defendant is tried for unlawful possession of a firearm after a felony conviction. *Prock v. State*, 1975 OK CR 213, ¶¶ 15-16, 542 P.2d 522, 525; *Marr v. State*, 1973 OK CR 342, ¶ 5, 513 P.2d 324, 326, *overruled on other grounds*, *Chapple v. State*, 1993 OK CR 38, ¶ 18, 866 P.2d 1213, 1217, and *Williams v. State*, 1990 OK CR 39, ¶ 6, 794 P.2d 759, 762.

The requirements that a dangerous or deadly firearm must be easily concealed was removed from section 1283 in 2005. 2005 Okla. Sess. Laws ch. 190 § 2. Possession of a carbon dioxide gas-powered air pistol is not prohibited under the statute, because it is neither "a firearm" "nor dangerous or deadly." *Thompson v. State*, 1971 OK CR 328, ¶¶ 13-14, 488 P.2d 944, 947-48.

2006 SUPPLEMENT

OUJI-CR 6-39A

POSSESSION OF A FIREARM/WEAPON BY A CHILD-ELEMENTS

No child may be found delinquent for committing the offense of possession of a firearm/weapon by a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowing;

Second, willful;

Third, possession of;

Fourth, a **[Specify Type of Firearm or Weapon in 21 O.S. Supp. 2016, § 1272].**

_____

Statutory Authority: 21 O.S. Supp. 2016, § 1273(C).

(2017 Supp.)

OUJI-CR 6-39B

POSSESSION OF A FIREARM/WEAPON BY A CHILD

- DEFENSE

The defendant has raised the defense that **he/she** was in the possession of a firearm that was used for participation in **[Specify Activity Listed in 21 O.S. Supp. 2016, § 1273(C)]**. It is the burden of the State to prove beyond a reasonable doubt that the defendant was in the possession of a firearm that was not used for participation in **[Specify Activity Listed in 21 O.S. Supp. 2016, § 1273(C)]**.

_____
Statutory Authority: 21 O.S. Supp. 2016, § 1273(C).

(2017 Supp.)

OUJI-CR 6-40

POSSESSING A FIREARM AFTER A FELONY CONVICTION -

DEFENSE OF LACK OF KNOWLEDGE

The defendant has presented evidence that **he/she** had no knowledge of the presence of a firearm **(under his/her immediate control)/(in the vehicle which he/she operated)/(in the vehicle in which he/she was a passenger)**. The question of whether the defendant knew of the presence of the firearm is a question of fact to be determined by the jury. Where there is a conflict in the evidence, it is the exclusive function of the jurors to weigh the evidence and determine the defendant's guilt or innocence. In determining whether the defendant had knowledge of the presence of the firearm you may consider circumstantial evidence.

Committee Comments

The literal terms of section 1283 encompass neither criminal intent nor knowledge of the presence of the firearm. It is settled beyond doubt that the statute does not intend to impose strict liability on former felons who are detected in the presence of a firearm. Rather, the mens rea elements of willfullness and knowledge are integral components; the State must demonstrate that the defendant was cognizant of the presence of the firearm and willfully performed conduct forbidden by the statute regardless of that knowledge, and the jury must be so instructed. *Williams v. State*, 565 P.2d 46, 49 (Okl. Cr. 1977), *overruled on other grounds*, *Chapple v. State*, 866 P.2d 1213, 1217 (Okl.Cr. 1993), *Williams v. State*, 794 P.2d 759, 763 (Okl.Cr. 1990), and *Lenion v. State*, 763 P.2d 381, 383 (Okl.Cr. 1988); *Rodgers v. State*, 517 P.2d 1138 (Okl. Cr. 1974); *Ware v. State*, 497 P.2d 775 (Okl. Cr. 1972); *Sessions v. State*, 494 P.2d 351 (Okl. Cr. 1972); *Thompson v. State*, 488 P.2d 944, 947 (Okl. Cr. 1971), *overruled on other grounds*, *Dolph v. State*, 520 P.2d 378, 380-81 (Okl. Cr. 1974). Thus, the elements of willfullness and knowledge are incorporated in the elemental instructions.

The prosecution's burden was stated by the court as follows:

> It is not necessary that the State prove that the defendant had possession of the gun with a specific intent to go to do an unlawful act but rather the State must prove that the defendant had a previous conviction of a felony and that the defendant carried the pistol on his person.

Sessions v. State, *supra*, 494 P.2d, at 354.

Where the defendant presents evidence demonstrating the absence of requisite cognizance, however slight, the jurors should be instructed with respect to this defense upon proper request from the defendant.

OUJI-CR 6-41

POINTING A FIREARM - INTRODUCTION

The defendant is charged with

[pointing a firearm at (Person at Whom Firearm Allegedly Pointed)]

[reckless conduct with a firearm]

on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 6-42

POINTING A FIREARM - ELEMENTS

No person may be convicted of pointing a firearm unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, pointing a **shotgun/rifle/pistol/(deadly weapon)**, whether loaded or unloaded;

Third, at any **person(s)**;

Fourth, without lawful cause;

Fifth, **(for the purpose of threatening)/(with the intention of discharging the firearm)/(with any malice)/(for any purpose of injuring, either through physical injury or mental or emotional intimidation)/(for purposes of whimsy/humor/[a prank]/(in anger or otherwise)**.

OUJI-CR 6-43

POINTING A FIREARM - LAWFUL CAUSE DEFINED

"Lawful cause" includes the pointing of shotguns, rifles, or pistols **(by [law enforcement authorities]/[members of the State Military Forces in the form of the Oklahoma Army/Air National Guard]/[members of the Federal Military Reserve and active military components] in the performance of their duties)/(by any federal government law enforcement officer in the performance of his/her duty)/ (in the performance of a play [on stage]/[at a rodeo]/[on television]/[on film])/(in defense of one's person/home/property)**.

Statutory Authority: 21 O.S. Supp. 1995, § 1289.16.

Committee Comments

Although this statute, prohibiting the deliberate menacing of persons with firearms, is relatively self-explanatory, the Commission has found no cases construing the elements which comprise the offense it defines. Since it is not difficult to envision a deliberate or willful pointing of a firearm which is within the bounds of the law within statutory terms, the Commission has incorporated both "willfully" and "without lawful cause" as elements in the instruction.

Where the proof in the case so warrants, the jury should be instructed with respect to the lesser included offense of reckless conduct, 21 O.S. Supp. 1995, § 1289.11. *Gatlin v. State*, 553 P.2d 204 (Okl. Cr. 1976).

OUJI-CR 6-44

RECKLESS CONDUCT WITH A FIREARM - ELEMENTS

No person can be convicted of reckless conduct with a firearm unless the State proves each element of the offense to your satisfaction, beyond a reasonable doubt. These elements are:

First, the defendant engaged in conduct with a loaded **shotgun/rifle/pistol**;

Second, which created a situation of unreasonable risk and probability of death or great bodily harm to another;

Third, and demonstrated a conscious disregard for the safety of another person.

Statutory Authority: 21 O.S. Supp. 1995, § 1289.11.

Committee Comments

The Oklahoma Court of Criminal Appeals held in *Witty v. State*, 710 P.2d 121, 123 (Okl. Cr. 1985), that in order for a person to be guilty of reckless conduct with a firearm, the firearm must be loaded.

The Committee concluded that there had to be a nexus between the weapon and the reckless conduct, and therefore, it has drafted the instruction to reflect this element, which is not clearly stated in the statute.

OUJI-CR 6-44A

DISCHARGING A FIREARM AT/INTO A BUILDING

No person can be convicted of discharging a firearm **at/into** a building unless the State proves each element of the offense to your satisfaction, beyond a reasonable doubt. These elements are:

First, the defendant **willfully/intentionally** discharged;

Second, a **firearm/(deadly weapon);**

Third, **at/into** a **dwelling/(building used for public/business purposes).**

Statutory Authority: 21 O.S. 2021, § 1289.17A.

(2024 Supp.)

WEAPONS OFFENSES - DEFINITIONS

Firearm - Weapon from which a shot or projectile is discharged by force of a chemical explosive such as gunpowder. An airgun, such as a carbon dioxide gas-powered air pistol, is not a firearm within the meaning of this definition.

Reference: Jones v. State, 899 P.2d 635, 651 (Okl. Cr. 1995); Thompson v. State, 488 P.2d 944 (Okl. Cr. 1971), overruled on other grounds, 520 P.2d 381 (Okl. Cr. 1974).

Knowingly - Personally aware of the facts.

Reference: 21 O.S. 1991, § 96; Jones v. State, 899 P.2d 635, 651 (Okl. Cr. 1995).

Malice - A wish to vex, annoy, or injure another person.

Reference: 21 O.S. 1991, § 95.

Offensive Weapon - Any implement likely to produce death, bodily harm, or fear of death or bodily harm in the manner it is used or attempted to be used.

Pistol - Any firearm capable of discharging a projectile composed of any material which may reasonably be expected to be able to cause lethal injury, with a barrel or barrels less than sixteen inches in length and using either gunpowder, gas, or means of rocket propulsion, but not including flare guns, underwater fishing guns, or blank pistols.

Reference: 21 O.S. Supp. 1995, § 1289.3; Jones v. State, 899 P.2d 635, 651 (Okl. Cr. 1995).

Possessing - Having actual physical custody, or knowledge of the weapon's presence, as well as power and intent to control its use or disposition.

Reference: Jones v. State, 899 P.2d 635, 651 (Okl. Cr. 1995).

Sawed-off Rifle - Any firearm capable of discharging single projectiles composed of any material which may reasonably be expected to be able to cause lethal injury, using either gunpowder, gas or any means of rocket propulsion, designed with a barrel or barrels more than sixteen inches in length which have been reduced to less than sixteen inches in length and an overall length less than twenty-six inches, including the stock portion.

References: Price v. State, 532 P.2d 851 (Okl. Cr. 1975); 21 O.S. 1991 & Supp. 1995, §§ 1289.4, 1289.18.

Sawed-off Shotgun - Any firearm capable of discharging a series of projectiles of any material which may reasonably be expected to be able to cause lethal injury, using either gunpowder, gas, or any means of rocket propulsion, designed with a barrel more than eighteen inches in length which has been reduced to less than eighteen inches in length.

References: Price v. State, 532 P.2d 851 (Okl. Cr. 1975); 21 O.S. 1991 & Supp. 1995, §§ 1289.5, 1289.18.

Willful - Purposeful. Willful does not require any intent to violate the law, or injure another, or to acquire any advantage.

Reference: 21 O.S. 1991, § 92; Jones v. State, 899 P.2d 635, 651 (Okl. Cr. 1995).

OUJI-CR 6-46

RESISTING A PEACE OR EXECUTIVE OFFICER - INTRODUCTION

The defendant is charged with **resisting/obstructing a/an peace/ executive** officer on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 6-47

RESISTING **A/AN PEACE/EXECUTIVE** OFFICER - ELEMENTS

No person may be convicted of resisting **a/an peace/executive** officer unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, by the use of **force/violence**;

Third, resisting;

Fourth, **a/an peace/executive** officer;

Fifth, in the performance of **his/her** official duties.

Statutory Authority: 21 O.S. 1991, § 268.

Committee Comments

The language of section 268 of Title 21 uses only "executive officer" in defining those persons included within its protection. The Commission has used both "peace officer" and "executive officer" to indicate the victims included within the protection of this statute because all appellate cases found concerning the statute have to do with resisting peace officers. Normally, if one resists an executive officer with force and violence, that resistance will be against a peace officer. If the victim is an executive officer other than a peace officer, the alternate, "an executive officer," should be given as the fourth element.

Under the second element, the State, in order to sustain this charge against a defendant, must show some act of aggression by the defendant from which the court and jury can reasonably infer forcible resistance to, or interference with, an executive officer. *Reams v. State*, 551 P.2d 1168 (Okl. Cr. 1976); *Cummins v. State*, 6 Okl. Cr. 180, 117 P. 1099 (1911).

The principal difficulty found in the cases interpreting this statute has to do with the right to resist an unlawful arrest. Under 22 O.S. Supp. 1995, § 196, a peace officer is authorized to arrest without a warrant in a number of circumstances. These include when a misdemeanor is committed or attempted in the officer's presence, the officer has probable cause to believe that a person under the influence of alcohol or an intoxicating substance was driving or in actual physical control of a motor vehicle involved in an accident, an officer has probable cause to believe a person has committed an act of domestic violence within the past four hours, or an officer is acting on a violation of a protective order. If a peace officer lacks authority to to arrest a person without an arrest warrant and attempts to do so, the officer is a trespasser, and the person sought to be arrested may resist. *Davis v. State*, 53 Okl. Cr. 411, 12 P.2d 555 (1932). *See also Sandersfield v. State*, 568 P.2d 313 (Okl. Cr. 1977); *Morrison v. State*, 529 P.2d 518 (Okl. Cr. 1974); *Carter v. State*, 507 P.2d 932, 933-34 (Okl. Cr. 1973); *Walters v. State*, 403 P.2d 267 (Okl. Cr. 1965).

A person may use only reasonable force in resisting an unlawful arrest. In *Davis*, *supra*, the Court of Criminal Appeals stated:

> The right to resist an unlawful arrest is limited and varies with the circumstances. If the official character of the officer is known to the person sought to be arrested, or if the officer informs him of his official character and his reason for the arrest, and the person sought to be arrested has no reason to apprehend any treatment other than detention, he is not justified in the use of a deadly

> weapon in resisting the arrest.

53 Okl. Cr., at 418, 12 P.2d, at 577.

A recent case has given a slightly different view to the subject of resisting an arrest. In *Ajeani v. State*, 610 P.2d 820 (Okl. Cr. 1980), the defendant was arrested and charged with breach of the peace and public intoxication. The defendant resisted the officer in the officer's efforts to make the arrest. As a result, the defendant was also charged with resisting an officer and with assault and battery upon a police officer. The defendant was acquitted of the public-intoxication and breach of the peace charges. He was convicted for resisting an officer and for assault and battery upon a police officer.

On appeal, the defendant claimed that, since he had been acquitted of the charges forming the basis for his arrest, no public offense had in fact been committed in the officer's presence and his arrest was unlawful. As a result, he claimed that he was lawfully resisting an unlawful arrest. Judge Bussey, in writing for a divided court, stated:

> We hold that an arrest for a misdemeanor, without a warrant, where the arresting officer has probable cause, based on information coming to his senses or his personal observation at the time, to believe that a misdemeanor or other public offense is being committed in his presence by the arrestee, is not unlawful, even though arrestee is subsequently found innocent of the charges.

Id. at 822.

It would appear that, if the officer's mistake is honest and reasonable, the arrest is lawful. The court did state, however, that mere suspicion or subterfuge would not justify a warrantless misdemeanor arrest and that information supplied by a third person would not suffice.

In *Ajeani*, the Court of Criminal Appeals also held that it was improper under 21 O.S. 1991, § 11, to charge a defendant both with resisting an officer and with assault and battery upon a police officer for the same conduct by the defendant, occurring during the same transaction.

OUJI-CR 6-48

OBSTRUCTING AN OFFICER IN THE PERFORMANCE OF **HIS/HER** OFFICIAL DUTIES - ELEMENTS

No person may be convicted of obstructing an officer in the performance of **his/her** official duties unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **delayed/obstructed**;

Third, a **[Specify Public Officer]**;

Fourth, known by the defendant to be a **[Specify Public Officer]**;

Fifth, in the discharge of any duty of **his/her** office.

[A person does not have to use physical force to be guilty of obstructing an officer in the performance of his/her official duties.]

Statutory Authority: 21 O.S. 1991, § 540.

Notes on Use

The last sentence is not necessary if the defendant used physical force.

Committee Comments

In *Trent v. State*, 777 P.2d 401, 402 (Okl. Cr. 1989), the Oklahoma Court of Criminal Appeals expressly overruled *Ratcliff v. State*, 12 Okl. Cr. 448, 158 P. 293 (1916), and held that words alone may suffice to support a conviction for obstructing an officer.

RESISTING A PEACE OR EXECUTIVE OFFICER - DEFINITIONS

Executive Officer - An officer in the executive branch of government.

Reference: Spivey v. State, 69 Okl. Cr. 397, 104 P.2d 263 (1940).

Force - Act of aggression by one in resistance of interference with an officer.

References: Reams v. State, 551 P.2d 1168 (Okl. Cr. 1976); Cummins v. State, 6 Okl. Cr. 180, 117 P. 1099 (1911).

Knowingly - Personally aware of the facts.

Reference: 21 O.S. 1991, § 96.

Resisting - Opposing actively; withstanding; to be firm against proposed action.

Reference: American Heritage Dictionary 1106 (1969).

Violence - Physical force exerted for the purpose of damaging or abusing.

Reference: American Heritage Dictionary 1431 (1969).

OUJI-CR 6-50

ESCAPE FROM LAWFUL CUSTODY - INTRODUCTION

The defendant is charged with

[escape/(attempted escape) from a peace officer]

[(escape from)/(unauthorized entry) a penal institution]

[(possession of)/bringing contraband in/into a prison/jail]

[jumping bail]

on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 6-51

ESCAPE FROM A PEACE OFFICER - ELEMENTS

No person may be convicted of escape from a peace officer unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, escape;

Second, from a peace officer;

Third, after being lawfully **arrested/detained** by such peace officer.

(2000 Supp.)

OUJI-CR 6-52

ATTEMPTED ESCAPE FROM A PEACE OFFICER - ELEMENTS

No person may be convicted of attempted escape from a peace officer unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, attempting to escape;

Second, from a peace officer;

Third, after being lawfully **arrested/detained** by such peace officer.

Statutory Authority: 21 O.S. 1991, § 444.

Committee Comments

Section 444 of Title 21 was enacted by the Legislature in 1981, and became effective on October 1, 1981. One of the apparent purposes of the statute was to fill gaps in the law of escape.

A problem with this statute occurs in relation to 21 O.S. 1991, § 701.7(B). One of the grounds for charging a defendant with murder in the first degree is for a killing occurring during an "escape from lawful custody." Escapes from lawful arrest or lawful detention did not fall within the "escape from lawful custody provision" of 21 O.S. 1991, § 701.7(B), prior to the effective date of section 444 on October 1, 1981.

The penalties specified under 21 O.S. 1991, § 444, vary depending upon the basis for the arrest. A defendant, who is arrested for a misdemeanor and escapes, may be guilty of a misdemeanor, and a defendant, who is arrested for a felony and escapes, may be guilty of a felony. Nevertheless, proof of a felony or misdemeanor charge is not necessary for a conviction under section 444. *Tyler v. State*, 1989 OK CR 31, ¶¶ 3-5, 777 P.2d 1352, 1353.

The variation in punishment under section 444 is important in reference to a charge of murder in the first degree under section 701.7(B). If a defendant kills another while escaping from a misdemeanor arrest, the Commission has concluded that a murder-in-the-first-degree charge would be improper. Section 701.7(B) has as its common law background the felony-murder rule. It is submitted that the felony-murder rule as it existed by statute in Oklahoma prior to 1973, 21 O.S. 1971, § 701.3, has been divided into two statutory provisions under the current law. Section 701.7(B) includes specifically enumerated dangerous felonies, and section 701.8(2) includes all other felonies. This section stipulates that homicide is murder in the second degree "[w]hen perpetrated by a person engaged in the commission of *any felony other than* the unlawful acts set out in section 1, subsection B, [21 O.S. 1991, § 701.7(B)] of this act." (Emphasis added.)

The Commission has reached its conclusion that a misdemeanor escape under section 444 cannot be the basis for a murder in the first degree charge even though section 701.7(B) does not use the term "felony." This is because all other crimes therein listed are felonies and because section 701.8(2) stipulates that it applies "to any felony other than the unlawful acts set out in section 1, subsection B." (21 O.S. 1991, § 701.7(B)).

To conclude that a person could be convicted of murder in the first degree for a killing occurring in the commission of a misdemeanor escape would create a misdemeanor-murder rule. This would clearly be against prior Oklahoma law and the common law. (This same argument is present in reference to the misdemeanor escape crimes which may still exist under 57 O.S. 1991, § 56.)

Section 444 also includes a specific attempt crime. Since a specific attempt statute for these escapes exists, it

would be improper to charge a defendant with attempted escape under the general attempt statutes. *See Ex parte Smith*, 95 Okl. Cr. 370, 246 P.2d 389 (1952). Since section 701.7(B) applies only to completed crimes, it would not be proper to charge someone with murder in the first degree for a killing he committed while attempting to escape under the Provisions of section 444.

(2000 Supp.)

OUJI-CR 6-53

ESCAPE FROM PENAL INSTITUTION - ELEMENTS

No person may be convicted of escape from a penal institution unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, escape from a **(county/ city jail)**;

Second, by a **(prisoner in a county/city jail**;

Third, **(awaiting charges for a felony offense)/(awaiting trial)/(having been sentenced on a felony charge to the Department of Corrections)/(having been lawfully detained)**;

Fourth, while **he/she** is **(actually confined there)/(permitted to be at large as a trusty)/(awaiting transportation to a Department of Corrections facility to serve his/her sentence)**.

OR

First, escape from the custody of the Department of Corrections;

Second, by an inmate in its custody;

Third, while **(actually confined in a correctional facility)/(assigned to a house arrest program)/(assigned to the Preparole Conditional Supervision Program)/(assigned to an alternative incarceration authorized by law)/(permitted to be at large as a trusty)**.

[An inmate assigned to **(house arrest)/(the Preparole Conditional Supervision Program)/(an alternative incarceration authorized by law)** shall be considered to have escaped if **(the inmate cannot be located within a 24 hour period)/(the inmate fails to report to a confining facility/institution as directed).]**

[Custody means either imprisonment by physical means or restraint by a superior force acting as a moral restraint.]

[Escape means a departure from custody, with or without force, whether from the custody of an officer or from any place where one is lawfully confined.]

Statutory Authority: 21 O.S. 2011, § 443.

Committee Comments

The first bracketed paragraph is taken from 21 O.S. 2011, § 443(C). The definitions in the last two paragraphs are based on *Urbauer v. State*, 1987 OK CR 231, ¶ 5, 744 P.2d 1274, 1275.*See also Hunt v. State*, 1990 OK CR 37, ¶¶ 6-9, 793 P.2d 1366, 1368 (affirming conviction of prisoner who escaped while he was at liberty on a weekend pass).

2012 SUPPLEMENT

OUJI-CR 6-53A

ESCAPE FROM JUVENILE DETENTION FACILITY - ELEMENTS

No person may be convicted of escape from a **(juvenile detention)/(secure juvenile)** facility unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a **juvenile/youthful** offender lawfully placed in a **(juvenile detention)/(secure juvenile)** facility;

Second, absented **himself/herself** without official permission from the facility;

Third, while actually confined in the facility.

OR

First, a **juvenile/youthful** offender lawfully placed in a **(juvenile detention)/(secure juvenile)** facility;

Second, absented **himself/herself** without official permission while away from the facility;

Third, while escorted by a transportation officer.

OR

First, a **juvenile/youthful** offender lawfully placed in a **(juvenile detention)/(secure juvenile)** facility;

Second, while permitted to be on an authorized **pass/(work program)**; outside the facility;

[Third, could not be located within a twenty-four-hour period.]

OR

Third, failed to report to the facility at the specified time.]

OR

Third, absconded (from an electronic monitoring device)/(after removing an electronic monitoring device from his/her body).]

OR

Third, failed to return from a pass issued by a facility/(secure placement).]

Statutory Authority: 21 O.S. 2011, § 443(E).

2012 SUPPLEMENT

OUJI-CR 6-54

UNAUTHORIZED ENTRY INTO PENAL INSTITUTION - ELEMENTS

No person may be convicted of unauthorized entry into a penal institution unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, gaining entry;

Third, that is unauthorized;

Fourth, to **(a State penal institution)/(a jail)/(a place where prisoners are located)/(the grounds of a penal institution)**.

Statutory Authority: 21 O.S. 1991, § 445.

OUJI-CR 6-55

(POSSESSION OF)/BRINGING CONTRABAND **IN/INTO**

PRISON/JAIL - ELEMENTS

No person may be convicted of **(possession of)/bringing** contraband **in/into** a **prison/jail/(place where prisoners are located)** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, without authority;

Second, **bringing/(having possession of)**;

Third, **[a gun/knife/bomb/(dangerous instrument)]/[Specify Controlled Dangerous Substance Listed in 21 O.S. Supp. 1995, § 2-101]/[a beverage containing more than one-half of one percent alcohol by volume]/money**;

Fourth, **into/in** a **jail/(State penal institution)/(place where prisoners are located)**.

Statutory Authority: 57 O.S. Supp. 1995, § 21.

OUJI-CR 6-56

JUMPING BAIL - ELEMENTS

No person may be convicted of jumping bail unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant was **(admitted to bail)/(released on recognizance/bond/ undertaking)**;

Second, in connection with a **(felony charge)/(pending appeal/certiorari after a felony conviction)**;

Third, the defendant **(incurred a forfeiture of the bail)/(violated the recognizance/bond/undertaking)**;

Fourth, the defendant willfully failed to surrender **himself/herself** within 5 days after the forfeiture of the bail.

Statutory Authority: 22 O.S. 1991, § 1110.

Committee Comments

The Oklahoma Court of Criminal Appeals held in *James v. State*, 817 P.2d 1279, 1281 (Okl. Cr. 1991), that a forfeiture of bail may occur before the actual collection of the forfeited bond.

OUJI-CR 6-56A

REMOVAL OF ELECTRONIC MONITORING DEVICE - ELEMENTS

No person may be convicted of the removal of an electronic monitoring device unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the person was charged with a **felony/misdemeanor**;

Second, the person was **(admitted to bail)/(released on recognizance/bond/undertaking for appearance before a magistrate/court)**;

Third, the person was required to wear an electronic monitoring device on the person's body as a condition of **bail/release**; and

Fourth, the person removed the electronic monitoring device without authorization from the court.

Statutory Authority: 22 O.S. 2011, § 444(D).

2012 SUPPLEMENT

OUJI-CR 6-57

RIOT - INTRODUCTION

The defendant is charged with **(participating in a)/(incitement to)** riot on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 6-58

PARTICIPATING IN RIOT - ELEMENTS

No person may be convicted of participating in a riot unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, participating with 2 or more other persons;

Second, who are acting together;.

Third, without authority of law;

[Fourth, in a **(use of force)/violence.]**

OR

[Fourth, in a threat to use **force/violence**;

Fifth, accompanied by the immediate power of execution.]

Statutory Authority: 21 O.S. 1991, § 1311.

OUJI-CR 6-58A

PARTICIPATING IN RIOT - PUNISHMENT

If you find beyond a reasonable doubt that the defendant committed the crime of participating in riot, you shall return a verdict of guilty by marking the Verdict Form appropriately.

If you have a reasonable doubt of the defendant's guilt of the charge of participating in riot, or you find that the State has failed to prove each element of the charge of participating in riot beyond a reasonable doubt, you shall return a verdict of not guilty by marking the Verdict Form appropriately.

If you find the defendant guilty, you shall then determine the proper punishment.

[Select the appropriate paragraph]:

If you determine that the State has proved that the crime of **murder/maiming/robbery/rape/arson** was committed in the course of the riot by proving the following elements beyond a reasonable doubt: **[specify elements]**, then the crime of participating in riot is punishable by **[state range of punishment]**.

OR

If you determine beyond a reasonable doubt that the riotous assembly was to **(resist execution of [specify state or federal statute)/(obstruct [identify state or federal officer] in the performance of ([specify legal duty])/(serving/executing a [specify legal process])**, then the crime of participating in riot is punishable by imprisonment in the penitentiary not exceeding ten years and not less than two.

OR

If you determine beyond a reasonable doubt that **[Name of Defendant]** was **(carrying a firearm/(deadly/dangerous weapon)/disguised** at the time of the riot, then the crime of participating in riot is punishable by imprisonment in the penitentiary not exceeding ten years and not less than two.

OR

If you determine beyond a reasonable doubt that **[Name of Defendant] directed/advised/encouraged/solicited** other persons, who participated in the riot to acts of **force/violence**, then the crime of participating in riot is punishable by imprisonment in the penitentiary not exceeding ten years and not less than two.

Otherwise, it is punishable by a fine of up to $1,000, or imprisonment for up to 1 year, or both. When you have decided on 1) whether **[Name of Defendant]** is guilty or not guilty, 2) whether **[specify additional findings for enhancement of punishment: e.g., [Name of Defendant] was carrying a firearm at the time of the riot]**, and 3) the proper punishment, you shall fill in the appropriate spaces on the Verdict Form for the crime of participating in riot and return the verdict to the Court.

Statutory Authority: 21 O.S. 1991, § 1312.

Notes on Use

This is the basic instruction for participating in a riot, and it should be given in place of OUJI-CR 10-13 at the end of the the case. It should be modified appropriately if there are prior convictions or lesser included offenses. *See* OUJI-CR 10-15 to 10-25. The trial court should also prepare a Verdict Form on which the jury must indicate whether or not it determined the additional findings for the enhanced punishment as well as its finding of

guilt and the propoer punishment.

Committee Comments

The different sections in 21 O.S. 1991, § 1312 specify different punishments for the crime of participating in a riot, rather than separate offenses. *Symonds v. State*, 66 Okl.Cr. 49, 53-54, 89 P.2d 970, 973 (1939); *Schwatzfeger v. State*, 57 Okl.Cr. 92, 94, 45 P.2d 550, 551 (1935).

(2000 Supp.)

OUJI-CR 6-59

INCITEMENT TO RIOT - ELEMENTS

No person may be convicted of incitement to riot unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **action/conduct**;

Second, that with the intent to cause, aid, or assist the initiation/continuation of a riot;

Third, urged other persons;

Fourth, to commit **[acts of unlawful force/violence]/[the unlawful burning/ destroying of property]/[the unlawful interference with a (police/peace officer)/fireman/ (member of the Oklahoma National Guard)/(a member of a unit of the armed services) who was officially assigned to riot duty in the lawful performance of his duty]**;

[Fifth, the defendant's **act/conduct** created a clear and present danger of imminent unlawful action.].

A riot is defined as any use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by 3 or more persons acting together and without authority of law.

Statutory Authority: 21 O.S. Supp. 1995, § 1320.2, 21 O.S. 1991, § 1311.

Notes on Use

In *Price v. State*, 1994 OK CR 26, ¶ 5, 873 P.2d 1049, 1052, the Oklahoma Court of Criminal Appeals required the Fifth Element to be given in cases involving constitutionally protected speech.

(2000 Supp.)

OUJI-CR 6-60

TERRORISM - ELEMENTS

No person may be convicted of terrorism unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly committed an act;

Second, of violence;

Third, that resulted in **(damage to property)/ (personal injury)**;

Fourth, with the intent to coerce;

Fifth, a **(civilian population)/government**;

Sixth, into granting illegal **political/economic** demands.

OR

First, knowingly committed an act;

Second, with the intent to incite violence;

Third, in order to create apprehension of;

Fourth, **(bodily injury)/(damage to property)/**;

Fifth, in order to coerce;

Sixth, a **(civilian population)/government**;

Seventh, into granting illegal **political/economic** demands.

Statutory Authority: 21 O.S. Supp. 2004, § 1268.1.

(2005 Supp.)

OUJI-CR 6-61

TERRORISM HOAX - ELEMENTS

No person may be convicted of terrorism hoax unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, simulated;

Third, an act of terrorism;

Fourth, as a **joke/hoax/prank/trick**;

Fifth, against a **place/population/business/agency/government**;

[Sixth, by intentionally;

Seventh, using a substance;

Eighth, to cause **fear/intimidation/anxiety**;

Ninth, and a reasonable belief;

Tenth **,** that the substance is **used/placed/sent/delivered/employed** as an act of biochemical terrorism;

Eleventh, that required an **(emergency response)/(evacuation/quarantine of any person/place/article)**].

OR

[Sixth, by **a/an act/threat** of **violence/sabotage/damage/harm**;

Seventh, against a **population/place/infrastructure**;

Eighth, that caused **fear/intimidation/anxiety**;

Ninth, and a reasonable belief by any victim;

Tenth **,** that the **act/threat** is an act of terrorism;

Eleventh, that is intended to disrupt a **place/population/business/agency/ government**].

Statutory Authority: 21 O.S. Supp. 2004, § 1268.1.

Notes on Use

For definitions of biological terrorism and terrorism, see OUJI-CR 6-62, *infra*.

(2005 Supp.)

OUJI-CR 6-62
TERRORISM - DEFINITIONS

Biochemical Terrorism – An act of terrorism involving any biological

organism or chemical or combination of organisms or chemicals that is capable of and intended to cause death, illness or harm to any human or animal upon contact or ingestion, or harm to any food or water supply or other product consumed by humans or animals.

Reference: 21 O.S. Supp. 2004, § 1268.1.

Terrorism – An act of violence resulting in damage to property or personal injury perpetrated to coerce a civilian population or government into granting illegal political or economic demands; or conduct intended to incite violence in order to create apprehension of bodily injury or damage to property in order to coerce a civilian population or government into granting illegal political or economic demands. Peaceful picketing or boycotts and other nonviolent action is not terrorism.

Reference: 21 O.S. Supp. 2004, § 1268.1.

(2005 Supp.)

OUJI-CR 7-1

HARMING ANIMALS - INTRODUCTION

The **defendant(s) is/are** charged with

[cruelty to animals]

[(mistreatment of)/(interference with)/killing a police dog/horse]

[(mistreatment of)/(interference with)/killing a police dog/horse during the commission of a misdemeanor/felony]

on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 7-2

CRUELTY TO ANIMALS -- ELEMENTS

No person may be convicted of cruelty to animals unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **willfully/maliciously**;

Second, **caused/procured/permitted/instigated/(tend ed to further)**;

Third, any animal in subjugation or captivity;

Fourth, **(to be)/being overdriven/overloaded/tortured/ destroyed/killed/ (cruelly beaten)/(cruelly injured)/maimed/mutilated/(deprived of necessary food, drink, or shelter)**.

Statutory Authority: 21 O.S. 1991, § 1685.

Committee Comments

4 O.S. Supp. 1995, § 41 authorizes the killing of a member of the dog or cat family that chases or worries livestock while off of its owner's premises, and an appropriate instruction should be given if that is a defense.

OUJI-CR 7-3

CRUELTY TO ANIMALS -- DEFENSE

A person is justified in **destroying/injuring** an animal if:

First, **he/she** acted to defend **himself/herself/(another person)/(his/her home/ property)** against harm threatened by the animal;

Second, the animal's actions led **him/her** to reasonably believe that it would inflict the harm;

Third, the **destruction/injury** was reasonable in view of the seriousness of the harm threatened;

Fourth, **he/she** reasonably believed that the harm could only be prevented by immediate **destruction/injury** of the animal; and

Fifth, the kind and amount of force used was reasonably proportionate to the kind and amount of danger presented by the animal.

It is the burden of the State to prove beyond a reasonable doubt that the defendant was not justified in **destroying/injuring** an animal. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Committee Comments

This instruction is derived from *Grizzle v. State*, 707 P.2d 1210, 1213 (Okl. Cr. 1985).

OUJI-CR 7-4

(MISTREATMENT OF)/(INTERFERENCE WITH)
POLICE DOG/HORSE - ELEMENTS

No person may be convicted of **(mistreatment of)/(interference with)** a police dog/horse unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **striking/tormenting/(administering a nonpoisonous desensitizing substance to)/mistreating)/ (interfering with the lawful performance of)**;

Third, a police **dog/horse**;

Fourth, **owned/used** by;

Fifth, a law enforcement **agency [of a political subdivision]** of the State.

Statutory Authority: 21 O.S. Supp. 2014, § 649.1.

(2014 Supp.)

OUJI-CR 7-5

(MISTREATMENT OF)/(INTERFERENCE WITH) POLICE DOG/HORSE DURING COMMISSION OF CRIME - ELEMENTS

No person may be convicted of **(mistreatment of)/(interference with)** a police **dog/horse** during the commission of a **misdemeanor/felony** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, willfully;

Third, without lawful cause or justification;

Fourth, **striking/tormenting/(administering a nonpoisonous desensitizing substance to)/mistreating)/ (interfering with the lawful performance of)**;

Fifth, a police **dog/horse**;

Sixth, **owned/used** by;

Seventh, a law enforcement **agency [of a political subdivision]** of the State;

Eighth, during the commission of a misdemeanor/felony.

Statutory Authority: 21 O.S. Supp. 2014, § 649.1.

(2014 Supp.)

OUJI-CR 7-6

KILLING/BEATING/TORTURING ETC.
POLICE DOG/HORSE - ELEMENTS

No person may be convicted of **killing/beating/torturing/(injuring so as to disfigure/disable)/ (administering a poison to)/(setting a booby trap device for the purpose of injury so as to disfigure/disable/ kill)** a police **dog/horse** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **killing/beating/torturing/(injuring so as to disfigure/disable)/(administering a poison to)/ (setting a booby trap device for the purpose of injury so as to disfigure/disable/kill)/ (paying/(agreeing to pay) bounty for the purpose of injury so as to disfigure/disable/kill)**;

Third, a police **dog/horse**;

Fourth, **owned/used** by;

Fifth, a law enforcement **agency [of a political subdivision]** of the State.

Statutory Authority: 21 O.S. Supp. 2014, § 649.2.

(2014 Supp.)

OUJI-CR 7-7

KILLING /BEATING/TORTURING ETC.
POLICE DOG/HORSE DURING COMMISSION OF CRIME - ELEMENTS

No person may be convicted of **killing/beating/torturing/(injuring so as to disfigure/disable)/ (administering a poison to)/(setting a booby trap device for the purpose of injury so as to disfigure/disable/ kill)** a police **dog/horse** during the commission of a **misdemeanor/felony** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, knowingly;

Second, willfully;

Third, without lawful cause or justification;

Fourth, **killing/beating/torturing/(injuring so as to disfigure/disable)/(administering a poison to)/ (setting a booby trap device for the purpose of injury so as to disfigure/disable/kill)/(paying/(agreeing to pay) bounty for the purpose of injury so as to disfigure/disable/kill)**;

Fifth, a police **dog/horse**;

Sixth, **owned/used** by;

Seventh, a law enforcement **agency [of a political subdivision]** of the State;

Eighth, during the commission of a **misdemeanor/felony**.

Statutory Authority: 21 O.S. Supp. 2014, § 649.2.

(2014 Supp.)

OUJI-CR 7-8

OPERATING POLICE FREQUENCY RADIO - INTRODUCTION

The **defendant(s) is/are** charged with operating a police frequency radio on **[Date]** in **[Name of County]** County, Oklahoma.

OUJI-CR 7-9

OPERATING POLICE FREQUENCY RADIO - ELEMENTS

No person may be convicted of operating a police frequency radio unless the State proves beyond a reasonable doubt each element of the crime. These elements are:

First, operating a mobile radio;

Second, that is capable of receiving transmissions made by a law enforcement agency;

Third, **(for an illegal purpose)/(while committing a crime)**.

Statutory Authority: 21 O.S. 1991, § 1214.

OUJI-CR 7-11

USING A COMMUNICATIONS FACILITY TO COMMIT A FELONY – INTRODUCTION

The **defendant(s) is/are** charged with using **[specify communications facility described in 13 O.S. 2011, § 176.2(5), such as a telephone]** to commit a felony on **[Date]** in **[Name of County]** County, Oklahoma.

_____

Statutory Authority: 13 O.S. 2011, § 176.3(8).

(2017 Supp.)

OUJI-CR 7-12

USING A COMMUNICATIONS FACILITY TO COMMIT A FELONY – ELEMENTS

No person may be convicted of using a [specify communications facility described in 13 O.S. 2011, § 176.2(5), such as a telephone] to commit a felony unless the State proves beyond a reasonable doubt each element of the crime. These elements are:

First, willfully using a **[specify communications facility described in 13 O.S. 2011, § 176.2(5), such as a telephone]**;

Second, in **committing/(causing/facilitating the commission of)**;

Third, the crime of **[specify felony listed in 13 O.S. Supp. 2016, § 176.7]**.

2017 Supplement

OUJI-CR 8-1

DEFENSE OF ANOTHER - INTRODUCTION

Evidence has been introduced of defense of another as a defense to the charge that the defendant has committed the crime of **[Crime Charged in Information/Indictment]**.

Notes on Use

This instruction is simply an introductory instruction for use in all cases in which the defendant relies upon defense of another as a defense to the charge. This instruction is appropriate for use whether the defendant is claiming justifiable homicide in defense of another or justifiable use of nondeadly force in defense of another.

OUJI-CR 8-2

DEFENSE OF ANOTHER - JUSTIFIABLE USE OF DEADLY FORCE

A person was justified in using deadly force in defense of another person when the person using force reasonably believed that use of deadly force was necessary to **(prevent death or great bodily harm to another)/(stop/prevent the commission of a felony that involved the use/(threat of) physical force/violence against any person).** Defense of another is a defense although the danger to the life or personal security of the other person may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed the use of deadly force was necessary to **(prevent death or great bodily harm to another)/(stop/prevent the commission of a felony that involved the use/(threat of) physical force/violence against any person).**

Statutory Authority: 21 O.S. Supp. 2014, § 733(2).

Committee Comments

Prior to 2014, justifiable homicide in the defense of another was limited to the defense of persons specified in the statute, which were spouses, parents, children, masters, mistresses, and servants. The Court of Criminal Appeals refused to extend the justification beyond the statutory language. See *Whitechurch v. State*, 1983 OK CR 9, ¶ 11, 657 P.2d 654, 656 (statute did not cover a brother or sister); *Cowles v. State*, 1981 OK CR 132, ¶ 11, 636 P.2d 342, 345 (defendant's companion was not within the limited group of persons for whom fatal force in their defense was justifiable). Justifiable homicide was also previously limited to instances in which the other person was in imminent danger of death or great bodily harm. *See Garrett v. State*, 1978 OK CR 126, ¶ 11, 586 P.2d 754, 756 (justifiable homicide not warranted where defendant shot deceased and three others to prevent continued statutory rape of her foster daughter; the daughter was not in imminent danger and defendant had previous knowledge of the relationship)

Section 733(2) was amended in 2014 to incorporate the language of 21 O.S 2011, § 1289.25(D) into the defense of justifiable homicide. The justifiable homicide provision in 21 O.S Supp. 2014, § 733(2) provides that homicide is justifiable when a person kills a victim while lawfully defending himself or herself or another person "when the person using force reasonably believes such force is necessary to prevent death or great bodily harm to himself or herself or another or to terminate or prevent the commission of a forcible felony." "A forcible felony" is defined broadly as "any felony which involves the use or threat of physical force or violence against any person."

2015 SUPPLEMENT

OUJI-CR 8-3

DEFENSE OF ANOTHER -

JUSTIFIABLE USE OF FORCE TO PREVENT OFFENSE

A person is justified in using reasonable force in aid or defense of another person who is about to be injured during the commission of a crime.

Statutory Authority: 22 O.S. 2011, § 33.

Committee Comments

In *Whitechurch v. State*, 1983 OK CR 9, ¶¶ 14-15, 657 P.2d 654, 657, the Oklahoma Court of Criminal Appeals required a jury instruction to be given that covered the defense in 22 O.S. 2011, § 33. The Court noted that this defense complemented and to a certain extent overlapped the principles of self-defense and the defense of others.

2015 SUPPLEMENT

OUJI-CR 8-4

DEFENSE OF ANOTHER - JUSTIFIABLE USE OF NONDEADLY FORCE

A person is justified in using force in defense of another if that person reasonably believed that use of force was necessary to protect another from imminent danger of bodily harm. Defense of another is a defense although the danger to the personal security of another may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that another was in imminent danger of bodily harm. The amount of force used may not exceed the amount of force a reasonable person, in the circumstances and from the viewpoint of the defendant, would have used to prevent the bodily harm.

Statutory Authority: 21 O.S. 2011, § 643(3).

Committee Comments

Since section 643(3) is the statutory authorization for the use of nondeadly force both in self-defense and in the defense of another, the statutory language should be construed the same way for both defenses. Thus, the above instruction is practically identical to the instruction on justifiable use of nondeadly force in self-defense. (See the Committee Comments accompanying OUJI-CR 8-48.) Of course, the general rule obtains that one who goes to the aid of another acts at his own peril, for the right to act in defense of that other is coextensive with the other's right to defend himself at that time, under those circumstances. *McBroom v. State*, 1924 OK CR 90, 26 Okl. Cr. 352, 224 P. 210, 210 (Syllabus by the Court); *Head v. State*, 1924 OK CR 7, 26 Okl. Cr. 33, 221 P. 791, 793-94.

It should be pointed out that justifiable use of nondeadly force in defense of another is not limited by the statutory language of section 643(3) to any specific, named persons. Hence, a person can come to the defense of any other person with nondeadly reasonable force. If the person defended against should then accidentally be killed, the homicide would seem to be an excusable homicide under 21 O.S. 2011, § 731(1). *See Adams v. State*, 1951 OK CR 20, 93 Okl. Cr. 333, 338-39, 228 P.2d 195, 198; *Johnson v. State*, 1936 OK CR 66, 59 Okl. Cr. 283, 295-96, 58 P.2d 156, 162. To the defendant, it is immaterial whether the homicide is called excusable or justifiable for purposes of criminal law, because in either instance the defendant is entitled to be found not guilty. (See also the instructions on excusable homicide, OUJI-CR 8-28 and OUJI-CR 8-29.)

(2017 SUPP.)

OUJI-CR 8-5

DEFENSE OF ANOTHER - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that the defendant was not acting in defense of another. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Committee Comments

This instruction sets forth the appropriate burden of proof when the defendant claims defense of another, under either section 733(2) or section 643(3), as a defense to the charge. The burden of proof rests on the State. Defense of another is, however, a defense. Hence, the defendant must first come forward with sufficient evidence to raise defense of another as an issue, unless the evidence of the prosecution has raised the issue. If the defendant fails to come forward with evidence, or fails to come forward with sufficient evidence, the issue of defense of another is not raised in the trial and the trial judge should not instruct on defense of another. Whether the defendant has come forward with sufficient evidence is a question of law for decision by the trial judge. If the defendant presents sufficient evidence to raise the defense of defense of another, or if the defense is raised by the prosecution, an instruction must be given in order to apprise the jurors of the defendant's theory of the case.

Once the defendant has presented sufficient evidence to raise defense of another as an issue, the State has the burden of proof to overcome the defense beyond a reasonable doubt. It is a decision for the jury as to whether the State has met the burden of proof. *See Bearden v. State*, 458 P.2d 914 (Okl. Cr. 1969). Nor does 22 O.S. 1991, § 745, shift the burden of proof. Section 745 is solely a statement of trial procedure which puts the burden on the defendant to come forward with evidence of mitigation, justification, or excuse. If the defendant does not come forward with evidence of defense of another as justification, the issue of defense of another is not raised, unless the evidence of the State has raised the issue. *Meadows v. State*, 487 P.2d 359 (Okl. Cr. 1971).

No instructions on the defendant's burden to come forward with evidence, or on whether the defendant has presented sufficient evidence, are presented because, as questions of trial procedure and of law, they are beyond the legitimate concern of the jury.

OUJI-CR 8-6

DEFENSE OF ANOTHER - WHEN DEFENSE NOT AVAILABLE

Defense of another is permitted as a defense solely because of necessity. Defense of another is not available to a defendant when the person on whose behalf the defendant intervened **(was the aggressor)/(provoked another with the intent to cause the altercation)/(voluntarily entered into mutual combat)**, no matter how great the danger to personal security became during the altercation unless the right of defense of another is reestablished.

OUJI-CR 8-7

DEFENSE OF ANOTHER - DEFENSE REESTABLISHED

If the person on whose behalf the defendant intervened **(was the original aggressor)/(provoked another with the intent to cause the altercation)/(voluntarily entered into mutual combat)** but withdrew or attempted to withdraw from the altercation and communicated **his/her** desire to withdraw to the other **participant(s)** in the altercation, then the defendant would be entitled to the defense of defense of another.

OUJI-CR 8-8

DEFENSE OF ANOTHER - WHEN DEFENSE AVAILABLE

If the person on whose behalf the defendant intervened **(was not the original aggressor)/(did not provoke another with the intent to cause the altercation)/(did not voluntarily enter into mutual combat)**, the defendant may act on his/her reasonable belief that the person is in imminent danger of **(death or great bodily harm)/(bodily harm)**.

OUJI-CR 8-9

DEFENSE OF ANOTHER - AGGRESSOR DEFINED

A person is an aggressor when that person by **his/her** wrongful conduct provokes, brings about, or continues an altercation. **[The use of words alone cannot make a person an aggressor.]**

Committee Comments

The above four instructions reflect the case law that one who intervenes on behalf of another intervenes at his own risk. A defendant is entitled to the defense of defense of another only when the person defended is not at fault in the altercation. If the person defended is at fault, even if the defendant is unaware of who is at fault, the defense of defense of another does not exist. Hence, although the defendant is entitled to act on reasonable appearances, he is entitled to the defense of defense of another only as long as he has chosen correctly to act on behalf of the party not at fault in the altercation, or the party who has attempted to terminate the altercation. *Hendrick v. State*, 63 Okl. Cr. 100, 73 P.2d 184 (1937); *Hare v. State*, 58 Okl. Cr. 420, 54 P.2d 670 (1936); *Head v. State*, 26 Okl. Cr. 33, 221 P. 791 (1924); *Moore v. State*, 25 Okl. Cr. 151, 219 P. 175 (1923). Thus, these instructions should be read in conjunction with those pertaining to the defense of self-defense. (For a more detailed discussion of these four instructions, see the Committee Comments accompanying the instructions on self- defense following OUJI CR 8-53.) These four instructions are applicable whether the defendant is claiming defense of another under section 733(2) or under section 643(3).

One situation which may arise in determining whether the person defended is at fault, the determination upon which the availability of the defense of defense of another hinges, is not specifically resolved by the cases. If A voluntarily enters into combat with B using merely nondeadly force but is faced with use of deadly force by B in response, does A, the original aggressor, have a right of self-defense, so that a person who intervenes on A's behalf may avail himself of the defense of defense of another? The pertinent cases address the issue of A's right of self-defense only in circumstances where persons in the position of A entered an affray using deadly force, and thus are not necessarily dispositive. *See, e.g., Price v. State*, 541 P.2d 373 (Okl. Cr. 1975); *Freeman v. State*, 97 Okl. Cr. 275, 262 P.2d 713 (1953); *Jenkins v. State*, 80 Okl. Cr. 328, 161 P.2d 90 (1945); *Koozer v. State*, 7 Okl. Cr. 336, 123 P. 554 (1912). In these cases, the Court of Criminal Appeals has reiterated that a combatant has the duty to withdraw or attempt to withdraw, and to communicate the withdrawal or attempted withdrawal, before a right of self-defense is established. The language of the court in *Jenkins, supra*, is particularly pertinent. The court stated:

> Where a defendant seeks or provokes a difficulty without any intention of killing or doing serious bodily injury to the deceased, and a conflict ensues, and the defendant, being hard-pressed, kills the deceased, then [the defendant] will be guilty of manslaughter, unless before the fatal blow was struck or shot was fired the defendant sought to withdraw from the combat....

80 Okl. Cr., at 334, 161 P.2d, at 97, *quoting Koozer v. State, supra.*

Thus, although these cases resolve situations where the defendant voluntarily entered mutual combat with deadly force, the language of the court suggests that one who uses nondeadly force and is met in combat with deadly force may have to withdraw, or attempt to do so, and sufficiently communicate this act to the opponent before self-defense becomes available. In the context of the example outlined above, a person who intervenes on A's behalf can avail himself of the defense of defense of another only where A himself withdrew or attempted to do so and adequately communicated this to B.

In delineating a standard by which to judge the sufficiency of the initial aggressor's withdrawal or attempted withdrawal, the Court of Criminal Appeals attempts to determine whether the circumstances of each case demonstrate that the initial aggressor clearly showed by his conduct a desire to decline participation in any

further struggle, and in some manner made this intention known to his adversary. Determination of the sufficiency of a combatant's withdrawal or attempted withdrawal, and his communication thereof, must remain an ad hoc decision. *See, e.g., Martley v. State*, 519 P.2d 544 (Okl. Cr. 1974); *Townley v. State*, 355 P.2d 420 (Okl. Cr. 1960); *Perez v. State*, 52 Okl. Cr. 180, 300 P. 428 (1931): *Brannon v. State*, 24 Okl. Cr. 362, 217 P. 1060 (1923).

The definition of aggressor is taken virtually verbatim from the definition set forth by the Court of Criminal Appeals in *Townley, supra*.

A further difficulty in determining the availability of the defense of defense of another becomes apparent when the provisions of section 643(3) are read in juxtaposition with the provisions of section 733(2). Section 643(3) permits the intervenor to aid another person who is "about to be injured" and to use that degree of force "sufficient to prevent such offense." Section 733(2) terms a homicide justifiable when perpetrated in defense of a person who is included within one of the specified classes of persons who have some relation to the defendant, such as spouse, parent, master, mistress, or servant. The question unresolved by the juxtaposition of these two statutes is whether deadly force may be used under section 643(3) in defense of a stranger or nonrelative under circumstances where the stranger or nonrelative himself has a right to utilize deadly force in repelling an attack.

For example, assume that A commits an unprovoked attack upon B using deadly force. B is not the aggressor and retains a right of self-defense. C observes the attack and, although he is not acquainted with B, comes to B's defense. In the ensuing struggle, C, using force reasonable under the circumstances, slays A. May C raise the defense outlined in section 643(3) in exculpation of his homicidal conduct, or does section 733(2) restrict the lawful use of deadly force in defense of another to situations where that other is a member of one of the classes of persons specified by section 733(3)?

The paucity of case law in Oklahoma pertaining to the availability of the defense set forth in section 643(3) does not address this question. The cases do resolve that, when defending a person who is a member of one of the classes detailed in section 733(2), the defender is justified in committing a homicide only if he reasonably perceives that the person aided - spouse, parent, child, master, mistress, or servant - is in imminent danger of great bodily injury or death. *Garrett v. State*, 586 P.2d 754 (Okl. Cr. 1978); *Hendrick v. State, supra*; *Hare v. State, supra; Moore v. State, supra; Litchfield v. State*, 8 Okl. Cr. 164, 126 P. 707 (1912); *Clemmons v. State*, 8 Okl. Cr. 159, 126 P. 704 (1912). In *Haines v. State*, 275 P.2d 347 (Okl. Cr. 1954), the court affirmed the defendant's conviction for manslaughter in the first degree and rejected the defendant's claim that he acted in defense of his paramour, or "mistress," and was therefore entitled to the defense set forth in section 733(2). The court construed the statutory term "mistress" as restricted to the female counterpart of "master." However, in *Haines* the woman allegedly defended had been subjected only to verbal abuse and threats by the deceased, so that there was no "reasonable ground to apprehend ... great personal injury" under section 733(2), and no right of self-defense on the part of the person defended under section 643(3).

Arguments support both sides of the question concerning the availability of the defense of defense of another to an intervenor who uses deadly force to aid a person who is not his parent, child, spouse, master, mistress, or servant. It might be contended that the defense should be available wherever the person defended could lawfully use deadly force in self-defense, and that the absence of one of the relationships designated in section 733(2) between the intervenor and the person defended should not preclude the availability of the defense where deadly force is necessary to repel the attack. On the other hand, it might be maintained that the statutes should be narrowly construed to permit use of deadly force only under the circumstances delineated in section 733(2), since the common law defense of defense of another developed from property concerns, from the common law privilege of a person to protect that which was "his," including spouse, children, parents, and servants. R. Perkins, *Criminal Law* 1019 (2d ed. 1969). Furthermore, perhaps the use of deadly force to defend a person other than those described in section 733(2) should be discouraged.

The confusion surrounding this issue is compounded when two additional statutes are considered. Section 31 of

Title 22 provides: "Lawful resistance to the commission of a public offense may be made: (1) By the party about to be injured; (2) By other parties." Section 33 of Title 22 provides: "Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense."

One further situation where the intervenor who enters an affray to aid another is allowed to avail himself of a defense was outlined by the court in *Moore v. State*, 25 Okl. Cr. 118, 218 P. 1102 (1923). Where the defendant enters a situation of combat in order to defend a person who has no right to self-defense, the intervenor also has no right to claim defense of another. However, if the intervenor himself withdraws and is then pursued, he may avail himself of the defense of self-defense, even though the party whom the intervenor intended to aid did not withdraw.

The Commission has concluded that, if the evidence of the prosecution in the trial indicates no dispute that the person defended was at fault, and the defendant does not come forward with evidence to indicate that the person defended was not at fault, then the issue of defense of another has not been raised. Under such circumstances, the defendant who aided another by use of force would have chosen incorrectly to act on behalf of a person who was at fault. In such a situation, no instructions on defense of another, including the four instructions above, should be given to the jury. The only question for determination by the jury is whether the defendant committed the crime charged or a lesser included offense. *See Ridinger v. State*, 97 Okl. Cr. 377, 267 P.2d 175 (1953). Moreover, if there is no dispute in the evidence that the person defended was not at fault and the defendant presents sufficient evidence of defense of another, then the issue of defense of another is raised, but the above four instructions need not be given because fault is not in dispute. Only the appropriate defense-of-another instruction and the burden-of-proof instruction should be given. The only question for determination by the jury is whether the State has met its burden of proof to overcome the defense of defense of another. *See Bearden v. State*, 458 P.2d 914 (Okl. Cr. 1969).

The only time the above four instructions should be used is when a dispute exists as to whether the person defended was the party at fault, or whether the other participant in the altercation was at fault. When such dispute exists, all four instructions should be given so that the jury may be clearly informed as to the respective rights of the parties. *See Scaggs v. State*, 417 P.2d 331 (Okl. Cr. 1966); *Townley v. State, supra; Perez v. State, supra.*

OUJI-CR 8-10

DEFENSE OF ANOTHER -

WHEN PERSON AIDED IS A TRESPASSER

Defense of another is available to a defendant when the person on whose behalf the defendant intervened was a trespasser only if the trespasser availed or attempted to avail **himself/herself** of any reasonably safe means of retreat from the imminent danger of **(death or great bodily harm)/(bodily harm)** before repelling or attempting to repel an unlawful attack.

OUJI-CR 8-11

DEFENSE OF ANOTHER - TRESPASSER DEFINED

A person is a trespasser if that person has **([entered without consent]/[is unlawfully] upon the land of another)/(refused to leave the land of another after a lawful request to leave has been made to him/her)**.

Committee Comments

The instructions pertaining to defense of trespassers state existing law. It is settled in Oklahoma that an individual may resist a trespass upon real property in his possession, and may eject the trespasser by use of any reasonable force. So long as the trespasser does not commit or attempt a felony, force is reasonable only where it does not take or endanger human life. If no felony is committed or attempted, but the individual is unable to prevent or terminate the trespass by means short of life-endangering force, the Court of Criminal Appeals has firmly declared that the individual "must suffer the trespass and seek redress at the hands of the law rather than commit homicide." *Jackson v. State*, 49 Okl. Cr. 337, 293 P. 567, 568 (1930). *See also Turpen v. State*, 89 Okl. Cr. 6, 204 P.2d 298 (1949); *Hovis v. State*, 83 Okl. Cr. 299, 176 P.2d 833 (1947); *Grindstaff v. State*, 82 Okl. Cr. 31, 165 P.2d 846 (1946); *Hendrick v. State*, 63 Okl. Cr. 100, 73 P.2d 184 (1937); *Dyer v. State*, 58 Okl. Cr. 345, 53 P.2d 700 (1936); *Choate v. State*, 37 Okl. Cr. 314, 258 P. 360 (1927); *Thomason v. State*, 17 Okl. Cr. 666, 191 P. 1096 (1920); *Marshall v. State*, 11 Okl. Cr. 52, 142 P. 1046 (1914); *Dickinson v. State*, 3 Okl. Cr. 151, 104 P. 923 (1909).

However, the court has squarely held that, when faced by an imminent threat of bodily harm or death arising from an unlawful attack, the trespasser's right of self-defense is circumscribed by the requirement that he will avail himself of any reasonable means of retreat before responding to the attack. As stated by the court in *Womack v. State*, 36 Okl. Cr. 44, 253 P. 1027 (1927):

> [T]he trespasser's right of self-defense does not arise until he has availed himself of every safe means of retreat. But, even a trespasser, under such circumstances, where means of retreat are impracticable, has a right within reasonable bounds to repel an apparent dangerous attack in his necessary self-defense.

Id. at 47, 253 P. at 1029. *See also Walston v. State*, 597 P.2d 768, 770-71 (Okl. Cr. 1979); *Thompson v. State*, 462 P.2d 299 (Okl. Cr. 1969).

Since the availability of the intervenor's claim of defense of another is derivative, the intervenor who defends a person who is, in fact, a trespasser does so at his own risk. The defendant who claims the defense of defense of another is entitled to avail himself of this defense only if the person aided would have been entitled to the defense of self-defense, and this general rule obtains where the person defended is a trespasser. *See Hendrick v. State, supra.* (For a more detailed discussion of the two trespasser instructions, see the Committee Comments accompanying the self-defense instructions following OUJI-CR 8-55.)

These two trespasser instructions are to be given only when a factual dispute exists as to whether or not the person defended was a trespasser, or, if a trespasser, whether or not the person defended availed himself of every reasonable means of retreat. This factual dispute is appropriately to be resolved by the jury under proper instructions.

OUJI-CR 8-12

DEFENSE OF ANOTHER - DEFINITIONS

Bodily Harm - Any touching of a person against **his/her** will with physical force, in an intentional, hostile, and aggressive manner.

Reference: Black's Law Dictionary 222 (Rev. 4th ed. 1968).

Deadly Force - Force intended or likely to cause death or great bodily injury.

References: Gransden v. State, 12 Okl. Cr. 417, 158 P. 157 (1916); R. Perkins, Criminal Law 993 (2d ed. 1969).

Great Bodily Harm - Serious and severe bodily injury. Such injury must be of a greater degree than a mere battery.

Reference: Roddie v. State, 19 Okl. Cr. 63, 198 P. 342 (1921).

Imminent Danger - Danger that is pressing, urgent or immediate.

References: Lary v. State, 50 Okl. Cr. 111, 296 P. 512 (1931); Turner v. State, 4 Okl. Cr. 164, 111 P. 988, 998 (1910); R. Perkins, Criminal Law 994 (2d ed. 1969).

Master - Male employer.

Reference: Black's Law Dictionary 879 (5th ed. 1979).

Mistress - Female employer.

Reference: Webster's Third New International Dictionary 1446 (1961).

Reasonably Safe Opportunity - An opportunity to retreat with complete safety.

Reference: W. LaFave & A. Scott, Criminal Law § 53, at 396 (1972).

Servant - Employee.

Reference: Black's Law Dictionary 1227 (5th ed. 1979).

OUJI-CR 8-13

DEFENSE OF PROPERTY - INTRODUCTION

Evidence has been introduced of defense of property as a defense to the charge that the defendant has committed the crime of **[Crime Charged in Information/ Indictment]**.

Committee Comments

This instruction is simply an introductory instruction for use in all cases in which the defendant relies upon defense of property as a defense to the charge. This instruction is appropriate for use whether the defendant is claiming justifiable homicide in defense of habitation. or justifiable use of nondeadly force in defense of property.

OUJI-CR 8-14

DEFENSE OF PROPERTY - JUSTIFIABLE USE OF DEADLY FORCE IN DEFENSE OF HABITATION

A person is justified in using deadly force when resisting any attempt by another to commit a felony upon or in any dwelling house in which that person is lawfully present. Defense of habitation is a defense although the danger that a felony would be committed upon or in the dwelling house may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that there was an imminent danger that such felony would occur.

Statutory Authority: 21 O.S. 1991, § 733(1).

Committee Comments

At common law, the precept that a person's habitation constituted his "castle" gave rise to a privilege to defend his dwelling from felonious attempts, even to the point of exercising deadly force. R. Perkins, *Criminal Law* 1022 (2d ed. 1969). This right of defense on behalf of property which constitutes a dwelling, codified at 21 O.S. 1991, § 733(1), must be distinguished from the far more restricted right of defense of other property, codified at 21 O.S. 1991, § 643(3), which permits only use of nondeadly force.

The Court of Criminal Appeals has consistently interpreted this provision of section 733(1) as extending the right to use deadly force in defense of one's habitation only where the person defending has reason to fear that one who entered unlawfully, a trespasser, intended to perpetrate a felony therein, or to inflict harm upon him or some other person. The position espoused by the court with respect to defense of one's domicile may be summarized as follows:

> A person may resist a trespass on real property in his possession, where such trespass does not amount to a felony, and may eject the trespasser therefrom by the use of any reasonable force short of taking or endangering human life; but if he is unable to prevent a trespass, where no felony is attempted, by any means short of taking or endangering human life, he must suffer the trespass and seek redress at the hands of the law rather than commit homicide.

Jackson v. State, 49 Okl. Cr. 337, 339, 293 P. 567, 568 (1930). *Accord, Turpen v. State*, 89 Okl. Cr. 6, 204 P.2d 298 (1949); *Hovis v. State*, 83 Okl. Cr. 299, 176 P.2d 833 (1947); *Grindstaff v. State*, 82 Okl. Cr. 31, 165 P.2d 846 (1946); *Hendrick v. State*, 63 Okl. Cr. 100, 73 P.2d 184 (1937); *Hare v. State*, 58 Okl. Cr. 420, 54 P.2d 670 (1936); *Schmitt v. State*, 57 Okl. Cr. 102, 47 P.2d 199 (1935); *Choate v. State*, 37 Okl. Cr. 314, 258 P. 361 (1927); *Armstrong v. State*, 11 Okl. Cr. 959, 143 P. 870 (1914); *Marshall v. State*, 11 Okl. Cr. 52, 142 P. 1046 (1914); *Collegenia v. State*, 9 Okl. Cr. 425, 132 P. 375 (1913).

Use of the statutory term "dwelling house" would seem to preclude use of deadly force in defense of one's place of business. Although the Court of Criminal Appeals has not considered this issue, claims of appropriate use of deadly force to defend one's business establishment were rejected on other grounds in two cases, in which the court did not isolate this fact as a further ground for the infirmity of the claim. *Hovis, supra; Jackson, supra.*

Justifiable use of deadly force under 21 O.S. 1991, § 733(1), is further discussed in the Committee Comments under self-defense, OUJI-CR 8-46.

OUJI-CR 8-15

DEFENSE OF PERSON - JUSTIFIABLE USE OF DEADLY FORCE AGAINST INTRUDER

A/An person/(owner/manager/employee of a business) is justified in using force that is intended or likely to cause death or great bodily harm to another person who **(was in the process of unlawfully and forcefully entering)/(unlawfully and forcibly entered)** a **dwelling/residence/(occupied vehicle)/(place of business)** if the person using the force knew or had reason to believe that an unlawful and forcible entry **(was occurring)/(had occurred)**.

OR

A/An person/(owner/manager/employee of a business) is justified in using force that is intended or likely to cause death or great bodily harm if the person against whom the force was used **(had attempted to remove)/(was attempting to remove)** another person against the will of that other person from a **dwelling/residence/(occupied vehicle)/(place of business)** and the person using the force knew or had reason to believe that an unlawful and forcible **removal/(attempt to remove) (was occurring)/(had occurred)**.

[A person is not justified in using force if:

The person against whom the force is used **(has the right to be in)/(is a lawful resident of)** the **dwelling/residence/(occupied vehicle)**, such as a/an owner/lessee/titleholder, and there is not a **(protective order from domestic violence in effect)/(a written pretrial supervision order of no contact)** against that person.

OR

The **person/persons** sought to be removed are **children/grandchildren/(in the lawful custody/(under the lawful guardianship)** of the person against whom the force is used.

OR

The person who uses force is **(engaged in)/(using the dwelling/residence/(occupied vehicle)/(place of business** to further) an unlawful activity.]

["Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people.]

["Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.]

["Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.]

Statutory Authority: 21 O.S. 2011, § 1289.25 (B), (C), (F).

Notes on Use

The bracketed language should be given only where supported by the evidence at trial.

2012 SUPPLEMENT

OUJI-CR 8-15A

DEFENSE OF PERSON - RIGHT TO STAND YOUR GROUND

A person has no duty to retreat and has the right to stand **his/her** ground and meet force with force, including deadly force, if **he/she** is not engaged in an unlawful activity and is attacked in any place where **he/she** has a right to be, if **he/she** reasonably believes it is necessary to do so to prevent **(death/(great bodily harm) to himself/herself/ another)/(the commission of a forcible felony)**.

Statutory Authority: 21 O.S. 2011, § 1289.25 (D), (F).

Notes on Use

This Instruction is a type of self-defense instruction, but it includes justification for the use of deadly force to prevent death or great bodily harm to another or the commission of a forcible felony. See also the self-defense instructions in OUJI-CR 8-45 to 8-56, *infra*. It should be used only if the attack occurred outside of a dwelling, residence, or occupied vehicle. For instructions if the attack occurred inside a dwelling, residence, or occupied vehicle, see OUJI-CR 8-14 and 8-15, *supra*.

Committee Comments

The Oklahoma Court of Criminal Appeals discussed the "stand your ground" law in *Dawkins v. State*, 2011 OK CR 1, ¶ 11, 252 P.3d 214, 218. The Court decided that the Legislature intended the law to exclude from the law's benefit persons who were actively committing a crime, but not persons who had or may have committed a crime in the past. The Court of Criminal Appeals gave the following examples as crimes where the perpetrators would not be allowed to rely on this defense while they were engaged in committing them:"use of an illegal weapon in commission of the homicide, possession of illegal drugs on the premises, or an ongoing assault by the defendant against another person in the residence." *Id.* The Court of Criminal Appeals also ruled that the Legislature did not intend to prohibit persons who may have committed minor infractions of the law from using the benefit of the right of defense. It gave the following examples of such minor infractions: "persons who are illegally parked or have outdated vehicle registration, have outstanding warrants for minor offenses, or are in arrears with child support payments. We give these examples as a guide to trial courts in exercising their discretion, and are confident that this interpretation of the law implements the Legislature's stated intent." *Id.*

(2017 SUPP.)

OUJI-CR 8-16

DEFENSE OF PROPERTY -

JUSTIFIABLE USE OF NONDEADLY FORCE

A person is justified in using force in preventing or attempting to prevent a trespass or other unlawful interference with real or personal property in **his/her** lawful possession. Defense of property is a defense although the danger to the property defended may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed the danger of interference to be imminent. The amount of force used may not exceed that amount of force a reasonable person, in the circumstances and from the viewpoint of the defendant, would have used to prevent the trespass or unlawful interference.

Statutory Authority: 21 O.S. 1991, § 643(3).

Committee Comments

It has been pointed out that criminal cases wherein the defense of protection of property has been relied upon to exculpate a defendant ordinarily involve concomitant exculpatory claims, such as self-defense or defense of habitation.

> [H]ence property protection is usually overshadowed by some other defense. In fact, the chief importance of the privilege of protecting property is frequently that its proper exercise does not make one an "aggressor" or in any way at fault, and this leaves all other privileges unimpaired.

R. Perkins, *Criminal Law* 1026 (2d ed. 1969). This observation is borne out in the Oklahoma cases. *See, e.g., Johnson v. State*, 59 Okl. Cr. 283, 58 P.2d 156 (1936) (defense of habitation); *Thomason v. State*, 17 Okl. Cr. 666, 191 P. 1096 (1920) (self-defense); *Dickinson v. State*, 3 Okl. Cr. 151, 104 P.2d 923 (1909) (self-defense).

It is clear from the holdings of the Court of Criminal Appeals that, even though there may be a wrongful trespass, a property owner may not transcend reasonableness in the use of force to terminate the wrongful intrusion, and "reasonableness" in this context encompasses that force deemed necessary to defend the property trespassed upon, other than the taking or endangering of human life. *Buchanan v. State*, 25 Okl. Cr. 198, 219 P. 420 (1923); *Garrison v. State*, 19 Okl. Cr. 3, 197 P. 517 (1921); *Thomason, supra; Dickinson, supra.*

The Commission has found no cases, however, wherein the court approved the use of deadly force to prevent a felonious trespass or wrongful interference with property, which did not occur in a dwelling house and did not involve a claim of self-defense or defense of another. In *Hendrick v. State*, 63 Okl. Cr. 100, 73 P.2d 184 (1937), a case wherein a claim of defense of another was raised in addition to a claim of defense of property, the court rejected both claims, and stated:

> The right to defend property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, to the extent of slaying the aggressor, does not include the right to defend it, to the same extent, where there is no intention to commit a felony. A man may use force to defend his real or personal property in his actual possession against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention. But, in the absence of an attempt to commit a felony, he cannot defend his property, except his habitation, to the extent of killing the aggressor, for the purpose of preventing a trespass, and if he should do so, he would be guilty of a felonious homicide. Life is too valuable to be sacrificed solely for the protection of

> property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress. Ordinarily the killing allowed in the defense of property is solely for the prevention of a felony.
>
> The law affords ample redress for trespasses committed on a man's land, but does not sanction the taking of life to prevent it. The owner may, no doubt, oppose force with force to protect his property from injury or destruction, but not to the extent of taking life, or in excess of the necessity of the case. When he carries resistance to excess and uses more force than is reasonably necessary, he becomes a wrongdoer.

Id. at 108, 73 P.2d at 189-90.

Section 643(3) does not permit a person to use force in order to retrieve property which is taken by a police officer pursuant to a search and seizure which is allegedly unlawful. *VanKaler v. State*, 496 P.2d 807 (Okl. Cr. 1972).

OUJI-CR 8-17

DEFENSE OF PROPERTY - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that the defendant was not acting in defense of property. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Committee Comments

This instruction sets forth the appropriate burden of proof when the defendant claims self-defense under either section 733(1) or section 643(3) as a defense to the charge. The burden of proof rests on the State. Defense of property is, however, a defense. Hence, the defendant must first come forward with sufficient evidence to raise this defense as an issue, unless the evidence of the prosecution has raised the issue. If the defendant fails to come forward with evidence, or fails to come forward with sufficient evidence, the issue of defense of property is not raised in the trial and the trial judge should not instruct on this defense. Whether the defendant has come forward with sufficient evidence is a question of law for decision by the trial judge. If the defendant presents sufficient evidence to raise the defense of property, or if the defense is raised by the prosecution, an instruction must be given in order to apprise the jurors of the defendant's theory of the case.

Once the defendant has presented sufficient evidence to raise defense of property as an issue, then the State has the burden of proof to overcome the defense beyond a reasonable doubt. It is a decision for the jury as to whether the State has met the burden of proof. *Bearden v. State*, 458 P.2d 914 (Okl. Cr. 1969).

OUJI-CR 8-18

DEFENSE OF PROPERTY - DEFINITIONS

Deadly Force - Force intended or likely to cause death or great bodily injury.

Reference: R. Perkins. Criminal Law 993 (2d ed. 1969).

Property - Property includes:

(a) Real Property - Every estate, interest, and right in lands, including structures or objects permanently attached to the land;

(b) Personal Property - Money, goods, chattels, effects, evidences of rights in action, and written instruments effecting a monetary obligation or right or title to property.

References: 21 O.S. 1991, §§ 102, 103, 104.

OUJI-CR 8-19

DEFENSE OF DURESS - INTRODUCTION

Evidence has been introduced of duress as a defense to the charge that the defendant has committed the crime of **[Crime Charged in Information/Indictment]**.

OUJI-CR 8-20

DEFENSE OF DURESS - DURESS DEFINED

A person is entitled to the defense of duress if that person committed the **act(s)/omission(s)** which constitute the crime because of a reasonable belief that **(he/ she)/(his/her spouse/child)** was in imminent danger of death or great bodily harm from another.

Statutory Authority: 21 O.S. 1991 & Supp. 1995, §§ 152(7), 155, 156.

Committee Comments

For Oklahoma cases addressing the defense of duress, see *Tully v. State*, 730 P.2d 1206 (Okl. Cr. 1986) (duress defense may be available in felony murder case); *Spears v. State*, 727 P.2d 96 (Okl. Cr. 1986) (holding overturned by 1992 amendment to 21 O.S. Supp. 1995, § 156); *Smith v. State*, 703 P.2d 201 (Okl. Cr. 1985); *Denson v. State*, 481 P.2d 190 (Okl. Cr. 1970); *Methvin v. State*, 60 Okl. Cr. 1, 60 P.2d 1062 (1936). *See also Shelton v. State*, 793 P.2d 866, 876-77 (Okl. Cr. 1988) (trial court properly refused instruction on defense of duress where there was no evidence of use of actual force or fear to compel defendant to commit crimes).

It should be pointed out that the statutory language places no restriction on the kinds of crimes for which the defense of duress is available. At common law, duress is not available as a defense to murder or assault with intent to kill. W. LaFave & A. Scott, *Criminal Law* § 49, at 376 (1972); R. Perkins, *Criminal Law* 951-53 (2d ed. 1969). Although the Oklahoma Court of Criminal Appeals has not been presented this precise question, the court has indicated approval of cases from other jurisdictions which deny the defense of duress to crimes of intentional killing. *Methvin, supra. But cf. Tully*, *supra* (allowing duress instruction in felony murder case).

Special limitations apply to the availability of the defense of duress in prosecutions for escape. *Davis v. State*, 763 P.2d 109, 110 (Okl. Cr. 1988) ("We think it is settled law that duress is not a defense to Escape in this jurisdiction."); *Chester v. State*, 485 P.2d 1065, 1067 (Okl. Cr. 1971) (defense may be available in limited circumstances). In prosecutions for escape, no instruction on duress or involuntary escape should be given unless the defendant was in imminent and immediate danger at the time of the escape and returned to custody at the first opportunity. *Johnson v. State*, 745 P.2d 1193 (Okl. Cr. 1987). *See also Grubb v. State*, 533 P.2d 989, 990 (Okl. Cr. 1975), in which the Oklahoma Court of Criminal Appeals approved the following instruction: "You are instructed that it is no defense to a charge of escape that the prisoner feared violence from third persons, and you shall not consider such evidence as a defense or in mitigation of punishment."

For definitions of great bodily harm and imminent danger, see OUJI-CR 8-12.

OUJI-CR 8-21

DEFENSE OF DURESS-LIMITATION ON DEFENSE

A person is not entitled to the defense of duress if **he/she** fails to use a reasonably safe opportunity to escape from the imminent danger of death or great bodily harm.

Committee Comments

No Oklahoma statutes or cases set forth the above limitation on the defense of duress, but such limitation does exist in the common law interpretation of the defense. W. LaFave & A. Scott, *Criminal Law* § 49, at 378 (1972); R. Perkins, *Criminal Law* 954 (2d ed. 1969). This instruction should be given only when there is evidence that the defendant had an opportunity to escape.

OUJI-CR 8-22

DEFENSE OF DURESS - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that the defendant was not acting under duress. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Committee Comments

The issue of the burden of proof for the defense of duress has not yet been decided by the Oklahoma Court of Criminal Appeals. It is the opinion of the Commission, however, that, once the defense of duress is properly raised, the burden of proving the nonexistence of the defense of duress should properly rest on the State. *Cf. Mullaney v. Wilbur*, 421 U.S. 684 (1975). This would make the defense of duress consistent with other defenses, such as self-defense, intoxication, and insanity, in which the Court of Criminal Appeals has specifically held that the burden of proof is upon the State.

Duress is a defense, however. Thus, the Commission has emphasized that the defendant must come forward with evidence concerning duress, unless the evidence of the prosecution has raised the issue. If the defendant fails to come forward with evidence of duress, or fails as a matter of law to come forward with sufficient evidence, the issue of duress is not raised in the trial and the trial judge should not instruct on duress. If the defendant presents sufficient evidence to raise the defense of duress, or if the evidence of the prosecution raises the issue of duress, the trial judge should instruct the jury on duress because the trial judge has a duty to instruct on the defendants' theory of the case. No instructions on the defendant's burden to come forward with evidence, or on whether the defendant has presented sufficient evidence, are presented because these matters are questions of trial procedure and of law, and are beyond the legitimate concern of the jury.

OUJI-CR 8-23

DEFENSE OF DURESS - DEFINITION

Omission - Failure to act when there is a legal duty to do so.

References: Wharton's Criminal Law § 25:116-17 (14th ed. 1978); R. Perkins, Criminal Law 591 (2d ed. 1969).

OUJI-CR 8-24

DEFENSE OF ENTRAPMENT - INTRODUCTION

Evidence has been introduced of entrapment as a defense to the charge of **[Crime Charged in Information/Indictment]**.

OUJI-CR 8-25

DEFENSE OF ENTRAPMENT - REQUIREMENTS

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, **he/she** is entitled to the defense of entrapment, because the law as a matter of policy forbids a conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that a police officer provides what appears to be a favorable opportunity is no defense.

If you should find from the evidence that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit a crime such as that charged in the information whenever opportunity was offered and the police merely offered the opportunity, the defendant is not entitled to the defense of entrapment.

If, on the other hand, you should find that the defendant had no previous intent or purpose to commit any offense of the character here charged, and did so only because **he/she** was induced or persuaded by some agent of the police, then the government has seduced an innocent person, and the defense of entrapment is a good defense.

Committee Comments

This instruction is substantially similar to that approved by the Court of Criminal Appeals in *Robinson v. State*, 1973 OK CR 152, 507 P.2d 1296 , *overruled on other grounds*, *McInturff v. State*, 1976 OK CR 226, 554 P.2d 837 , 841. Entrapment occurs when the planning and volitional conduct associated with an offense are entirely the products of an officer or a person acting under the direction of an officer, and the officer or his agent procures the commission of the offense by a person who, but for the artifice of the officer, would not have perpetrated it. *Kiddie v. State*, 1977 OK CR 301, 574 P.2d 1042 ; *Dupree v. State*, 1973 OK CR 53, 506 P.2d 974 ; *McCart v. State*, 1967 OK CR 222, 435 P.2d 419 ; *Riddle v. State*, 1962 OK CR 98, 374 P.2d 634 ; *Crosbie v. State*, 1958 OK CR 78, 330 P.2d 602 ; *Savage v. State*, 1956 OK CR 112, 304 P.2d 344 ; *Bayouth v. State*, 1956 OK CR 26, 294 P.2d 856; *Lee v. State*, 66 OK CR 399, 92 P.2d 621 (1939). *See also Jacobson v. United States*, 503 U.S. 540, 554 (1992) (prosecution was required to offer evidence of defendant's predisposition to commit criminal independent of the government's acts and beyond a reasonable doubt). Merely furnishing the defendant with an opportunity to commit a crime is not entrapment. *Hunnicutt v. State*, 1988 OK CR 91, 755 P.2d 105 , 107-08. The defense of entrapment is not available unless the officer or the person acting under his direction first suggested perpetration of the criminal act, or lured or persuaded the defendant to partake of the criminal conduct. *Stevens v. State*, 51 Okl. Cr. 451, 2 P.2d 282 (1931); *Warren v. State*, 35 Okl. Cr. 430, 251 P. 101 (1926). The court has analyzed the availability of the entrapment defense as follows:

> One who is instigated, induced, or lured by officer of law or other person, for purposes of prosecution, into commission of crime which he had otherwise no intention of committing may avail himself of the defense of entrapment. Principle of entrapment places no limitation on right of officers to obtain evidence of any crime originating in mind of another; and an officer may, when acting in good faith with view to detecting crime, make use of deception, trickery or artifice.

Robinson, *supra*, 1973 OK CR 152, ¶ 11, 507 P.2d at 1299 (citations omitted; emphasis in original), *overruled on burden of proof*, *McInturff v. State*, 1976 OK CR 226, ¶ 12, 554 P.2d 837, 841.

Where the evidence indicates that entrapment may have occurred, the issue concerning the existence of the requisite mental state to commit the crime charged is reserved to the jury. *Slagel v. State*, 1988 OK CR 284, ¶ 9, 766 P.2d 355 , 357. ("A question of entrapment is generally one for the jury, rather than for the court."); *Ryans v. State*, 1966 OK CR 153, 420 P.2d 556 .

The Court of Criminal Appeals discussed the defense of sentencing entrapment in Leech v. State, 2003 OK CR 4, 66 P. 3d 987, and pointed out how OUJI-CR 8-25 should be modified if the defense of sentencing entrapment has been raised. It stated:

> In a case where sufficient evidence is presented to raise the issue of sentence entrapment, this language must be modified to make it clear to the jury that the issue is whether or not the defendant, although intending to commit a lesser offense, has been entrapped into committing a greater offense. If the defendant had no previous intent to commit the greater crime or did not become ready and willing to commit a greater crime during the course of the transaction, even though predisposed to commit the lesser crime, then a finding that law enforcement agents committed sentencing entrapment would require that the defendant be found not guilty of the greater crime, and guilty of the lesser offense.

2003 OK CR 4, ¶ 10, 66 P.3d at 990.

(2005 Supp.)

OUJI-CR 8-26

DEFENSE OF ENTRAPMENT - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that no entrapment occurred. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Committee Comments

Since entrapment is an affirmative defense, the obligation to produce evidence sufficient to raise the defense remains with the defendant, unless the evidence adduced by the prosecution has raised the issue. If the defendant fails to present any evidence that tends to prove that entrapment occurred, or if the defendant's evidence is insufficient as a matter of law, the issue of entrapment is not presented and no instruction should be given. If the defendant presents sufficient evidence to raise the defense of entrapment, or if the defense is raised by the prosecution, an instruction must be given in order to apprise the jurors of the defendant's theory of the case.

Once the defense of entrapment is properly raised, the burden of proving the nonexistence of the defense and the predisposition of the defendant rests on the State, and the jury must be so instructed. *McInturff v. State*, 554 P.2d 837 (Okl. Cr. 1976); *Striplin v. State*, 499 P.2d 446 (Okl. Cr. 1972). Note that *Watson v. State*, 382 P.2d 449 (Okl. Cr. 1962) and *Robinson v. State*, 507 P.2d 1296 (Okl. Cr. 1973), were specifically overruled on the issue of burden of proof by *McInturff, supra*.

No instructions concerning the defendant's burden to come forward with evidence, or the question of whether the defendant has presented sufficient evidence to warrant an instruction, are included because these matters pertain to questions of law and of trial procedure, both of which are beyond the legitimate concern of the jurors.

OUJI-CR 8-27

DEFENSE OF EXCUSABLE HOMICIDE - INTRODUCTION

Evidence has been introduced of excusable homicide as a defense to the charge that the defendant has committed the crime of **[Crime Charged in Information/ Indictment]**.

OUJI-CR 8-28

DEFENSE OF EXCUSABLE HOMICIDE -

ACCIDENT AND MISFORTUNE - LAWFUL ACT

A homicide is excusable when committed by lawful means, with usual and ordinary caution, and without any unlawful intent, but occurs by accident and misfortune while doing some lawful act.

Statutory Authority: 21 O.S. 1991, § 731.

OUJI-CR 8-29

DEFENSE OF EXCUSABLE HOMICIDE - ACCIDENT

AND MISFORTUNE - NO UNDUE ADVANTAGE TAKEN

A homicide is excusable when committed by accident and misfortune **(in the heat of passion)/(upon any sudden and sufficient provocation)/(upon sudden combat)**, provided that no undue advantage is taken, nor dangerous weapon used, and that the killing is not done in a cruel and unusual manner.

Statutory Authority: 21 O.S. 1991, § 731.

Committee Comments

The two subsections of section 731 describe situations which are generally mutually exclusive, so, although aspects of both subsections may be applicable in a particular case, the subsections are presented as separate instructions for purposes of clarity. The instructions follow the language of the statute, with only minor modifications used in the interest of clarity, to enable the trial judge to select those circumstances descriptive of the case on trial.

The law in Oklahoma regarding excusable homicide is well settled. Excusable homicide is distinguished from killings termed justifiable homicide in that the latter involves the taking of life as a matter of right, such as self-defense or other statutorily defined cause, as set forth in section 733 of Title 21. However, "excusable homicide is where death results from a lawful act by lawful means, accomplished accidentally or by misfortune or misadventure, or accomplished with sufficient provocation, with no undue advantage and without unnecessary cruel treatment." *Gaunce v. State,* 22 Okl. Cr. 361, 364, 211 P. 517, 518 (1923).

The court has termed "misfortune" analogous to "misadventure," so that in a homicide situation "misfortune" means that, without unlawful intent, the lawful conduct of a person unfortunately causes the death of another. *Adams v. State*, 93 Okl. Cr. 333, 228 P.2d 195 (1951); *Mead v. State*, 65 Okl. Cr. 86, 83 P.2d 404 (1938); *Gaunce, supra*.

That excusable homicide becomes an issue for jury consideration only where death results from conduct that is otherwise lawful is reiterated throughout the cases. In *Johnson v. State*, 506 P.2d 963 (Okl. Cr. 1973), the defendant urged as error on appeal from his conviction for manslaughter in the first degree the trial court's refusal to instruct the jury concerning excusable homicide. The defendant had carried a firearm in his belt throughout the entire evening on which the homicide occurred. The defendant maintained during his trial that the deceased had provoked an altercation with him and that during the ensuing struggle, the gun accidentally discharged, causing her death. In affirming the conviction, the court observed that section 1272 of Title 21 prohibits the carrying of a firearm, and declared:

> The evidence by the defense does indicate a showing of an accidental death but the evidence does not show the defendant to be involved in some lawful act, by lawful means, with usual and ordinary caution, without any unlawful intent. The possession of the firearm, under the circumstances of the instant case, resulted in a casualty, and this possession was unlawful. Since the defendant admits being engaged in an unlawful act, which resulted in a death, there is no question of fact for a jury in determining whether or not the defendant was engaged in lawful conduct. Therefore, the evidence required to support this instruction was not present and the court properly refused to instruct on excusable homicide.

Id. at 967. *Accord, Rice v. State*, 567 P.2d 525 (Okl. Cr. 1977) (defendant shot at deceased with shotgun

through open window); *Bell v. State*, 381 P.2d 167 (Okl. Cr. 1963) (defense of excusable homicide not available to defendant who committed homicide while attempting to escape in a stolen car, and while shooting at pursuing police officers). *See also Seals v. State*, 92 Okl. Cr. 272, 222 P.2d 1037 (1950) (defendant's conviction for first-degree manslaughter for homicide resulting from defendant's disciplining of his stepson affirmed where evidence showed defendant had subjected the child to protracted and continuous abuse, culminating in final, fatal blow).

By contrast, the court reversed a conviction for first-degree manslaughter in *Thompson v. State*, 507 P.2d 1271 (Okl. Cr. 1973), where the trial judge refused to instruct on excusable homicide, and instead instructed the jurors concerning justifiable homicide. The defendant testified that she and her adopted son were scuffling over a rifle, which was not pointed at the deceased, but accidentally discharged, killing him. The defendant maintained she did not know what caused the rifle to discharge, whether she or her son had inflicted the fatal wound, or whether it was caused by a shot from a rifle which the deceased was firing. Under these circumstances, refusal to instruct regarding the defendant's theory of excusable homicide constituted reversible error. *Accord Dennis v. State*, 556 P.2d 617 (Okl. Cr. 1976) (error to refuse to instruct on excusable homicide where defendant's evidence showed homicide could have occurred as a result of a hunting accident).

Defense by the defendant against an unprovoked assault by the deceased has been held to warrant an instruction on excusable homicide, as long as the remaining statutory requirements are met. For example, in *Mead v. State, supra*, the deceased approached the defendant, shouted abusive words at him, and shoved his hand at the defendant's face. The defendant struck the deceased, who fell into a ditch and expired. The death was caused by a blood clot or embolism in the left pulmonary artery. In reversing a conviction for manslaughter in the second degree, the court observed:

> [T]he evidence ... shows that the defendant was at a place where he had a right to be; that the deceased was the aggressor, used abusive language, and made an assault upon the defendant, and the testimony of all the witnesses shows ... that the alleged homicide was committed by accident and misfortune, in the heat of passion, upon sudden provocation, and that no undue advantage was taken, nor any dangerous weapon used, and without any unlawful intent.

65 Okl. Cr. at 98, 83 P.2d at 410. *See also Adams v. State*, 93 Okl. Cr. 333, 228 P.2d 195 (1951); *Palmer v. State*, 78 Okl. Cr. 220, 146 P.2d 592 (1944); *Johnson v. State*, 59 Okl. Cr. 283, 58 P.2d 156 (1936).

OUJI-CR 8-30

DEFENSE OF EXCUSABLE HOMICIDE - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that the death is not excusable homicide. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Committee Comments

Since the claim that a homicide occurred as a result of accident or misfortune in the performance of a lawful act in a lawful manner is a defense, the onus of producing evidence sufficient to raise the defense of excusable homicide remains on the defendant, unless the evidence of the prosecution has raised the issue. If the defendant fails to adduce any evidence that tends to prove that the homicide was excusable, or if the defendant's evidence is insufficient as a matter of law, the issue of the excusability of the homicide is not presented, and no instruction should be given. *Thompson v. State*, 51 Okl. Cr. 335, 1 P.2d 811 (1931). If the defendant presents sufficient evidence to raise the defense of excusable homicide, or if the defense is raised by the evidence of the prosecution, an instruction must be given in order to apprise the jurors of the defendant's theory of the case.

Once the defense of excusable homicide is properly raised, the burden of proving the nonexistence of the defense should rest on the State. *Cf. Mullaney v. Wilbur*, 421 U.S. 684 (1975). No instructions concerning the defendant's burden to come forward with evidence, or the question of whether the defendant has presented sufficient evidence to warrant an instruction, are included because these matters pertain to questions of law and of trial procedure, both of which are beyond the legitimate concern of the jurors.

OUJI-CR 8-31

DEFENSE OF MENTAL ILLNESS - INTRODUCTION

Defendant has raised the Defense of Mental Illness and asserts he/she should be found not guilty by reason of mental illness for **[Crime Charged in Information/ Indictment]**. Under Oklahoma law, no person can be convicted of a crime if that person was:

1) mentally ill at the time of the commission of the acts or omissions that constitute the crime, and

2) was either unable to understand the nature and consequences of his or her actions or was unable to differentiate right from wrong, and

3) **has not been** diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged.

Notes on Use

The introductory instruction is simply meant to inform the jury that the defendant is claiming the defense of mental illness and that the laws of the State do not permit conviction of a defendant who was mentally ill at the time of the commission of the acts with which he is charged, was either unable to understand the nature and consequences of his/her actions or was unable to differentiate right from wrong, and has not been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged. 22 O.S. Supp. 2017, § 1161. The defense of mental illness replaces what was formerly known as the defense of insanity.

(2018 Supp.)

OUJI-CR 8-32

DEFENSE OF MENTAL ILLNESS - REQUIREMENTS

The existence of mental illness standing alone is not sufficient to establish the Defense of Mental Illness. Instead, a person is not guilty by reason of mental illness when that person committed the act for which the person has been charged while mentally ill and was either unable to understand the nature and consequences of **his/her** actions or was unable to differentiate right from wrong, and has not been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged.

Statutory Authority: 21 O.S. 2011, § 152(4); 22 O.S. 2011 & Supp. 2017, §§ 914, 1161.

Notes on Use

The major difference between not guilty by reason of mental illness and guilty with a mental defect is whether the defendant has been diagnosed with antisocial personality disorder that substantially contributed to the act for which the defendant has been charged. The governing statute, 22 O.S. Supp. 2017, § 1161, defines antisocial personality disorder by reference to the definition in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5), or its subsequent editions. This condition is commonly called sociopathy, and it is characterized by a pervasive pattern of disregard for, or violation of, the rights of others and an impoverished moral sense or conscience.

(2019 Supp.)

OUJI-CR 8-33

DEFENSE OF MENTAL ILLNESS -

GUILTY WITH MENTAL DEFECT

I am also required by law to instruct you concerning the verdict of guilty with a mental defect. A person is guilty with mental defect if that person committed the act for which the person was charged and was either unable to understand the nature and consequences of **his/her** actions or was unable to differentiate right from wrong, **and has been** diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged. At the end of these instructions you will be asked to determine whether the Defendant is guilty, guilty with a mental defect, not guilty, or not guilty by reason of mental illness.

Statutory Authority: 22 O.S. Supp. 2017, § 1161(H)(4).

(2019 Supp.)

OUJI-CR 8-33A

DEFENSE OF MENTAL ILLNESS - CONSIDERATION

In considering the Defense of Mental Illness, you shall first determine whether, at the time of the commission of the acts or omissions that constitute the crime, the defendant was either unable to understand the nature and consequences of **his/her** actions or was unable to differentiate right from wrong. If you find that the defendant was able to understand the nature and consequences of **his/her** actions and was able to differentiate right from wrong, then the Defense of Mental Illness does not apply.

If you find either that the defendant was unable to understand the nature and consequences of his or her actions or was unable to differentiate right from wrong, then you must determine whether the defendant has been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged. If you find that the defendant has been so diagnosed and that **his/her** antisocial personality disorder substantially contributed to **his/her** criminal act, you shall find the defendant guilty with mental defect if the State has proved all elements of the charged offense beyond a reasonable doubt.

If you find that the defendant has not been diagnosed with antisocial personality disorder or that the disorder did not substantially contribute to **his/her** criminal act, you must determine whether the defendant is mentally ill. If you find that at the time of the commission of the acts or omissions that constitute the crime the defendant was mentally ill, and that the defendant was either unable to understand the nature and consequences of **his/her** actions or was unable to differentiate right from wrong, then the defendant is not guilty by reason of mental illness. If you find that the defendant was not mentally ill, then the Defense of Mental Illness does not apply.

(2018 Supp.)

OUJI-CR 8-33B

DEFENSE OF MENTAL ILLNESS - BURDEN OF PROOF

Every person is presumed to be of sound mind, and unless evidence is produced that the defendant is not guilty by reason of mental illness, the defense of mental illness does not apply. Therefore, unless you determine that sufficient evidence has been presented to raise a reasonable doubt that the defendant is not guilty by reason of mental illness, the State may rely on this presumption and not offer any proof that the defense of mental illness does not apply. However, if sufficient evidence has been presented to raise a reasonable doubt that the defendant is not guilty by reason of mental illness, the State has the burden to prove beyond a reasonable doubt that the defendant was not acting under circumstances sufficient to constitute the defense of mental illness. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty by reason of mental illness.

Statutory Authority: 21 O.S. 2011, § 152(4); 22 O.S. 2011 & Supp. 2017, §§ 914, 1161.

Notes on Use

The explicit language of 22 O.S. Supp.2017, § 1161(A)(5) requires the defendant to raise the Defense of Mental Illness. Every person is presumed to be of sound mind and capable of committing crimes, thus, it is the defendant's burden to produce evidence establishing the defense of not guilty by reason of mental illness. *See* 21 O.S. 2011, § 152(4).

(2019 Supplement)

OUJI-CR 8-33C

DEFENSE OF MENTAL ILLNESS - EXPLANATION OF CONSEQUENCES OF VERDICT OF NOT GUILTY BY REASON OF MENTAL ILLNESS AND GUILTY WITH MENTAL DEFECT

If you decide that the defendant is not guilty by reason of mental illness at the time of the commission of the crime charged, the defendant shall not be released from confinement in a mental hospital until the court determines that the defendant is dangerous to the public peace and safety by being a risk of harm to **himself/herself** or others on account of a mental illness.

If you decide that the defendant is guilty with mental defect, you shall then determine the proper punishment as prescribed in these Instructions.

_____

Statutory Authority: 22 O.S. Supp. 2017, § 1161(A)(2), (A)(5).

Notes on Use

This Instruction should be given when a defense of not guilty by reason of mental illness has been raised. The Court of Criminal Appeals held in *Ullery v. State*, 1999 OK CR 36, ¶ 28, 988 P.2d 332, 346, that a jury instruction on the consequences of a verdict of not guilty by reason of insanity was not required. However, in an unpublished decision, *Fears v. State*, No. F-2004-1279 (July 7, 2006), the Court of Criminal Appeals has suggested that trial courts should use an instruction explaining the consequences of a verdict of not guilty by reason of insanity. There is a risk that jurors might confuse a verdict of not guilty by reason of mental illness with other not guilty verdicts and think that the defendant would go free if they returned a verdict of not guilty by reason of mental illness. *See Lyles v. United States*, 254 F.2d 725, 728 (D.C. Cir. 1957), *overruled in part in Brawner v. United States*, 471 F.2d 969 (D.C. Cir. 1972). This Instruction ought to avoid both juror confusion and also unnecessary speculation by jurors during their deliberations.

(2019 Supplement)

OUJI-CR 8-33D

DEFENSE OF MENTAL ILLNESS - DEFINITIONS

Mental Illness: A person is mentally ill if that person has a substantial disorder of thought, mood, perception, psychological orientation or memory that significantly impaired judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life.

Mental Defect: A person has a mental defect if that person has been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged.

Antisocial Personality Disorder: An antisocial personality disorder is a pervasive pattern of disregard for and violation of the rights of others, occurring since the age of fifteen (15). It is indicated by three or more of the following:

1. Failure to conform to social norms with respect to lawful behaviors, as

indicated by repeatedly performing acts that are grounds for arrest.

2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.

3. Impulsivity or failure to plan ahead.

4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.

5. Reckless disregard for safety of self or others.

6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.

7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

In addition, 1) the individual is at least eighteen (18) years of age, 2) there is evidence of conduct disorder with onset before fifteen (15) years of age, and 3) the occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

Statutory Authority: 22 O.S. Supp. 2017, § 1161(H).

Notes on Use

This Instruction should be modified if the definition is modified by a subsequent edition of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).

Committee Comments

The Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders has two definitions of personality disorders, including the antisocial personality disorder. The first definition of antisocial personality disorder is found in Section II, and it has not changed from the definition in the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). This is the definition shown above.

The DSM-5 also includes an alternative approach to the diagnosis of personality disorder, which is found in Section III. The alternative approach was developed for DSM-5 for further study, and it is "based on a literature review of reliable clinical measures of core impairments central to personality pathology." DSM-5 Appendix, at p. 816. The DSM-5 states: "The current approach to personality disorders appears in Section II of DSM-5, and

an alternative model developed for DSM-5 is presented here in Section III. The inclusion of both models in DSM-5 reflects the decision of the APA Board of Trustees to preserve continuity with current clinical practice, while also introducing a new approach that aims to address numerous shortcomings of the current approach to personality disorders." DSM-5, Section III, at 763.

(2019 Supp.)

OUJI-CR 8-34

DEFENSE OF MENTAL ILLNESS - FORM OF VERDICT

IN THE DISTRICT COURT OF THE ____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,

)

)

Plaintiff,)

vs)

) Case No. _____

JOHN DOE,)

Defendant.)

)

VERDICT

COUNT 1 -- [CRIME CHARGED]

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

_____ Guilty and fix punishment at _____.

_____ Guilty with mental defect and fix punishment at _____.

_____ Not guilty.

_____ Not guilty by reason of mental illness.

_____

FOREPERSON

_____

Statutory Authority: 21 O.S. 2011, § 152(4); 22 O.S. 2011 & Supp. 2017, §§ 914, 1161.

(2018 SUPPLEMENT)

OUJI-CR 8-35

DEFENSE OF VOLUNTARY INTOXICATION - INTRODUCTION

Evidence has been introduced of intoxication of the **defendant** as a defense to the charge that the defendant has committed the crime of **[Crime Charged in Information/Indictment]**.

OUJI-CR 8-36

DEFENSE OF VOLUNTARY INTOXICATION - REQUIREMENTS

The crime of **[Crime Charged in Information/Indictment]** has as an element the **specific criminal intent of [Insert Specific Intent Required By the Statute]**. A person is entitled to the defense of intoxication if that person was incapable of forming the specific criminal intent of [**Insert Specific Intent Required By the Statute**] because of **his/her** intoxication.

Statutory Authority: 21 O.S. 2001, §§ 153, 704.

Notes on Use

The Oklahoma Court of Criminal Appeals emphasized in*Malone v. State*, 2007 OK CR 34, ¶ 29, 168 P.3d 185, 198, the duty of the trial court to tailor this instruction to the particular case by filling in the specific criminal intent at issue in place of the bracketed language. For example, where voluntary intoxication is raised as a defense to first-degree murder, the trial court should substitute "malice aforethought" for the bracketed language of "[Insert Specific Intent Required By the Statute]." Alternatively, a trial court could substitute "a deliberate intent to kill" for the bracketed language, because malice aforethought is defined as a deliberate intent to kill. *Id.* ¶ 30.

Committee Comments

In contrast with several other defenses, insanity, for example, the defense of voluntary intoxication is primarily a mitigating, as opposed to an exculpating, defense. Voluntary intoxication is available as a defense only when the crime with which the defendant is charged has as its mens rea element a specific criminal intent. *See Jones v. State*, 1982 OK CR 112, ¶ 13, 648 P.2d 1251 , 1255 ("Stated simply, voluntary intoxication is no defense to a crime, except to the extent that the intoxication rendered the defendant incapable of forming the necessary mental element."). Voluntary intoxication is relevant to disprove the existence of a specific criminal intent and thereby the commission of the crime, but voluntary intoxication does not excuse the defendant from criminal liability for a lesser included offense which does not have such a mens rea requirement. As stated in R. Perkins, *Criminal Law* 889 (2d ed. 1969), "voluntary drunkenness is no excuse for an actus reus."

The above interpretation is that which the Court of Criminal Appeals has given to 21 O.S. 2001, § 153. *Huffman v. State*, 1923 OK CR 251, 217 P. 1070, 24 Okl. Cr. 292. Moreover, the court has interpreted 21 O.S. 2001, § 704, to mean that a homicide is not automatically mitigated simply because of intoxication. As long as the homicide was committed with "malice aforethought," the crime is murder even though the defendant was drunk. However, if intoxication prevented the formation of the required specific intent to kill, then under section 153 intoxication would be a mitigating defense, and the defendant would be punishable for any appropriate lesser included offense. 21 O.S. 2001 & Supp. 2009, §§ 701.7, 701.8, 711.

The Court of Criminal Appeals has specifically ruled that the defense of intoxication is available in murder cases. *Perryman v. State*, 1916 OK CR 76, 159 P. 937, 12 Okl. Cr. 500. *See also Couch v. State*, 1962 OK CR 130, 375 P.2d 978 (second degree burglary); *Gower v. State*, 1956 OK CR 49, 298 P.2d 461 (larceny of automotive driven vehicles); *Kerr v. State*, 1954 OK CR 131, 276 P.2d 284 (larceny of domestic animals); *Walker v. State*, 1951 OK CR 9, 226 P.2d 998, 93 Okl. Cr. 251; *Huffman, supra; Cheadle v. State*, 1915 OK CR 59, 149 P. 919, 11 Okl. Cr. 566, (murder). Voluntary intoxication should be available as a defense, however, as to any crime that has a specific criminal intent as the mens rea requirement.

Voluntary intoxication is not a defense to the crime of rape, because rape does not have a specific criminal intent mens rea requirement. *Boyd v. State*, 1977 OK CR 322, 572 P.2d 276 ; *Kitch v. State*, 1937 OK CR 99, 69 P.2d 411, 61 Okl. Cr. 435, 446. Voluntary intoxication is not a defense to a crime having a general mens

rea requirement, such as criminal negligence. R. Perkins, *Criminal Law* 900 (2d ed. 1969).

It seems appropriate at this point to emphasize that insanity and voluntary intoxication are separate defenses, although both defenses may involve the effect of alcohol upon a person's mental abilities. Several cases have seemingly confused the two defenses. *Couch v. State, supra; Myers v. State*, 1946 OK CR 109, 174 P.2d 395, 83 Okl. Cr. 177.

As stated above, voluntary intoxication is only a defense to a crime which has a specific mens rea as an element of the crime. The defendant is permitted to introduce evidence that his drunken state made it impossible for him to have formed the specific mens rea required. If the evidence indicates that the drunkenness prevented the defendant from forming the specific mens rea necessary, then that element of the crime has not been established and, as a consequence, the crime itself has not been proved. Since the defendant was only in a temporary state of drunkenness, probably voluntarily induced, he is still subject to criminal liability for lesser included offenses contained within the crime charged. The defendant is still held accountable for these lesser included offenses which do not have a specific mens rea as an element. In effect, the defendant claims that drunkenness prevented formation of the necessary mens rea of the crime charged, but does not claim that his mental faculties have been destroyed. Voluntary intoxication is, therefore, primarily a mitigating defense; *i.e.*, it prevents conviction for certain crimes but does not entirely exculpate the defendant from criminal liability.

Insanity, by contrast, is an exculpating defense. If a defendant can present evidence which establishes that he/she was insane during the commission of the criminal act(s), the defendant is entirely free from criminal liability. The defendant claims that he/she is not accountable to the criminal law because his/her mental faculties were destroyed to such an extent that he cannot know right from wrong. The defendant claims that he/she was incapable of forming any mental state concerning the rightness or wrongness of his actions because of insanity at the time of the alleged crime.

Insanity may be brought about by numerous conditions, including chronic intoxication. A person can use alcohol so excessively and so continuously that eventually the alcohol destroys the mental faculties of the alcoholic. This condition, known as delirium tremens, thus serves as the underlying cause of insanity. When the defendant claims that his mental faculties have been destroyed by delirium tremens, the appropriate defense is the defense of insanity, not the defense of voluntary intoxication. *Mott v. State*, 1951 OK CR 68, 232 P.2d 166, 94 Okl. Cr. 145, 157.

(2010 Supp.)

OUJI-CR 8-37

DEFENSE OF VOLUNTARY INTOXICATION

BY NARCOTICS, DRUGS, HALLUCINOGENIC SUBSTANCES

The defense of intoxication can be established by proof of intoxication caused by **narcotics/drugs/(hallucinogenic substances)**.

Committee Comments

The Court of Criminal Appeals has ruled that intoxication caused by drugs, narcotics, or hallucinogenic substances is to be treated similarly to intoxication caused by alcohol for purposes of the defense of intoxication. *Jones v. State*, 1982 OK CR 112, ¶ 10, 648 P.2d 1251, 1255 ("where drugs are voluntarily taken, the law of voluntary intoxication shall apply"); *Gibson v. State*, 1972 OK CR 249, ¶ 38, 501 P.2d 891; *Myers v. State*, 1946 OK CR 109, 174 P.2d 395, 83 Okl. Cr. 177, 186.

This instruction should be given only in cases in which intoxication induced by nonalcoholic substances is used as a defense. The instruction is simply a clarifying instruction to the jury. No clarifying instruction is needed when intoxication induced by the traditional means of alcohol is used as a defense.

(2010 Supp.)

OUJI-CR 8-38

DEFENSE OF VOLUNTARY INTOXICATION - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that the defendant formed the specific criminal intent of **[Insert Specific Intent Required By the Statute]**. If you find that the State has failed to sustain that burden, by reason of the intoxication of **[Name of Defendant]**, then **[Name of Defendant]** must be found not guilty of **[Crime Charged in Information/ Indictment]**. You may find **[Name of Defendant]** guilty of **[Lesser Included Offense]**, if the State has proved beyond a reasonable doubt each element of the crime of **[Lesser Included Offense]**.

Notes on Use

The trial court should fill in the specific criminal intent at issue in place of the bracketed language in the first sentence of this instruction. See *Malone v. State*, 2007 OK CR 34, ¶ 31, 168 P.3d 185, 199.

Unless the evidence of the prosecution has raised the issue, the defendant must come forward with evidence concerning intoxication in order to raise it as a defense. If the defendant fails to come forward with evidence of intoxication, or fails as a matter of law to come forward with sufficient evidence, the issue of intoxication is not raised in the trial, and the trial judge should not instruct on intoxication. *See Charm v. State*, 1996 OK CR 40, ¶ 11, 924 P.2d 754 , 761. If the defendant presents sufficient evidence to raise the issue of intoxication, or if the evidence of the prosecution raises the issue of intoxication, the trial judge should instruct the jury on intoxication because the trial judge has a duty to instruct on the defendant's theory of the case. No instructions on the defendant's burden to come forward with evidence, or on whether the defendant has presented sufficient evidence, are presented because these are questions of trial procedure and of law, which are beyond the legitimate concern of the jury.

Committee Comments

This instruction sets forth the appropriate burden of proof that rests upon the State. *Kerr v. State*, 1954 OK CR 131, 276 P.2d 284 . It is drafted, however, to inform the jury very clearly that the defendant is to be acquitted only of the crime having a specific mens rea, but not of a lesser included offense, if one exists, lacking such a mens rea requirement.

The use of the following instruction was approved in *Oxendine v. State*, 1958 OK CR 104, 335 P.2d 940 :

> You are instructed that homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of voluntary intoxication at the time. However, one of the elements of the crime of murder is an intent to effect the death of the person killed and if you find that the defendant at the time of the killing was so completely drunk as to be totally unable to form an intent to kill, or if you have a reasonable doubt thereof, you should not find the defendant guilty of murder. The homicide, under such circumstances, unless otherwise excusable, would amount to manslaughter in the first degree.

Id. at ¶ 10, 335 P.2d at 940. *See also Charm v. State*, 1996 OK CR 40, ¶ 6, 924 P.2d 754 , 774 (Lane, J., dissenting) (noting that *Oxendine* has been followed in three other cases).

(2010 Supp.)

OUJI-CR 8-39

DEFENSE OF VOLUNTARY INTOXICATION - DEFINITIONS

Drugs - Substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in a human or other animal; substances other than food intended to affect the structure or any function of the body of a human or other animal; under the law, the substance **[Name of Substance]** is a drug.

> Note: Name, as applicable, substances listed in the Uniform Controlled Dangerous Substances Act, 63 O.S. 2001 & Supp. 2009, §§ 2-101 et seq., United States and homeopathic pharmacopoeias and National Formulary.

References: 63 O.S. 2001 & Supp. 2009, §§ 2-101 et seq.

Intoxication - A state in which a person is under the influence of an intoxicating **liquor/drug/substance** to such an extent that **his/her (passions are visibly excited)/ (judgment is impaired)**.

Reference: Findlay v. City of Tulsa, 1977 OK CR 113 , ¶ 14, 561 P.2d 980 , 984.

Narcotic Drug - Opium, coca leaves, opiates, cocaine, ecgonine, and all isomers, compounds and preparations derivative therefrom.

Reference: 63 O.S. Supp. 2009, § 2-101(26).

(2010 Supp.)

OUJI-CR 8-40

DEFENSE OF INVOLUNTARY INTOXICATION - INTRODUCTION

Evidence has been introduced of involuntary intoxication as a defense to the charge that the defendant has/have committed the crime of **[Crime Charged in Information/Indictment]**.

Notes on Use

This is simply an introductory instruction to inform the jury of the defense upon which the defendant is relying.

OUJI-CR 8-41

DEFENSE OF INVOLUNTARY INTOXICATION - REQUIREMENTS

A person is entitled to the defense of involuntary intoxication if, at the time of the commission of the acts/omissions that constitute the crime, that person did not know that **his/her acts/omissions** were wrong and was unable to distinguish right from wrong with respect to **his/her acts/omissions**. A person is also entitled to the defense of involuntary intoxication if that person did not understand the nature and consequences of **his/her acts/omissions**. The inability to know right from wrong or to understand the nature and consequences of **his/her** acts must be caused by the involuntary use of an intoxicant.

OUJI-CR 8-42

INVOLUNTARY INTOXICATION DEFINED

Involuntary intoxication is a state of intoxication that has been induced **(under duress on the part of another)/(by force of another)/(by ignorance of the character of medication or other substances taken, whether the ignorance results from the defendant's own innocent mistake or from fraud/trickery of another)**.

Authority: Choate v. State, 19 Okl. Cr. 169, 197 P. 1060 (1921); Perryman v. State, 12 Okl. Cr. 500. 159 P. 937 (1916).

Notes on Use

This instruction should be given whenever the defense is applicable.

Committee Comments

In *Jones v. State*, 648 P.2d 1251, 1258 (Okl. Cr. 1982), the Oklahoma Court of Criminal Appeals provided the following analysis of the defense of involuntary intoxication:

> Involuntary intoxication is a complete defense where the defendant is so intoxicated that he is unable to distinguish between right and wrong, the same standard as applied in an insanity defense. An involuntary intoxication defense is available where the intoxication results from: 1) fraud, trickery or duress of another; 2) accident or mistake on his own part; 3) a pathological condition; 4) ignorance as to the effects of prescribed medication.
>
> The question of whether the defendant's intoxication was involuntary is a fact question for the jury.

648 P.2d at 1258.

Despite the similar standard by which the defense of involuntary intoxication is defined, involuntary intoxication is not identical with the defense of insanity. For the defense of involuntary intoxication, no claim is necessary that the incapacity to know right from wrong, or the nature and consequences of acts, is a result of mental disease. Involuntary intoxication is solely a claim that the person, without personal culpability for the intoxication, was so intoxicated at the particular time as to be unable to know right from wrong, or the nature and consequences of his acts.

Insanity, on the other hand, requires that the incapacity to know right from wrong, or the nature and consequences of acts, be related to mental disease. Intoxication can, after a period of time, so debilitate the mind that the mental faculties of the person are destroyed. This is defined as delirium tremens. If this conditions destroys a person's mental faculties, the incapacity to know right from wrong, or the nature and consequences of acts, would be a product of this condition. In this latter instance, the appropriate defense is insanity, not involuntary intoxication.

OUJI-CR 8-43

DEFENSE OF INVOLUNTARY INTOXICATION

BY NARCOTICS, DRUGS, HALLUCINOGENIC SUBSTANCES

The defense of involuntary intoxication can be established by proof of intoxication caused by **narcotics/drugs/(hallucinogenic substances)**.

Committee Comments

Since the Court of Criminal Appeals has held that the defense of intoxication can be established by proof of intoxication caused by drugs, narcotics, or hallucinogenic substances, *Gibson v. State*, 501 P.2d 891 (Okl. Cr. 1972); *Myers v. State*, 83 Okl. Cr. 177, 174 P.2d 395 (1946), a similar decision should result when the defendant claims involuntary intoxication by reason of drugs, narcotics, or hallucinogenic substances. *See Wooldridge v. State*, 801 P.2d 729, 734 (Okl. Cr. 1990); *Grayson v. State*, 687 P.2d 747, 749 (Okl. Cr. 1984).

This instruction should be given only in cases in which involuntary intoxication induced by nonalcoholic substances is used as a defense. The instruction is simply a clarifying instruction for the jury. No clarifying instruction seems to be needed when involuntary intoxication induced by the traditional means of alcohol is used as a defense.

OUJI-CR 8-44

DEFENSE OF INVOLUNTARY INTOXICATION - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that the defendant did know that **his/her acts/omissions** were wrong, was able to distinguish right from wrong with respect to **his/her acts/omissions**, and understood the nature and consequences of **his/her acts/omissions** at the time of the commission of the **acts/omissions** that constitute the crime. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Committee Comments

This instruction places the burden of proof upon the State. It should be clearly understood, however, that the defense of involuntary intoxication is a defense. The defendant must come forward with evidence concerning involuntary intoxication, unless the evidence of the prosecution has raised the issue. If the defendant fails to come forward with evidence of involuntary intoxication or fails as a matter of law to come forward with sufficient evidence, the issue of involuntary intoxication is not raised in the trial and the trial judge should not instruct on involuntary intoxication. If the defendant presents sufficient evidence to raise the issue of involuntary intoxication, or if the evidence of the prosecution raises the issue of involuntary intoxication, the trial judge should instruct the jury on involuntary intoxication because the trial judge has a duty to instruct on the defendant's theory of the case.

Where evidence of intoxication has been introduced, the defendant must produce sufficient evidence to raise a reasonable doubt as to the voluntariness of the intoxication in order to invoke the defense of voluntary intoxication. *Wooldridge v. State*, 801 P.2d 729, 734 (Okl. Cr. 1990); *Grayson v. State*, 687 P.2d 747, 749 (Okl. Cr. 1984).

No instructions on the defendant's burden to come forward with evidence, or on whether the defendant has presented sufficient evidence, are presented because these are questions of trial procedure and of law, which are beyond the legitimate concern of the jury.

OUJI-CR 8-45

DEFENSE OF SELF-DEFENSE - INTRODUCTION

Evidence has been introduced of self-defense as a defense to the charge that the defendant has committed the crime of **[Crime Charged in Information/Indictment]**.

Notes on Use

This instruction is simply an introductory instruction to be used when the defendant is using self-defense as a defense to the charge. This instruction is for use whether the defendant is claiming justifiable homicide, section 733, or justifiable use of nondeadly force, section 643(3).

OUJI-CR 8-46

DEFENSE OF SELF-DEFENSE - JUSTIFIABLE USE OF DEADLY FORCE

A person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to prevent death or great bodily harm to **himself/herself** or to terminate or prevent the commission of a forcible felony against **himself/herself**. Self-defense is a defense although the danger to life or personal security may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that **he/she** was in imminent danger of death or great bodily harm.

_____

Statutory Authority: 21 O.S. Supp. 2016, § 733.

Notes on Use

This Instruction should be used for the use of deadly force in self defense or to prevent the commission of a forcible felony upon the defendant. For an Instruction for the use of deadly force in the defense of another or to prevent the commission of a forcible felony upon another, see OUJI-CR 8-2, *supra*. For an Instruction for the use of deadly force in protection of the habitation, see OUJI-CR 8-14, *supra*. For an Instruction for the use of deadly force against an intruder, see OUJI-CR 8-15, *supra*. For an Instruction on the right to stand your ground, see OUJI-CR 8-15A, *supra*.

Committee Comments

Fear alone does not justify a homicide, *McKee v. State*, 1962 OK CR 57, 372 P.2d 243; nor may a homicide be justified because of threats or insults by the decedent, *Jamison v. State*, 1956 OK CR 127, 304 P.2d 371; *Fields v. State*, 1947 OK CR 126, 85 Okl. Cr. 439, 188 P.2d; *Ging v. State*, 1925 OK CR 461, 31 Okl. Cr. 428, 239 P. 685; nor may a defendant kill and be justified when acting simply on subjective honest belief, *Haines v. State*, 1954 OK CR 85, 275 P.2d 347; *Hood v. State*, 1925 ok cr 461, 70 Okl. Cr. 334, 106 P.2d 271. Rather, a homicide is justifiable when a reasonable person would have used deadly force. *Davis v. State*, 2011 OK CR 29, ¶ 95, 268 P.3d 86, 114 (quoting this Instruction); *Harris v. State*, 1968 OK CR 223, 448 P.2d 296; *Jamison v. State, supra; Brown v. State*, 1923 OK CR 204, 24 Okl. Cr. 161, 216 P. 944. A homicide is also justifiable when the use of deadly force is reasonably necessary because the danger appears imminent. *McKee v. State, supra; Lary v. State*, 1931 OK CR 83, 50 Okl. Cr. 111, 296 P. 512; *Best v. State*, 1926 OK CR 41, 33 Okl. Cr. 237, 242 P. 1063. Finally, the jury should view the circumstances from the viewpoint of the defendant. *Wingfield v. State*, 1949 OK CR 36, 89 Okl. Cr. 45, 55, 205 P.2d 320, 327, *overruled on other grounds, Hommer v. State*, 1983 OK CR 2, ¶ 6, 657 P.2d 172, 174; *Guthrie v. State*, 1948 OK CR 58, 87 Okl. Cr. 112, 194 P.2d 895.

Subsection 1 of 21 O.S. Supp. 2016, § 733 provides that homicide is justifiable "[w]hen resisting any attempt ... to commit any felony upon him." Nevertheless, the Court of Criminal Appeals has held that the use of deadly force is not justifiable to prevent commission of any felony. In *Mammano v. State*, 1958 OK CR 94, 333 P.2d 602, the deceased grabbed the defendant's hands and placed them on his private parts. The defendant killed the deceased and pleaded subsection 1 in justification. The court held that the acts of the deceased alone did not justify the homicide because the acts of the deceased did not involve imminent danger of death or great bodily harm to the defendant. The conviction was affirmed. The *Mammano* case, therefore, places a limitation on the "any felony" language of subsection 1. Only those felonies which involve danger of imminent death or great bodily harm may be defended against by the use of deadly force.

Subsection 3 of section 733 also contains the language, "in lawfully suppressing any riot; or in lawfully keeping and preserving the peace." Research has shown only one case that has invoked the "preserving the peace"

language, and no cases that have invoked the "suppressing any riot" language as justification for the use of deadly force. *Fleming v. State*, 1965 OK CR 53, 401 P.2d 997. In *Fleming*, the defendant had been asked by a neighbor to come to her house to help her stop a fight that had developed between her husband and a friend. When the defendant attempted to stop the fight, the friend began fighting with the defendant and attacked the defendant with a knife. The defendant killed the friend. The Court of Criminal Appeals reversed the conviction for first-degree manslaughter because the trial court failed to instruct on subdivision 3 of section 733. The Commission considered it significant, however, that the defendant in *Fleming* had been attacked by the decedent, who was wielding a knife. Hence, the defendant had a right of self-defense. The Commission is therefore of the opinion that a homicide is "necessarily committed" when preserving the peace only in those situations in which the peacemaker is in imminent danger of death or great bodily harm, i.e., only in those situations in which the peacemaker has a defense of self-defense. Similarly, the Commission has concluded that use of deadly force is justifiable when suppressing a riot only in those situations in which the defense of self-defense is applicable.

(2017 SUPP.)

OUJI-CR 8-47

DEFENSE OF SELF-DEFENSE - BATTERED WOMEN CASES

A person is justified in using deadly force in self-defense if that person believed that use of deadly force was necessary to protect herself from imminent danger of death or great bodily harm. Self-defense is a defense although the danger to life or personal security may not have been real, if a person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that she was in imminent danger of death or great bodily harm.

Notes on Use

This instruction was adopted by the Oklahoma Court of Criminal Appeals in *Bechtel v. State*, 840 P.2d 1, 11 (Okl. Cr. 1992), for use in all Battered Women Syndrome cases. OUJI-CR 8-45 and 8-49 should also be given in such cases, but OUJI-CR 8-50 should not be given unless there is evidence that the defendant was the aggressor, provoked the altercation, or voluntarily entered into mutual combat. *Id.* at 12-14. This defense might also be applicable to a battered man, or in appropriate circumstances, to a battered child, but this has not yet been decided by the Oklahoma Court of Criminal Appeals. *Compare Commonwealth v. Kacsmar*, 617 A.2d 725, 731-32 (Pa. Super. 1992) (expert testimony on battered person syndrome should have been allowed in trial for voluntary manslaughter of defendant's brother), *overruled on other grounds*, *Commonwealth v. Miller*, 634 A.2d 614, 622 (Pa. Super. 1992), and *State v. Janes*, 850 P.2d 495, 503 (Wash. 1995) (evidence of battered child syndrome was admissible to prove self-defense), *with Jahnke v. State*, 682 P.2d 991, 99 (Wyo. 1984) (rejecting battered child defense). *Cf. Bechtel v. State*, 840 P.2d 1, 16 (Okl. Cr. 1992) (Lumpkin, J., dissenting). If so, this instruction would have to be modified appropriately.

OUJI-CR 8-48

DEFENSE OF SELF-DEFENSE

JUSTIFIABLE USE OF NONDEADLY FORCE

A person is justified in using force in self-defense if that person reasonably believed that use of force was necessary to protect **himself/herself** from imminent danger of bodily harm. Self-defense is a defense although the danger to personal security may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that he/she was in imminent danger of bodily harm. The amount of force used may not exceed the amount of force a reasonable person, in the circumstances and from the viewpoint of the defendant, would have used to prevent the bodily harm.

Statutory Authority: 21 O.S. 1991, § 643(3).

Committee Comments

Subdivision 3 of section 643 presents the statutory authorization for use of nondeadly force in self-defense. Although the proviso clause of section 643(3) seems to indicate that a person using force to protect himself is limited to the amount of force "sufficient to prevent" bodily harm, and no more, the Court of Criminal Appeals has interpreted section 643(3) to permit a person to use as much force as reasonably appears necessary, even though in reality no force is necessary. Moreover, section 643(3) permits the use of force in self-defense against any bodily harm that appears imminent, such as a simple assault or a simple battery. Use of nondeadly force is justifiable even though the harm defended against does not reasonably arouse fear of death or great bodily harm. *Johnson v. State*, 59 Okl. Cr. 283, 58 P.2d 156 (1936). *See Boston v. Muncie*, 204 Okl. 603, 233 P.2d 300 (1951). Section 643(3) therefore differs from section 733, in two respects: (1) only nondeadly force is permissible under section 643(3) as opposed to deadly force under section 733; and, (2) any bodily harm may be defended against under section 643(3), whereas, under section 733, the harm must potentially be death or great bodily harm.

The amount of nondeadly force permissible under section 643(3) must be reasonably related to the amount of force defended against. Hence, as the amount of force defended against becomes greater, the amount of force which may justifiably be used in response becomes greater. Of course, if the person claiming self-defense uses excessive force, the defense of self-defense does not justify the excessive force. *Easterling v. State,* 267 P.2d 185 (Okl. Cr. 1954). If the force defended against puts a person in reasonable fear of imminent death or great bodily harm, the permissible force in response can be deadly force, and the defense of self-defense changes from self-defense under section 643(3) to self-defense under section 733. Mere threats, however, do not justify the use of force by the defendant, and the defendant could be convicted of assault or battery. *Brewer v. State*, 84 Okl. Cr. 235, 180 P.2d 848 (1947).

This instruction primarily is meant for use in cases that do not involve a homicide charge, such as cases of assault, battery, and assault with a dangerous weapon, in which self-defense under section 643(3) is interposed as a defense to the charge. It should be emphasized, however, that a person is permitted to use nondeadly force to repel an assault under section 643(3). If a permissible amount of force is used to repel the assailant but the assailant is accidentally killed while being repelled, the jury should be given instructions on excusable homicide under section 731, as well as on self-defense under section 643(3). *Adams v. State*, 93 Okl. Cr. 333, 228 P.2d 195 (1951); *Johnson v. State, supra.* (See, as a cross-reference, the instructions on the defense of excusable homicide, OUJI-CR 8-27 through OUJI-CR 8-30.).

OUJI-CR 8-49

DEFENSE OF SELF-DEFENSE - BURDEN OF PROOF

It is the burden of the State to prove beyond a reasonable doubt that the defendant was not acting in self-defense. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Notes on Use

The Oklahoma Court of Criminal Appeals held in *Perez v. State*, 798 P.2d 639, 641 (Okl. Cr. 1990), that this instruction must be given in conjunction with other appropriate self-defense instructions when the defendant has introduced sufficient evidence to warrant the instruction.

Committee Comments

This instruction sets forth the appropriate burden of proof when the defendant claims self-defense under either section 733 or section 643(3) as a defense to the charge. The burden of proof rests on the State. Self-defense is, however, a defense. Hence, the defendant must first come forward with sufficient evidence to raise self-defense as an issue, unless the evidence of the prosecution has raised the issue. If the defendant fails to come forward with evidence, or fails to come forward with sufficient evidence, the issue of self-defense is not raised in the trial, and the judge should not instruct on self-defense. Whether the defendant has come forward with sufficient evidence is a question of law for decision by the trial judge. Once the defendant has presented sufficient evidence to raise self-defense as an issue, the State has the burden of proof to overcome the defense beyond a reasonable doubt. It is a decision for the jury as to whether the State has met the burden of proof. *Bearden v. State*, 458 P.2d 914 (Okl. Cr. 1969).

Nor does 22 O.S. 1991, § 745, shift the burden of proof. Section 745 reads:

> Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

Section 745 is solely a statement of trial procedure which puts the burden of coming forward with evidence of mitigation, justification, or excuse on the defendant. If the defendant does not come forward with evidence of self-defense as justification, the issue of self-defense is not raised, unless the evidence of the State has raised the issue. *Meadows v. State*, 487 P.2d 359 (Okl. Cr. 1971).

No instructions on the defendant's burden to come forward with evidence, or on whether the defendant has presented sufficient evidence, are presented because, as questions of trial procedure, 22 O.S. 1991, § 745, and of law, they are beyond the legitimate concern of the jury.

Whenever there is sufficient evidence to raise the defense of self- defense, either from the evidence of the State or from evidence brought forward by the defendant, the trial judge has the duty to instruct on self- defense, whether the defendant requests instructions or not. *Cordray v. State*, 268 P.2d 316 (Okl. Cr. 1954); *Owens v. State*, 93 Okl. Cr. 156, 225 P.2d 812 (1950). *See also Nance v. State*, 838 P.2d 513, 515 (Okl. Cr. 1992) (instruction on defense of accidental homicide required where evidence produced at trial supported the defense). *But see West v. State*, 798 P.2d 1083, 1085 (Okl. Cr. 1990) (evidence insufficient to support instruction on self-defense).

In a murder case where a self-defense instruction is required, it may be appropriate for the trial court to also instruct on a lesser included offense such as manslaughter. In *Walton v. State*, 744 P.2d 977, 978-79 (Okl. Cr. 1987), the Court of Criminal Appeals held that the trial court did not err in not instructing on the lesser included

offense of "heat of passion" first degree manslaughter, where there was no evidence that the killing was committed in the heat of passion and the defendant did not request the instruction. The court overruled its prior decision in *Morgan v. State*, 536 P.2d 952, 959 (Okl. Cr. 1975), which had mandated the giving of such an instruction.

OUJI-CR 8-50

DEFENSE OF SELF-DEFENSE - WHEN DEFENSE NOT AVAILABLE

Self-defense is permitted a person solely because of necessity. Self-defense is not available to a person who **(was the aggressor)/(provoked another with the intent to cause the altercation)/(voluntarily entered into mutual combat)**, no matter how great the danger to personal security became during the altercation unless the right of self-defense is reestablished.

OUJI-CR 8-51

DEFENSE OF SELF-DEFENSE - DEFENSE REESTABLISHED

A person who **(was the original aggressor)/(provoked another with intent to cause the altercation)/(voluntarily entered into mutual combat)** may regain the right to self-defense if that person withdrew or attempted to withdraw from the altercation and communicated **his/her** desire to withdraw to the other **participant(s)** in the altercation. If, thereafter, the other **participant(s)** continued the altercation, the other **participant(s)** became the **aggressor(s)** and the person who **(was the original aggressor)/(provoked another with the intent to cause the altercation)/(voluntarily entered into mutual combat)** is entitled to the defense of self-defense.

OUJI-CR 8-52

DEFENSE OF SELF-DEFENSE - NO DUTY TO RETREAT

A person who **(was not the aggressor)/(did not provoke another with intent to cause an altercation)/(did not voluntarily enter into mutual combat)** has no duty to retreat, but may stand firm and use the right of self-defense.

OUJI-CR 8-53

DEFENSE OF SELF-DEFENSE - AGGRESSOR DEFINED

A person is an aggressor when that person by **his/her** wrongful acts provokes, brings about, or continues an altercation. **[The use of words alone cannot make a person an aggressor.]**

Notes on Use

The parenthetical sentence is presented by the Committee for use by the trial judge in those cases in which it will serve as a clarifying sentence in this instruction. The sentence is in brackets because the Committee was of the opinion that it is not usually needed in most cases involving a dispute as to fault and normally should not be given.

Committee Comments

The previous four instructions are intended for use when the facts of the case give rise to a dispute as to who was the party at fault. These four instructions are applicable whether the defendant is claiming self-defense under either section 733 or section 643(3).

A person who is the aggressor in an altercation is not entitled to the defense of self-defense. *Ruth v. State*, 581 P.2d 919 (Okl. Cr. 1978); *Martley v. State*, 519 P.2d 544 (Okl. Cr. 1974); *Freeman v. State*, 97 Okl. Cr. 275, 262 P.2d 713 (1953); *Evans v. State*, 89 Okl. Cr. 218, 206 P.2d 247 (1949); *Rollen v. State*, 7 Okl. Cr. 673, 125 P. 1087 (1912). Neither may a person provoke an altercation as an excuse to inflict bodily injury upon another. *Moutrey v. State*, 9 Okl. Cr. 623, 132 P. 915 (1913); *Hays v. Territory*, 7 Okl. 15, 52 P. 950 (1897) (use of gross insults with intent to cause altercation). Nor may a person use self-defense if that person has voluntarily entered into mutual combat. *Jenkins v. State*, 80 Okl. Cr. 328, 161 P.2d 90 (1945); *Koozer v. State*, 7 Okl. Cr. 336, 123 P. 554 (1912). Hence, OUJI-CR 8-50 uses alternative language to permit the trial judge to conform the instruction to the particular facts of the trial.

Although a person may originally have been at fault in the altercation, a person can regain the right of self-defense if that person withdraws or attempts to withdraw from the altercation and communicates his withdrawal or attempted withdrawal to the other participant in the altercation. If the other participant continues to fight the person who wants to quit, the participant who was not originally at fault becomes the aggressor. *Scaggs v. State*, 417 P.2d 331 (Okl. Cr. 1966); *Townley v. State*, 355 P.2d 420 (Okl. Cr. 1960), *on rehearing* 1960.

Perez v. State, 51 Okl. Cr. 180, 300 P. 428 (1931), and *Price v. State*, 1 Okl. Cr. 358, 98 P. 447 (1908), make it clear that a person who is not at fault has no duty to retreat. A person who is not at fault is entitled to the defense of self-defense as long as the reasonable belief of imminent bodily harm and the necessity for the use of force exist. The Commission has concluded that OUJI-CR 8-50 is related to OUJI-CR 8-52 and should not be given separately.

The definition of aggressor in OUJI-CR 8-53 is taken almost verbatim from the definition set forth by the Court of Criminal Appeals in *Townley, supra*.

It should be emphasized that, if the evidence from the prosecution in the trial indicates no dispute that the defendant was at fault, and if the defendant does not come forward with evidence to indicate the defendant was not at fault, the issue of self-defense has not been raised. If the evidence indicates without dispute that defendant is at fault, the defendant is not entitled to the defense of self-defense. Therefore, no instructions on self-defense, including the above four instructions, should be given to the jury. The only question for determination by the jury is whether the defendant committed the crime charged or a lesser included offense. *Ridinger v. State*, 97 Okl. Cr. 377, 267 P.2d 175 (Okl. Cr. 1954); *Freeman, supra; Koozer, supra*. Moreover, if there is no dispute in the evidence that the defendant was not at fault and the defendant presents sufficient evidence of self-defense, the issue of self-defense is raised and the last four instructions should not be given. Only the appropriate self-

defense instruction and the burden of proof instruction should be given. The only question for determination by the jury is whether the State has met its burden of proof to overcome the defense of self-defense. *Bearden v. State*, 458 P.2d 914 (Okl. Cr. 1969).

The last four instructions should be used only when a dispute exists as to whether the defendant or the other participant in the altercation was at fault. When such a dispute exists, all four instructions should be given so the jury will be clearly informed as to the respective rights of the parties. Failure to give these four instructions would mean that the trial court had improperly assumed that the defendant was the aggressor. *Scaggs, supra; Townley, supra; Perez, supra*.

OUJI-CR 8-53 includes a parenthetical sentence indicating that use of words alone does not make a person an aggressor. As indicated in the commentary accompanying the self-defense instructions, a defendant is not able to claim the defense of self-defense to justify the use of any force upon a person who has insulted or threatened the defendant. *Ruth v. State, supra; Jarnison v. State*, 304 P.2d 371 (Okl. Cr. 1956); *Fields v. State*, 85 Okl. Cr. 439, 188 P.2d 231 (1948); *Brewer v. State*, 84 Okl. Cr. 235, 180 P.2d 848 (1947); *Tritthart v. State*, 35 Okl. Cr. 41, 247 P. 1111 (1926); *Burchett v. State*, 22 Okl. Cr. 81, 209 P. 970 (1922). Since a defendant cannot claim self-defense when insulted or threatened, the person who makes the insults or threats cannot be an aggressor. *But compare Hays v. Territory, supra*, (use of gross insults with intent to cause an altercation).

OUJI-CR 8-54

DEFENSE OF SELF-DEFENSE - AVAILABILITY TO A TRESPASSER

The defense of self-defense is available to a person who was a trespasser only if the trespasser availed or attempted to avail **himself/herself** of a reasonable means of retreat from the imminent danger of **(death or great bodily harm)/(bodily harm) before repelling/(attempting to repel)** an unlawful attack.

OUJI-CR 8-55

DEFENSE OF SELF-DEFENSE - TRESPASSER DEFINED

A person is a trespasser if that person has **([entered without consent]/[is unlawfully] upon the land of another)/(refused to leave the land of another after a lawful request to leave has been made to him/her)**.

Committee Comments

A person who is a trespasser can utilize the defense of self-defense but only if the trespasser has availed himself of every reasonable means of retreat. If a trespasser has tried every reasonable means of retreat, or if no reasonable means of retreat exists, the trespasser may use force to defend himself against imminent danger of death, great bodily harm, or bodily harm. Of course, the trespasser may respond only with the amount of force which is reasonably necessary to prevent the imminent harm reasonably believed to exist. Use of excessive force destroys the defense of self-defense for the trespasser, just as it does for all other persons claiming self-defense. *See Thompson v. State*, 462 P.2d 299 (Okl. Cr. 1969); *Womack v. State*, 36 Okl. Cr. 44, 253 P. 1027 (1927). The alternate language in OUJI-CR 8-54 permits it to be tailored to a case involving self-defense under either section 733 or section 643(3).

The definition of trespasser reflects the facts of numerous cases in which self-defense has been claimed either by a trespasser or against a trespasser. *E.g., Turpen v. State*, 89 Okl. Cr. 6, 204 P.2d 298 (1949); *Hovis v. State*, 83 Okl. Cr. 299, 176 P.2d 833 (1947); *Grindstaff v. State*, 82 Okl. Cr. 31, 165 P.2d 846 (1946); *Hendrick v. State*, 63 Okl. Cr. 100, 73 P.2d 184 (1937); *Dyer v. State*, 58 Okl. Cr. 345, 53 P.2d 700 (1936); *Choate v. State*, 37 Okl. Cr. 314, 258 P. 360 (1927); *Thomason v. State*, 17 Okl. Cr. 666, 191 P. 1096 (1920); *Marshall v. State*, 11 Okl. Cr. 52, 142 P. 1046 (1914); *Dickinson v. State*, 3 Okl. Cr. 151, 104 P. 923 (1909).

The purpose of these two trespasser instructions is to permit the jury to decide whether or not the defendant is a trespasser and therefore entitled to the defense of self-defense only after the retreat requirements are satisfied. OUJI-CR 8-54 and 8-55 are to be given only when a factual dispute exists as to whether or not the defendant was a trespasser, or, if a trespasser, whether or not the trespasser availed himself of every reasonable means of retreat. Furthermore, these two trespasser instructions are appropriate only after the defendant or the prosecution has presented sufficient evidence to raise self-defense as an issue in the case. *Downey v. State*, 510 P.2d 287 (Okl. Cr. 1973).

DEFENSE OF SELF-DEFENSE - DEFINITIONS

Altercation - Heated dispute or controversy.

Reference: Black's Law Dictionary 71 (5th ed. 1979).

Imminent danger - Danger that is pressing, urgent, or immediate.

References: Lary v. State, 50 Okl. Cr. 111, 296 P. 512 (1931); Turner v. State, 4 Okl. Cr. 164, 111 P. 988, 998 (1910); R. Perkins, Criminal Law 994 (2d ed. 1969).

Mutual combat - A fight between two or more parties into which each party has entered willingly.

References: Phelps v. State, 64 Okl. Cr. 240, 78 P.2d 1068 (1938); Weatherholt v. State, 9 Okl. Cr. 161, 131 P. 185 (1913); 27A Words and Phrases 712.

OUJI-CR 8-57

DEFENSE OF ALIBI -- REQUIREMENTS

Evidence has been introduced in this case that the defendant was at another and different place at the time of the commission of the crime charged. The law is that such a defense is proper and legitimate and you should consider all of the evidence bearing thereon, whether introduced by the State or the defendant, and if, after careful consideration of all of the evidence in the case, you have a reasonable doubt as to whether the defendant was present at the time and place where the crime was committed, if it was committed, then you must find the defendant not guilty.

Notes on Use

This instruction is required only if the defendant requests it. *Novey v. State*, 709 P.2d 696, 698 (Okl. Cr. 1985).

Committee Comments

This instruction is similar to one that the Court of Criminal Appeals approved in *Novey v. State*, 709 P.2d 696, 697-98 (Okl. Cr. 1985); *Cortez v. State*, 415 P.2d 196, 201 (Okl. Cr. 1966); and *Stuart v. State*, 35 Okl. Cr. 103, 112, 249 P. 159, 162 (1926). It omits the use of the word "alibi" in order to make it easier for jurors to understand.

OUJI-CR 8-58

BURGLARY - DEFENSE OF CONSENT

A person who enters a dwelling with the consent or authorization of an owner or occupant of that dwelling does not commit a "breaking" and therefore cannot be convicted of burglary **(in the first/second degree)/(with explosives)**. Such consent or authorization to enter is adequate where it is given by one who has actual authority to give it or by one who reasonably appears to have such authority.

It is the burden of the State to prove beyond a reasonable doubt that the defendant did not enter with the consent or authorization of an owner or occupant or one who reasonably appeared to have such authority. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty.

Notes on Use

This instruction should be given in a first or second degree burglary case or a burglary with explosives case where the evidence presented at trial sufficiently raises the issue of consent or authorization to enter.

Committee Comments

See Roberts v. State, 2001 OK CR 14, ¶ 19, 29 P.3d 583, 589.

2012 SUPPLEMENT

OUJI-CR 8-59

KIDNAPPING - DEFENSE OF CONSENT

The defendant has raised the defense of consent. It is the burden of the State to prove beyond a reasonable doubt that there was no consent to the **kidnapping/confining** of the other person. Consent of the other person shall not be a defense if **(consent was obtained by threat or duress)/(the other person was twelve years of age or younger)**. If you find that the State has failed to sustain its burden of proof beyond a reasonable doubt, then the defendant must be found not guilty.

Notes on Use

This instruction should be given where the evidence presented at trial sufficiently raises the defense of consent.

(2013 Supp.)

OUJI-CR 8-61

DEFENSE - VICTIM OF HUMAN TRAFFICKING

The defendant has raised the defense that **he/she** was a victim of human trafficking during the time of the alleged offense. It is the burden of the State to prove beyond a reasonable doubt that the defendant was not a victim of human trafficking during the time of the alleged offense. If you find that the State has failed to satisfy its burden of proof beyond a reasonable doubt, then the defendant must be found not guilty.

_____

Statutory Authority: 21 O.S. Supp. 2016, § 748(D).

Notes on Use

This instruction should be given where the evidence presented at trial sufficiently raises the defense that the defendant was a victim of human trafficking at the time of the alleged offense.

(2017 Supp.)

OUJI-CR 9-1

EVIDENCE - INFERENCES

You should consider only the evidence introduced while the court is in session. You are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified when considered with the aid of the knowledge which you each possess in common with other persons. You may make deductions and reach conclusions which reason and common sense lead you to draw from the fact which you find to have been established by the testimony and evidence in the case.

OUJI-CR 9-2

DIRECT EVIDENCE DEFINED

"Direct evidence" is the testimony of a person who asserts actual, personal knowledge of a fact, such as the testimony of an eyewitness. "Direct evidence" may also be an exhibit such as a photograph which demonstrates the existence of a fact. It is proof which points immediately to a question at issue and which proves the existence of a fact without inference or presumption.

Committee Comments

For similar definitions, see *Mayes v. State*, 887 P.2d 1288, 1301-02 (Okl. Cr. 1994); *Nichols v. State*, 418 P.2d 77, 84 (Okl. Cr. 1966).

OUJI-CR 9-3

CIRCUMSTANTIAL EVIDENCE DEFINED

"Circumstantial evidence" is the proof of facts or circumstances which gives rise to a reasonable inference of other connected facts that tend to show the guilt or innocence of a defendant. It is proof of a chain of facts and circumstances that indicates either guilt or innocence.

OUJI-CR 9-4

DIRECT AND CIRCUMSTANTIAL EVIDENCE - WEIGHT

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should consider circumstantial evidence together with all the other evidence in the case in arriving at your verdict.

(2013 Supp.)

OUJI-CR 9-5

CIRCUMSTANTIAL EVIDENCE

The State relies **[in part]** for a conviction upon circumstantial evidence. In order to warrant conviction of a crime upon circumstantial evidence, each fact necessary to prove the guilt of the defendant must be established by the evidence beyond a reasonable doubt. All of the facts and circumstances, taken together, must establish to your satisfaction the guilt of the defendant beyond a reasonable doubt.

Notes on Use

OUJI-CR 9-3 and 9-4 should be given along with this instruction. This Instruction shall be used in all cases, where the proof is based upon circumstantioal evidence either in whole or in part.

Committee Comments

The characterization of evidence as "direct" or "circumstantial" pertains to the kind of inferences the finder of fact must draw from the evidence in order to use it as proof of a fact in issue. Direct evidence requires no inferences. Direct evidence may be believed or disbelieved, but because it tends to establish the fact in issue "directly", the only issue remaining for the finder of fact is that of credibility. For example, in a case where the defendant is charged with reckless driving, the testimony of an eyewitness, the arresting officer, that the witness observed the defendant's automobile traversing the highway at a speed of 90 miles per hour moments before arrest is direct evidence of the speed at which the defendant drove at the relevant time. The officer's ability to estimate the speed of moving vehicles by sight may be questioned. Similarly, his testimony may be probed for bias or impeached by his own prior inconsistent statements. But these matters bear on his credibility. If he is believed, the fact of speed at the time of the arrest is established; no other inferences are possible. Likewise, proof of a radar scan taken at the time of the arrest is direct evidence. The reliability of the radar test and of the operator administering it may be challenged. But if the finder of fact determines to credit the test, the fact of speed is directly established.

Circumstantial evidence is that which tends to establish proof of a fact in issue indirectly, requiring the finder of fact to draw inferences from the existence of circumstances adduced. For example, if an eyewitness testified that he observed the defendant driving 90 miles per hour fifteen minutes before the defendant's arrest, the trier of fact must reason inferentially that the excessive rate of speed persisted in order to conclude that the defendant was speeding when apprehended. Thus, circumstantial evidence requires the fact-finder to consider whether proof of certain facts and circumstances allows inferences from which the jury can find that connected facts and circumstances exist, as a matter of common experience and observation, which establish the fact in issue. *Aday v. State*, 1924 OK CR 28Okl. Cr. 201, 230 P. 280; *Wertzberger v. State*, 1923 OK CR 25Okl. Cr. 1, 218 P. 721.

The instructions direct the jury to consider circumstantial evidence with all the other evidence in reaching a verdict. No indication of the relative weight to be afforded circumstantial evidence in comparison with direct evidence is made, as the function of determining the relative weight to be given to the evidence is reserved to the jury. Circumstantial evidence, with the reasonable inferences drawn there from, has the same probative weight as direct evidence. *Luker v. State*, 1976 OK CR 135, 552 P.2d 715; *Brewer v. State*, 1969 OK CR 107, 452 P.2d 597; *Young v. State*, 1962 OK CR 70, 373 P.2d 273.

In *Easlick v. State*, 2004 OK CR 21, ¶ 4, 90 P.3d 556, the Court of Criminal Appeals abolished the reasonable hypothesis test in Oklahoma. The reasonable hypothesis test required jurors to exclude every reasonable hypothesis other than guilt in order to convict a defendant in a case where the prosecution relied on circumstantial

evidence. In place of the reasonable hypothesis test, the Court of Criminal Appeals adopted a unified approach for determining the sufficiency of the evidence, in which no difference is given to the weight of circumstantial or direct evidence. Consequently, the Court of Criminal Appeals ordered modification of this instruction to remove the reasonable hypothesis test. Id. at n 3.

2006 SUPPLEMENT

OUJI-CR 9-6

EVIDENCE - SEPARATE CONSIDERATION FOR EACH DEFENDANT

You must give separate consideration to the case of each individual defendant. Each defendant is entitled to have **his/her** case decided on the basis of the evidence and the law which is applicable to **him/her**. The fact that you return a verdict of guilty or not guilty for one defendant should not, in any way, affect your verdict for the other defendant.

[Repeat Limiting Instructions, If Any, Given During the Trial.]

Notes on Use

This instruction is to be given only where more than one defendant is on trial.

Committee Comments

This instruction is a general one that merely informs the jury that it must assess the case of each defendant on the basis of the law and the evidence that pertains to him/her. Any instructions given during the course of the trial which restrict the use the jury may make of evidence should be repeated at this juncture. Examples include evidence relating to commission of other crimes by the defendant, or evidence offered only for purposes of impeachment, such as prior inconsistent statements or former convictions.

OUJI-CR 9-6A

EVIDENCE – SEPARATE CONSIDERATION FOR EACH CHARGE

You must give separate consideration for each charge in the case. The defendant is entitled to have **his/her** case decided on the basis of the evidence and the law which is applicable to each charge. The fact that you return a verdict of guilty or not guilty for one charge should not, in any way, affect your verdict for any other charge.

Notes on Use

This Instruction should be given if two or more charges against the same defendant are tried together. This Instruction is not required unless any party has made a timely request for it. *See Taylor v. State*, 2011 OK CR 8, ¶¶ 14-18, 248 P.3d 362,

Committee Comments

This instruction is similar to the one given in *Smith v. State*, 2007 OK CR 16, ¶ 38, 157 P.3d 1155, 1168-69.

(2014 Supp.)

OUJI-CR 9-7

SEPARATE DEFENDANTS

Another person, **[Name of Co-Defendant]**, has been charged in this case along with **[Name of Defendant]**. **[Name of Co-Defendant]** is not on trial at this time and that fact should not concern you when you are deciding this defendant's case. A defendant is entitled to separate consideration of **his/her** case.

Notes on Use

Unlike instruction OUJI-CR 9-6, this instruction should be given only where a separate trial is being held for one or more co-defendants.

OUJI-CR 9-8

EVIDENCE - FLIGHT

Evidence has been introduced of the defendant's **departure/concealment/(escape or attempt to escape from custody)** shortly after the alleged crime was committed. You must first determine whether this action by the defendant constituted flight.

The term "flight," as it is used in this instruction, means more than departure or concealment. To be in flight, a defendant must have **departed/(concealed himself/ herself)/(escaped or attempted to escape from custody)** with a consciousness of guilt in order to avoid arrest.

The defendant has offered evidence explaining **his/her** acts. You must consider the claim of the defendant in determining if flight occurred.

To find that the defendant was in flight you must find beyond a reasonable doubt that:

> First, the defendant **departed/(concealed himself/herself)/(escaped or attempted to escape from custody)**,
>
> Second, with a consciousness of guilt,
>
> Third, in order to avoid arrest for the crime with which **he/she** is charged.

If after a consideration of all the evidence on this issue, you find beyond a reasonable doubt that the defendant was in flight, then this flight is a circumstance which you may consider with all the other evidence in this case in determining the question of the defendant's guilt. However, if you have a reasonable doubt that defendant was in flight, then the fact of any **departure/concealment/(escape or attempt to escape from custody)** is not a circumstance for you to consider.

Notes on Use

This instruction is appropriate only if the defendant denies flight or offers evidence to explain the conduct that appears to constitute flight. *Mitchell v. State*, 876 P.2d 682, 685 (Okl. Cr. 1994). If it is given, the third paragraph must be included. *Hill v. State*, 898 P.2d 155, 163 (Okl. Cr. 1995) (omission of third paragraph was error). These restrictions may be waived by the defendant, however.

Committee Comments

The Court of Criminal Appeals has stated in numerous cases that evidence that the defendant merely departed from the scene of the crime or changed his appearance, etc., is insufficient to raise an inference of guilt. Rather, the court requires that the act of flight be accomplished by the defendant with a guilty mental state for purposes of avoiding apprehension before this evidence can be considered at all on the primary issue of guilt or innocence. As stated in *Compton v. State*, 74 Okl. Cr. 48, 53, 122 P.2d 819, 821 (1942):

> The term [flight] signifies, in legal parlance, not merely a leaving, but a leaving or concealment under a consciousness of guilt and for the purpose of evading arrest. Such consciousness and purpose is that which gives to the act of leaving its real incriminating character.

Whether the defendant was "in flight" as defined in "legal parlance" in performing particular conduct is a question of fact for the jury. *Voran v. State*, 536 P.2d 1322 (Okl. Cr. 1975); *Potter v. State*, 511 P.2d 1120 (Okl. Cr. 1973); *Ward v. State*, 444 P.2d 255 (Okl. Cr. 1968); *Denney v. State*, 346 P.2d 359 (Okl. Cr. 1959); *Smith v. State*, 291 P.2d 378 (Okl. Cr. 1955); *Wilson v. State*, 96 Okl. Cr. 137, 250 P.2d 72 (1952); *Lunsford v. State*, 53 Okl. Cr. 305, 11 P.2d 539 (1932); *Bruner v. State*, 31 Okl. Cr. 351, 238 P. 1000 (1925). The jury must make the initial determination that the defendant's conduct satisfies the legal definition of "flight" before it can consider the evidence for any purpose.

The instruction follows the guidelines articulated in *Wilson v. State, supra*, the most definitive case on the subject of flight. The court emphasized in *Wilson* that "flight" must first be defined for the jury in legal terms. The instruction sets forth the three requirements that must be present before a jury is permitted to find that the defendant's conduct constitutes flight: a departure or analogous conduct; a consciousness of guilt; and a purpose to avoid apprehension.

Although the jury is somewhat restricted in the use it may make of evidence of departure or concealment, the court has held that this instruction is warranted whenever evidence pertaining to conduct associated with flight is introduced, regardless of its low probative value on the question of consciousness of guilt, on the ground that whether the defendant's conduct actually constitutes flight in its legal sense is a question for the trier of fact. *Alberty v. State*, 561 P.2d 519 (Okl. Cr. 1977); *Padillow v. State*, 501 P.2d 837 (Okl. Cr. 1972); *Graham v. State*, 80 Okl. Cr. 159, 157 P.2d 758 (1945).

The court has found the instruction of particular importance when the defendant offers alternative explanations for his acts. In the words of the court:

> [T]he standard governing jury instructions relative to flight is not whether other explanations may be explicable of the circumstances surrounding apprehension, but whether, viewed in the context of other evidence, it tends to establish guilt or innocence.

Farrar v. State, 505 P.2d 1355, 1361 (Okl. Cr. 1973). *See also Ward v. State*, 444 P.2d 255 (Okl. Cr. 1968); *Sprouse v. State*, 52 Okl. Cr. 184, 3 P.2d 918 (1931).

Obviously, since the question is one of fact, the defendant must be permitted an opportunity to introduce evidence that explains his conduct. The cases require that the jury be specifically instructed that the defendant's evidence, if such is adduced, can be considered along with other evidence in determining whether flight occurred. *Wilson v. State, supra; Compton v. State*, 74 Okl. Cr. 48, 122 P.2d 819 (1942); *Sprouse v. State, supra*. Once the jurors determine that the defendant's conduct is tantamount to a flight in legal terms, this flight is a circumstance to be considered with all other facts and circumstances in the case in determining the question of guilt or innocence. *Smith v. State*, 291 P.2d 378 (Okl. Cr. 1955); *Rushing v. State*, 86 Okl. Cr. 24, 190 P.2d 828 (1948); *Broyles v. State*, 83 Okl. Cr. 83, 173 P.2d 235 (1946); *Colglazier v. State*, 23 Okl. Cr. 23, 212 P. 332 (1923).

Generally, evidence of flight will be in the form of proving that the defendant departed from the scene of the crime. However, the concept of flight is very broad, encompassing any conduct that tends to raise an inference that the defendant was impelled by a guilty conscience and sought to avoid arrest. A variety of acts have been held to constitute flight in Oklahoma, such as escape from jail and subsequent flight, *Peoples v. State*, 270 P.2d 380 (Okl. Cr. 1954); *Hudson v. State*, 78 Okl. Cr. 160, 145 P.2d 774 (1944); concealment, *Wettengle v. State*, 30 Okl. Cr. 388, 236 P. 626 (1925); and resisting the arresting officer, *Luttrell v. State*, 21 Okl. Cr. 466, 208 P. 1048 (1922). In *Almerigi v. State*, 17 Okl. Cr. 458, 188 P. 1094 (1920), the court referred to the defendant's altered appearance in growing a moustache in the context of flight, but since the defendant had also departed the scene of the crime, it is unclear whether an attempt to change identity, without more, constitutes evidence of flight.

The Oklahoma courts have not extended the concept of flight beyond these circumstances. However, conduct such as assuming a false name, *People v. Waller*, 14 Cal. 2d 693, 96 P.2d 344 (1939), as well as an attempt by the accused to take his own life has been held to constitute evidence of flight in other jurisdictions. *See, e.g., People v. Duncan*, 261 Ill. 339, 103 N.E. 1043 (1914); *Commonwealth v. Goldenberg*, 315 Mass. 26, 51 N.E.2d 762 (1943); *State v. Painter*, 329 Mo. 314, 44 S.W.2d 79 (1931); *State v. Lawrence*, 196 N.C. 562, 146 S.E. 395 (1929); *Commonwealth v. Giacobbe*, 341 Pa. 187, 19 A.2d 71 (1941).

OUJI-CR 9-9

EVIDENCE - PROOF OF OTHER CRIMES

[To Be Given When Proof of Other Crimes is Introduced and In the Final Instructions to the Jury].

You have received evidence that the defendant has allegedly committed **misconduct/offenses/(an offense)** other than that charged in the information. You may not consider this evidence as proof of the guilt or innocence of the defendant of the specific offense charged in the **information/indictment.** This evidence has been received solely on the issue of the defendant's alleged **motive/opportunity/intent/preparation/ (common scheme or plan)/ knowledge/identity/(absence of mistake or accident).** This evidence is to be considered by you only for the limited purpose for which it was received.

Statutory Authority: 12 O.S. 2021, § 2404(B).

Notes on Use

Before admitting "other crimes" evidence, the trial court must determine that there is clear and convincing evidence that the defendant committed the extrinsic offense. *See Burks v. State,* l979 OK CR 10, ¶ 16, 594 P.2d 771, 775.

This limiting instruction should normally be given both at the time "other crimes" evidence is introduced and with the final instructions to the jury. *See Burks* v. *State, supra,* ¶ 17. However, the trial court is not required to give the instruction *sua sponte* unless the failure to do so would constitute plain error. *See Jones v. State,* 1989 OK CR 7, ¶ 5, 772 P.2d 922, 925; 2 Leo H. Whinery, Oklahoma Evidence § 15.14 (1994).

The trial court should be especially careful when giving more than one limiting instruction to avoid inconsistencies between them. *See Lewis* v. *State,* 1998 OK CR 24, ¶ 22, 970 P.2d 1158, 1168 (1imiting instructions on other crimes evidence and the basis of opinion testimony were confusing and contradictory when given together because the only evidence of other crimes came in as the basis of opinion testimony).

Committee Comments

This limiting instruction is not applicable to proof of prior convictions admitted on the issue of credibility. Section 2404(B) of the Oklahoma Evidence Code, 12 O.S. 2021, § 2404(B), is a statutory enactment of the common law rule and is virtually identical to the federal counterpart. Cases proscribing the introduction by the prosecutor of evidence that the defendant perpetrated offenses other than that described in the information/ indictment in order to establish the defendant's propensity toward criminal behavior or that the defendant's character is consistent with the commission of the crime in question are legion. *See, e.g., Fetter v. State,* 1979 OK CR 77, 598 P.2d 262; *Burks v. State,* l979 OK CR 10, 594 P.2d 771; *Coats* v. *State,* 1978 OK CR 129, 589 P.2d 689; *Bryant v. State,* 1978 OK CR 110, 585 P.2d 377; *Snodgrass v. State,* 1978 OK CR 49, 578 P.2d 381; *Chandler v. State,* 1977 OK CR 324, 572 P.2d 285; *Grubb* v. *State,* 1976 OK CR 129, 551 P.2d 289; *Jett v. State,* 1974 OK CR 140, 525 P.2d 1247. However, admission of "other crimes" evidence is permissible where the evidence tends to establish some material aspect of the State's case.

The adoption of section 2404(B) reflects a change in the underlying theory of the propensity rule. Prior to the enactment of section 2404(B), the Court of Criminal Appeals articulated the propensity rule in an "exclusionary" form. Evidence that the defendant had committed other crimes or immoral acts was excluded, unless the proof could be categorized within a specified exception. *Barnhart v. State,* 1977 OK CR 18, 559 P.2d 451; *Tharps v. State,* 1976 OK CR 253, 555 P.2d 1054; *McMahan v. State,* 1960 OK CR 22, 354 P.2d 476 (Okl. Cr. 1960). By contrast, section 2404(B) phrases the propensity rule in an "inclusionary" fashion. Proof of other wrongdoing is admissible when offered for a relevant, permissible purpose, and is inadmissible when offered only

to cast aspersions upon the defendant's character. Although the difference in approach is probably insignificant as a matter of practical reality, II J. Weinstein & M. Berger, *Weinstein's Evidence* § 404[08], at 404-42 (1979), an argument may be made that the "inclusionary" approach fosters judicial awareness that the proffered evidence must actually be relevant as proof of a material issue. The "exclusionary" approach, it is argued, encourages judicial acceptance of the prosecutor's characterization of the evidence as being within the confines of an exception. Stone, *The Rule of Exclusion of Similar Fact Evidence: America,* 51 Harv. L. Rev. 988 (1938). The Court of Criminal Appeals has not always followed the rule's inclusionary language literally, and it has suggested in some of its decisions that the five exceptions in the rule are exclusive. See cases cited in 2 Leo H. Whinery, *Oklahoma Evidence* § l5.13 (1994).

The instruction is drawn in accordance with the language of the statute, including only those situations of admissibility enumerated therein. However, the stated permissible purposes are exemplary only; the list was clearly not intended to be exclusive or exhaustive. *Weinstein, supra,* at 404-42 (1979). The Court of Criminal Appeals, for example, has permitted use of other-crimes evidence as tending to demonstrate the defendant's "guilty knowledge." *Bewley v. State,* 1965 OK CR 82, 404 P.2d 39; *Mitchell v. State,* 1964 OK CR 94, 395 P.2d 814. Also, proof that establishes commission of a crime other than that with which the defendant is charged may be relevant as part of the res gestae. *Futerll v. State,* 1972 OK CR 258, 501 P.2d 901; *Hall v. State,* 80 Okl. Cr. 310, 159 P.2d 283 (1945); *Rogers v. State,* 8 Okl. Cr. 226, 127 P. 365 (1912).

It should be noted that the statutory use of the term "acts" in addition to "other crimes" operates also to exclude proof of misconduct that is not violative of the Criminal Code, unless such proof is relevant to some material issue. *Brown v. State,* 1975 OK CR 13, 530 P.2d 1056, decided prior to the enactment of the Evidence Code, is seemingly contrary (no error in admitting defendant's statement that he had some phenobarbital, but had no "speed," as possession of phenobarbital is not a crime under laws of Oklahoma).

ln order for evidence constituting proof of a prior crime or other misconduct to be admissible, general practice requires that the prosecutor be prepared to explain specifically how this evidence tends to prove or to disprove a proper consequential fact, such as intent or knowledge, or to establish a proposition, such as motive. If the trial court determines that the evidence is relevant as tending to establish the issue on which it is offered, the court must perform, in compliance with section 2403, the further process of evaluating the probative value of the evidence as compared to its potential for prejudice. *Snodgrass v. State, supra.* Section 2403, 12 O.S. 2021, § 2403, provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

See also Subcommittee's Notes to section 2404(B),12 O.S. 2021, § 2404(B), urging that the inherently prejudicial character of other-crimes evidence gives rise to greater judicial "caution in determining whether such evidence should be admissible under [section 2403]."

In *Burks v. State, supra,* the court, in order to ensure "the integrity of evidence to be received at criminal trials" as well as to "enhance judicial efficiency by providing uniform standards for the introduction of evidence of other crimes and reducing misuse of a potentially dangerous rule of evidence." 1979 OK CR 10, ¶¶ 8-9 (on denial of rehearing), 594 P.2d at 776-77, promulgated procedural rules to govern the admissibility of evidence of wrongful conduct by the defendant.

(1) The State shall, within ten days before the trial, or at a pretrial hearing, whichever occurs first, furnish the defendant with a written statement of the other offenses it intends to show, described with the same particularity required of an indictment or information. (However, no such notice is required if the other offenses are prior convictions, or are actually a part of the res gestae of the crime charged and thus are not chargeable as separate offenses.) The requirement of notice gives the defendant an opportunity to obtain a pretrial determination on the

admissibility of the evidence. However ... with regard to motions in limine, a pretrial ruling is not binding on the trial court. In order to properly preserve an objection it must be raised again during trial.

(2) At the time the evidence is offered the prosecutor shall specify the exception under which the evidence is sought to be admitted.

(3) Regardless of the exception used, there must be a visible connection between the offense charged and the offense sought to be proved.

(4) There must be a showing by the State that the evidence of other crimes is necessary to support the State's burden of proof; that the evidence is not merely cumulative. Such evidence should not be admitted where it is a subterfuge for showing to the jury that the defendant is a person who deserves to be punished.

(5) The evidence of the defendant's commission of other crimes need not be established beyond a reasonable doubt, but the proof must be clear and convincing.

(6) At the time the evidence is received, and in the final instructions to the jury, the trial court shall admonish the jury that the defendant cannot be convicted for any crime other than the one with which he is charged and that the evidence of the other offense or offenses is admitted solely for a limited purpose.

(7) In the event the prosecution attempts to use evidence of other crimes in rebuttal, the trial court should conduct an in camera hearing to determine whether the evidence is admissible under the above guidelines.

Id. ¶¶ 12-18, at 594 P.2d at 774-75.

Section 2404(B) does not attempt to define statutorily the circumstances wherein proof of other crimes may tend to establish "motive," "intent," "identity," etc. The parameters of these situations of admissibility are defined by common law. For motive, *see, e.g., Jones v. State,* 1975 OK CR 222, 542 P.2d 1316; for intent, *see Fetter v. State, supra; Hill v. State,* 1979 OK CR 2, 589 P.2d 1073; for plan, *see Burks v. State, supra; Bryant v. State, supra;* for knowledge, *see Snodgrass v. State, supra, Holmes v. State,* 1977 OK CR 244, 568 P.2d 317; for identity, *see Hill v. State, supra; Warner v. State,* 1977 OK CR 257, 568 P.2d 1284; *Davis v. State,* 1977 OK CR 5, 558 P.2d 679; and, for absence of mistake or accident, *see Worchester v. State,* 1975 OK CR 111, 536 P.2d 995.

The Court of Criminal Appeals has applied different standards in determining whether evidence of extrinsic offenses is admissible to prove a common scheme or plan. The narrowest standard is illustrated by *Marks v. State,* 1982 OK CR 186, ¶ 9, 654 P.2d 652, 655, and *Oglesby v. State,* 1979 OK CR 95, ¶¶ 4-5, 601 P.2d 458, 459, in which the Court defined a common scheme or plan to be where the extrinsic offense was committed to prepare the way for another crime and the commission of the second criminal depended on the perpetration of the first. Another standard is illustrated by such cases as *Salyers v. State,* 1997 OK CR 88, ¶ 11, 755 P.2d 97, 101, where separate acts of sexual abuse were admitted under the common scheme or plan exception because they were part of a continuing transaction. A third standard is represented by *Driver v. State,* 1981 OK CR 117, ¶¶ 5-6, 634 P.2d 760, 763, in which evidence of prior rapes were admitted because of their distinctive similarities to the rape for which the defendant was being prosecuted.

(2024 Supp.)

OUJI-CR 9-10

EVIDENCE - EVIDENCE OF DEFENDANT'S CHARACTER

The defendant has introduced evidence of **his/her** character for **(truth and veracity)/morality/chastity/honesty/integrity/(being a peaceful and law-abiding citizen)**. This evidence may be sufficient when considered with the other evidence in the case to raise a reasonable doubt of the defendant's guilt. However, if from all the evidence in the case you are satisfied beyond a reasonable doubt of the defendant's guilt, then you may find **him/her** guilty, even though he/she may have a good character.

Statutory Authority: 12 O.S. 1991, § 2404(A)(1).

Committee Comments

The character of a criminal defendant, demonstrable by proof of his reputation, may be proved in a criminal case in either of two distinct situations: (1) to prove circumstantially that, given his morality and personality characteristics, the defendant could not have committed the crime with which he is charged; and, (2) to parry an attack on his credibility when he takes the witness stand. In the former instance, the defendant initiates the character proof, which the prosecutor may rebut by presenting witnesses in rebuttal, or by cross-examining the defendant's witnesses. In the latter instance, the defendant is foreclosed from introducing proof of his character for truth and veracity until his credibility is attacked. This instruction is applicable only under circumstances described in the former instance: Character proof is presented as circumstantial evidence of innocence.

Proof that a litigant is a generally "good" or "bad" person is largely irrelevant to the proof of the precise issues which form the substance of the litigation. Section 2404(A), 12 O.S. 1991, § 2404(A), restates the common law rule which precludes the prosecutor from initiating proof of the defendant's bad character, but permits the defendant to demonstrate that he possesses certain good qualities in order to raise an inference of his innocence. The difference in treatment of the prosecutor and the defendant regarding the introduction of character proof inheres in the policy of avoiding the use of evidence which may result in unfair and undue prejudice to the defendant. Justice Jackson expatiated on the rule concerning character evidence as follows:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The over-riding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.
>
> But this line of inquiry firmly denied to the State is opened to the defendant because character is relevant in resolving probabilities of guilt. He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.
>
> Thus the law extends helpful but illogical options to a defendant. Experience taught a necessity that they be counterweighted with equally illogical conditions to keep the advantage from becoming an unfair and unreasonable one. The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make

himself vulnerable where the law otherwise shields him .

Michelson v. United States, 335 U.S. 469, 475-76, 478-79 (1948) (citations omitted).

The Court of Criminal Appeals has long adhered to the rule articulated in *Morris v. Territory*, 1 Okl. Cr. 617, 99 P. 760 (1909), concerning instructions regarding character of the defendant. The "better and safe practice" is to instruct the jurors upon the issue of character proof; if not granted express recognition by the court, character proof by the defendant might be largely ignored. Refusal to instruct upon character evidence is error; whether the error is harmless or prejudicial depends upon review of all the facts and circumstances of the particular case. *Pitman v. State*, 487 P.2d 716 (Okl. Cr. 1971); *Porter v. State*, 361 P.2d 695 (Okl. Cr. 1961); *Holcomb v. State*, 95 Okl. Cr. 55, 239 P.2d 806 (1952); *Stone v. State*, 80 Okl. Cr. 124, 157 P.2d 468 (1945); *Ware v. State*, 71 Okl. Cr. 232, 110 P.2d 617 (1941); *Tucker v. State*, 66 Okl. Cr. 335, 92 P.2d 595 (1939); *McCullom v. State*, 22 Okl. Cr. 46, 209 P. 781 (1922); *Holmes v. State*, 6 Okl. Cr. 541, 119 P. 430 (1911); *Wilson v. State*, 3 Okl. Cr. 714, 109 P. 289 (1910).

There is some conflict in the Oklahoma decisions concerning the requisite content of the character-evidence instruction. In *Kitchen v. State*, 66 Okl. Cr. 423, 92 P.2d 860 (1939), the court espoused the theory that the jurors must be charged that evidence of good character, standing alone, may be sufficient to generate a reasonable doubt, and thus require acquittal. The trial court's instruction in *Kitchen* was to the effect that if, after considering all of the evidence introduced, including the character evidence, the jury had a reasonable doubt of the defendant's guilt, they should acquit; but if they were satisfied from all of the evidence that the defendant's guilt had been established beyond a reasonable doubt, they should find the defendant guilty. The court termed this instruction erroneous:

> The vice of this instruction is that the jury were not clearly informed that good character may create a reasonable doubt as to whether such person would commit the crime charged, where otherwise no doubt existed, and that proof of good character may lead the jury to disbelieve the testimony against the defendant no matter how conclusive such testimony may be.

Id. at 430, 92 P.2d, at 864. A New York decision, *People v. Elliott*, 163 N.Y. 11, 57 N.E. 103 (1900), was cited in support of this rule, as were several early Oklahoma decisions. *Carney v. State*, 29 Okl. Cr. 83, 232 P. 451 (1925); *Kirby v. State*, 25 Okl. Cr. 330, 220 P. 74 (1923); *Wilson v. Territory*, 14 Okl. 436, 78 P. 124 (1904).

The *Carney* decision does not support the conclusion for which it was cited in *Kitchen.* In *Carney*, the court held only that evidence of good character is admissible, is to be considered by the jury in determining the defendant's guilt, and is a subject upon which the defendant is entitled to have the jury instructed. The opinion does not indicate what the content of the instruction should be. Similarly, the *Kirby* case is not supportive of *Kitchen.* In *Kirby,* the court held that, when a criminal defendant testifies and his testimony is contradicted only by the testimony of the State's witnesses, the defendant cannot introduce evidence of his good character for truth and veracity. The defendant's opportunity to have the jury consider his good character was limited to offering evidence of his good character as a peaceable and law-abiding citizen because his credibility had not been impeached. Finally, in *Wells*, the court did state proof of good character may suffice to raise a reasonable doubt of guilt, even though no doubt would otherwise exist. However, the court rebuffed the defendant's contention that a *Kitchen*-type instruction was appropriate, declaring that:

> [E]vidence of good character can only be considered in connection with all the other evidence, facts, and circumstances appearing in the trial, and if, after considering all of the evidence, including that as to good character, the jury entertain no reasonable doubt of guilt, they should convict, and that notwithstanding the evidence of former good character.

14 Okl. Cr. at 458, 78 P. at 131.

Kitchen has not been cited on the issue of what instruction is required with respect to character. The conviction in that case was reversed on other grounds, so the language in the decision on the character instruction may be considered dicta.

The Commission has concluded that the character-evidence instruction need not contain language that character evidence, standing alone, may create a reasonable doubt where none otherwise existed. Phrasing an instruction in those terms creates the hazard that "the jury may mistakenly take it as an invitation to consider good character evidence to the exclusion of all other evidence." *Smith v. United States*, 305 F.2d 197, 206 (9th Cir.), *cert. denied sub nom. Corey v. United States*, 371 U.S. 890 (1962).

The Commission's conclusion is supported by Oklahoma decisional law that conflicts with *Kitchen*, of which *Wilson v. State, supra*, is exemplary. In *Wilson*, the court instructed the jury to the effect that evidence of the defendant's character could be considered by the jury with all of the other evidence and could be given such weight as the jury deemed proper in determining the defendant's guilt or innocence.

The defendant had requested that the jury be instructed that, if they found the evidence against the defendant to be equally divided, the evidence of his good character could be sufficient to result in an acquittal. The defendant's requested instruction also provided that the evidence of his good character should be considered "without regard to the apparently conclusive or inconclusive character of such other evidence, and although there may be sufficient other evidence to warrant a finding of guilt[.] [I]f the good character of the accused creates the reasonable doubt of guilt, then you should acquit the defendant." 3 Okl. Cr. at 717, 109 P. at 291.

In holding that the trial judge's refusal to give the defendant's requested instructions was not error, the court stated:

> On principle it would seem that the very fact that the court admits the evidence as to the defendant's good character could not but be understood by the jury as a command to consider it; and it would seem, also, that when such evidence is admitted, and the court instructs the jury to acquit if, upon a consideration of all the evidence in the case they entertain a reasonable doubt of the defendant's built, that would be all that should be required. Be that as it may, however, we hold that it is sufficient in eases of this kind for the court to instruct the jury, in substance, that, if they believe from the evidence that prior to the alleged offense the defendant had the general reputation in his community of being a moral, law-abiding citizen, that they should consider that fact and give to it such weight as they deem proper in determining the question of the defendant's guilt or innocence; but if, upon a consideration of all the evidence in the case, including that bearing upon the defendant's good reputation, the jury nevertheless believes beyond a reasonable doubt that the defendant is guilty as charged, then his previous good reputation would constitute no justification or defense.

Id. at 717-18, 109 P. at 291.

In *Ware v. State, supra*, a later pronouncement by the Court of Criminal Appeals concerning the content of character instructions, the court approved an instruction directing the jury to consider character evidence "in connection with all the other evidence, facts and circumstances disclosed upon trial," while rejecting the defendant's contention that the jury should be instructed to consider "that evidence alone or that evidence taken in connection with all the other evidence in the case...." The court then declared, without citing *Kitchen*:

> It is not the duty of the jury to acquit the defendant if, upon the consideration of the testimony as to the defendant's good character and reputation "alone" the jury has a reasonable doubt of the defendant's guilt. This evidence should be taken into consideration with all the evidence offered in the trial of the case, and if, after a consideration of all the evidence, together with that of the good reputation and character of the defendant, the jury has a reasonable doubt of the guilt of the

> defendant, it is their duty to acquit him. *This evidence should not be considered "alone"*. This question has been discussed in the case of *Wilson v. State*.

71 Okl. Cr. at 237, 110 P.2d at 620 (emphasis added; citation omitted).

Section 2405 of the Evidence Code, 12 O.S. 1991, § 2405, sets forth alternate methods by which character may be proved: by the traditional means of summoning a witness to act as a spokesperson for the community and articulate for the fact-finder the reputation of a particular individual for possessing or not possessing a specific character trait; or by merely eliciting the subjective opinion of the witness regarding character. The character witness may be cross-examined by inquiry into that witness's knowledge of specific instances of conduct by the defendant which, if true, would tend to undermine the witness's opinion or report of reputation. Section 2405 provides in pertinent part: "Where evidence of a person's character or trait of character is admissible, proof may be by testimony as to reputation or by testimony in the form of opinion. Inquiry is allowable on cross-examination into relevant specific instances of conduct." 12 O.S. 1991, § 2405.

(2000 Supp.)

OUJI-CR 9-10A

EVIDENCE - EVIDENCE OF DEFENDANT'S PRIOR SEX CRIMES

You have heard evidence that the defendant may have committed **another/other offenses(s)** of **(sexual assault)/(child molestation)** in addition to the **offense(s)** for which **he/she** is now on trial. You may consider this evidence for its bearing on any matter to which it is relevant along with all of the other evidence and give this evidence the weight, if any, you deem appropriate in reaching your verdict. You may not, however, convict the defendant solely because you believe **he/she** committed **this/these** other **offense(s)** or solely because you believe **he/she** has a tendency to engage in acts of **(sexual assault)/(child molestation)**. The prosecution's burden of proof to establish the defendant's guilt beyond a reasonable doubt remains as to each and every element of **each/the** offense charged.

_____

Statutory Authority: 12 O.S. Supp. 2010, §§ 2413, 2414.

Notes on Use

This instruction should be given when evidence of other offenses involving sexual assault or child molestation has been introduced against a criminal defendant in a sexual assault or child molestation prosecution. For a list of the crimes constituting sexual assault or child molestation, see 12 O.S. Supp. 2010, §§ 2413(D), 2414(D).

Committee Comments

The Oklahoma Court of Criminal Appeals upheld the constitutionality of 12 O.S. Supp. 2010, § 2413 in *Horn v. State*, 2009 OK CR 7, ¶¶ 28, 38, 204 P.3d 377, 784, 786. The court emphasized in *Horn* that 12 O.S. Supp. 2010, §§ 2413, 2414 were subject to the balancing test in 12 O.S. Supp. 2010, § 2403. It also stated that in ruling on the admissibility of other sex crimes under sections 2413 and 2414,

> trial courts should consider, but not be limited to the following factors: 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the dangers that admission of propensity evidence poses, the trial court should consider: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; and 2) the extent to which such evidence will distract the jury from the central issues of the trial. [Citation omitted.] Any other matter which the trial court finds relevant may be considered. In particular, as proof of the prior act may largely rest upon testimony of the victim of that prior act, the credibility of that individual would be a factor for the court's consideration. Further, the propensity evidence must be established by clear and convincing evidence. If the defense raises an objection to the admission of the propensity evidence, the trial court should hold a hearing, preferably pre-trial, and make a record of its findings as to the factors set forth above.

2009 OK CR 7, ¶ 40, 204 P.3d at 786 (footnote omitted).

(2010 Supp.)

OUJI-CR 9-11

EVIDENCE - EVIDENCE OF DECEASED'S CHARACTER

Evidence has been introduced for the purpose of showing the character of the deceased to be that of a quarrelsome, dangerous person. You may consider that fact in connection with the other evidence in ascertaining whether or not the deceased was the aggressor and brought on the difficulty, and if you believe that **he/she** had such a character and that **his/her** reputation in this regard was known to the defendant, you may consider that fact in connection with all the other evidence in the case in ascertaining whether or not the defendant reasonably and in good faith believed that **he/she** was in danger of losing **his/her** life or of receiving great bodily injury at the hands of the deceased.

Statutory Authority: 12 O.S. 1991, § 2404(A)(2).

Committee Comments

Oklahoma authority prior to adoption of the Evidence Code permitted the defendant, in order to support a claim of self-defense in a homicide prosecution, to establish that the deceased was a person possessing violent tendencies. *Harris v. State*, 400 P.2d 64 (Okl. Cr. 1965); *Thompson v. State*, 365 P.2d 834 (Okl. Cr. 1961).

Section 2404(A)(2) allows the prosecutor to rebut evidence that the deceased perpetrated the initial aggressive act by offering proof of the victim's peaceful character. This statute works a change in the previous decisional law; cases prior to the enactment of the Code had held that, absent an attack by the defendant on the character of the deceased, evidence demonstrating the peaceful character traits of the victim was inadmissible. *Henson v. State*, 97 Okl. Cr. 240, 261 P.2d 916 (1953); *Miller v. State*, 63 Okl. Cr. 64, 72 P.2d 520 (1937).

As noted in the Committee Comments pertaining to proof of the character of the deceased, character evidence may be adduced under section 2405, 12 O.S. 1991, § 2405, either through use of reputation or opinion testimony. The character witness may be cross-examined by inquiry into that witness's knowledge of specific instances of conduct by the victim which, if true, would tend to undermine the witness's opinion or report of reputation.

Section 750 of Title 22, enacted in 1975, precludes the introduction of evidence, in any form, concerning prior sexual conduct of the prosecutrix in order to establish the defense of consent in a prosecution for rape or assault with intent to commit rape, unless the previous sexual conduct of the prosecutrix occurred with or in the presence of the defendant.

OUJI-CR 9-12

EVIDENCE - VOLUNTARY STATEMENT BY DEFENDANT

Evidence has been introduced in this case that the defendant made a statement to **[Name of Witness]** at **[Location]** on **[Date]**. Evidence relating to an alleged statement by a defendant outside of court and after a crime has been committed may be considered by you, but only with great caution and only if you determine that it was made and it was made voluntarily. Unless you are convinced beyond a reasonable doubt that the statement was voluntary, you should disregard it entirely.

To determine whether the defendant's statement was voluntary, you should consider all the circumstances surrounding it, including the age, education level, physical and mental condition of the defendant, and **(his/her treatment [while in custody]/[under interrogation])/(whether he/she was promised any benefit)** as shown by the other evidence in this case. A statement is voluntary when made by a person exercising his or her free will. A statement made against a person's will in response to force, threat, or promise is not voluntary.

If after considering the evidence you determine that the statement was made by the defendant and was voluntary, you may give it whatever weight you feel it deserves.

Notes on Use

This instruction should be used if a defendant's statement is admitted into evidence so that the jury may determine whether it was made voluntarily. Statements, admissions, and confessions of a defendant are all treated alike for purposes of the giving of the instruction. Also, no distinction is made with respect to the giving of the instruction between statements made to a law enforcement official as opposed to any other witness. However, the circumstances surrounding the statement, including whether it was made while the defendant was in custody or whether it was made to a law enforcement official are factors which may affect the voluntariness of the statement, and these factors should be included in the instruction, if applicable. Whether procedural safeguards, such as the giving of *Miranda* warnings, have been satisfied is an issue of law for the trial judge, and should not be presented to the jury.

Committee Comments

The Court of Criminal Appeals held in *Williams v. State*, 93 Okl. Cr. 260, 265, 226 P.2d 989, 993 (1951), that if an objection is interposed to the admission of a confession, the trial court should hold a hearing outside the presence of the jury to determine admissibility. Then at trial both the prosecution and the defense should be allowed to present evidence concerning the giving of the confession, and the jury should be instructed that it must determine the voluntariness of the confession and should disregard it if the confession was not voluntary.

In *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964), the United States Supreme Court held that due process requires that a defendant who objects to the use of a confession must be given a hearing on the issue of voluntariness that is not influenced by the truth or falsity of the confession. However, the Supreme Court decided several years later in *Lego v. Twomey*, 404 U.S. 477 (1972), that the United States Constitution did not require proof of voluntariness beyond a reasonable doubt at the *Jackson v. Denno* hearing. 404 U.S. at 488-89. It also determined that the jury need not rule on voluntariness after the trial judge had decided that the confession was admissible. 404 U.S. at 489-90. Although the United States Supreme Court appeared not to favor the jury's being given an opportunity to rule on voluntariness after the trial judge had done so, the Oklahoma Court of Criminal Appeals has upheld the procedure. *Davis v. State*, 437 P.2d 271 (Okl. Cr. 1968).

OUJI-CR 9-13

EVIDENCE - NECESSITY FOR

CORROBORATION OF CONFESSIONS

[Should you find that a confession was made by the defendant and was made freely and voluntarily and in compliance with the rules of law set forth above, then you are instructed:] A confession alone does not justify a conviction unless it is corroborated, that is confirmed and supported by other evidence of the material and basic fact or facts necessary for the commission of the offense charged.

Unless you find that the confession, if made, is corroborated, you must disregard it.

Notes on Use

This instruction shall be given in all cases in which a defendant's extrajudicial confession has been admitted. *Fontenot v. State*, 881 P.2d 69, 80 n.15 (Okl. Cr. 1994). The introductory language in the first paragraph should be given only if there is a jury question as to the voluntariness of the defendant's confession so that OUJI-CR 9-12 is given.

Committee Comments

In *Fontenot v. State*, 881 P.2d 69, 77-78 (Okl. Cr. 1994), the Court of Criminal Appeals abandoned the prior corpus delicti rule that required substantial independent evidence of the corpus delicti of the crime charged in order for a defendant's confession to be competent to support a conviction. Following the United States Supreme Court's decision in *Opper v. United States*, 384 U.S. 84 (1954), the Court of Criminal Appeals decided that a confession may be considered by the jury if it is supported by substantial independent evidence that would tend to establish its trustworthiness. It also ruled that 21 O.S. 1991, § 693 prohibits the use of a confession in a homicide case to prove that a death occurred, but that a confession may be used to prove that the defendant killed the victim. 881 P.2d at 80, n.15.

OUJI-CR 9-14

EVIDENCE - NECESSITY FOR

CORROBORATION IN HOMICIDE CASE

No person may be convicted of **(murder/manslaughter in the first/second degree)/(negligent homicide)** unless both the fact of the death of the person allegedly killed and the fact that **his/her** death was caused by the conduct of another person are established as independent facts and beyond a reasonable doubt.

Statutory Authority: 21 O.S. 1991, § 693.

Notes on Use

This instruction shall be given in a homicide case.

Committee Comments

In *Fontenot v. State*, 881 P.2d 69, 80 n.15 (Okl. Cr. 1994), the Oklahoma Court of Criminal Appeals ruled that 21 O.S. 1991, § 693 prohibits the use of a confession to prove that a death occurred, but a confession may be used to prove that the defendant killed the victim.

OUJI-CR 9-15

EVIDENCE - EXCULPATORY STATEMENT

OF FACT OF THE DEFENDANT

An exculpatory statement is defined as a statement by the defendant that tends to clear a defendant from alleged guilt, or a statement that tends to justify or excuse **his/her** actions or presence.

Where the State introduces in connection with a confession or admission of a defendant an exculpatory statement which, if true, would entitle **him/her** to an acquittal, **he/she** must be acquitted unless such exculpatory statement has been disproved or shown to be false by other evidence in the case. The falsity of an exculpatory statement may be shown by circumstantial as well as by direct evidence.

A statement is exculpatory within the meaning of this instruction only if it concerns a tangible, affirmative, factual matter capable of specific disproof. A statement is not exculpatory within the meaning of this instruction if it merely restates the defendant's contention of innocence.

Committee Comments

In *Knott v. State*, 432 P.2d 128 (Okl. Cr. 1967), the court affirmed the defendant's manslaughter conviction over his assertion that an instruction similar to the above should have been given. The defendant's statement contained the sentence, "I killed him; it was an accident," which defendant alleged was exculpatory. The court conceded the appropriateness of such an instruction in certain narrow circumstances that were not present in *Knott*.

Specifically, the court held that the defendant's designation of the homicidal incident as "an accident" was not sufficiently factual in nature to be encompassed by the exculpatory-statement rule. *See also Stiles v. State*, 829 P.2d 984, 991 (Okl. Cr. 1992) (instruction not warranted because defendant's admissions were not exculpatory).

Moreover, in *Knott*, the defendant took the stand and testified with respect to a defense of self-defense, which the court deemed an appropriate opportunity to bring the subject of the allegedly exculpatory statement to the attention of the jury. Thus, the rule requiring an exculpatory-statement instruction has application only in cases where the defendant does not take the stand. *See Brecheen v. State*, 732 P.2d 889, 897 (Okl. Cr. 1987) (instruction not warranted because defendant testified at trial and denied making the exculpatory statements).

The exculpatory-statement rule is referred to as the law in Oklahoma in *Dean v. State*, 381 P.2d 178 (Okl. Cr. 1963) (statement of the defendant that he witnessed a third party running from a burglarized store, then entered and helped himself to merchandise not exculpatory, but constitutes an admission of guilt). *See also Mitchell v. State*, 408 P.2d 566 (Okl. Cr. 1965). The Commission has found no cases where refusal to give the exculpatory-statement instruction was held to be erroneous.

OUJI-CR 9-16

EVIDENCE - USE OF CONFESSION OR ADMISSION

WITH MULTIPLE DEFENDANTS

(A confession)/(An admission) may not be considered by you against any defendant other than the person who made the **confession/admission**.

Notes on Use

This instruction shall be used if a codefendant's confession is admitted at a joint trial. Admission of a nontestifying codefendant's confession is allowable only if its admission does not violate the Confrontation Clause.

Committee Comments

In *Bruton v. United States*, 391 U.S. 123 (1968), the United States Supreme Court prohibited use of a codefendant's confession at a joint trial. It held that where the confession of a codefendant implicates the defendant, but the codefendant who made the statement does not testify, a cautionary instruction that the confession was admissible only in regard to the defendant who made it provided an inadequate safeguard of the nonconfessing defendant's rights to confrontation and cross-examination. Similarly, in *Lee v. Illinois*, 476 U.S. 530 (1986), the United States Supreme Court held that a judge's reliance upon a codefendant's confession in a bench trial violated the defendant's rights to confrontation. The Court determined that the confession lacked sufficient "indicia of reliability" to be admissible. 476 U.S. at 546.

In *Cruz v. New York*, 481 U.S. 186 (1987), the Supreme Court extended the *Bruton* rule to cases where both the defendant's and codefendant's confessions were introduced at their joint trial. The Supreme Court distinguished *Bruton*, however, in *Richardson v. Marsh*, 481 U.S. 200 (1987), where it held that a codefendant's confession may be admitted at a joint trial if the confession did not incriminate the defendant on its face and there was a proper limiting instruction. The Supreme Court ruled that incrimination could be avoided by redacting the confession to eliminate not only the defendant's name but any reference to his or her existence. 481 U.S. at 211.

OUJI-CR 9-17

EVIDENCE - STATEMENTS AND ACTS OF COCONSPIRATORS

[NO INSTRUCTION SHOULD BE GIVEN]

Committee Comments

The Oklahoma Evidence Code allocates the responsibility for determining most preliminary questions of fact concerning the admissibility of evidence, including whether an out of court statement is hearsay or is subject to a hearsay exception, to the trial judge. 12 O.S.1991, § 2105(A); John W. Strong, McCormick on Evidence § 53 (4th ed. 1992); 2 Leo H. Whinery, Oklahoma Evidence § 12.01 (1994). Once the judge decides that a coconspirator statement is admissible, the jury may consider the statement as it would any other evidence, and a special instruction is neither necessary nor appropriate. *See Laske v. State*, 694 P.2d 536, 538 (Okl. Cr. 1985) (judge decides whether the State has introduced sufficient independent evidence to prove the conspiracy); *United States v. James*, 590 F.2d 575, 580 (5th Cir.) (en banc) (judge determines admissibility of coconspirator statements), *cert. denied*, 442 U.S. 917 (1979).

The trial court may consider the statement itself in determining whether it is admissible as a coconspirator admission. *Harjo v. State*, 797 P.2d 338, 345 (Okl. Cr. 1990). To avoid the danger of the jury's hearing an out of court statement that is later found not to be admissible as a coconspirator admission, the trial judge should require the conspiracy to be proved before the statement is admitted, either at trial or at an *in camera* hearing. *Armstrong v. State*, 811 P.2d 593, 597 (Okl. Cr. 1991).

OUJI-CR 9-18

EVIDENCE - DYING DECLARATIONS

[NO INSTRUCTION SHOULD BE GIVEN]

Committee Comments

With the adoption of the Oklahoma Evidence Code, the jury should no longer be instructed on how to determine whether out of court statements satisfy the elements of the dying declaration exception to the hearsay rule, because the determination of most preliminary fact questions relating to the admissibility of evidence is for the judge, rather than the jury. *See* Committee Comments to OUJI-CR 9-17, *supra*.

Section 2804(B)(2) of the Oklahoma Evidence Code, 12 O.S. 1991, § 2804(B)(2), is identical to the Federal Rule, and provides an exception to the rule against hearsay, "[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death."

Dying declarations have traditionally been accorded admissibility because they derive a certain trustworthiness from the conviction that a person is disinclined to hazard a meeting with the Almighty with a lie staining his lips. For Oklahoma cases decided before the adopted of the Oklahoma Evidence Code concerning the dying declaration exception, see *Jones v. State*, 94 Okl. Cr. 359, 236 P.2d 102 (1951); *Graham v. State*, 80 Okl. Cr. 159, 157 P.2d 758 (1945); *Looper v. State*, 42 Okl. Cr. 341, 276 P. 503 (1929); *Beason v. State*, 18 Okl. Cr. 388, 195 P. 504 (1921).

OUJI-CR 9-19

EVIDENCE - EYEWITNESS IDENTIFICATIONS

The State must prove the identity of the defendant as the person who committed the crime charged beyond a reasonable doubt. If after examining all of the evidence, you have a reasonable doubt as to whether the defendant was the individual who committed the crime charged, you must find the defendant not guilty.

Eyewitness identifications are to be scrutinized with extreme care. Testimony as to identity is a statement of a belief by a witness. The possibility of human error or mistake and the probable likeness or similarity of objects and persons are circumstances that you must consider in weighing identification testimony. You should carefully consider the factors that bear upon the weight that you give to the identification testimony, such as: (1) whether the witness had an adequate opportunity to observe the subject clearly; (2) whether the witness is positive in the identification; (3) whether the witness's identification is weakened by a prior failure to identify the subject; (4) whether the witness's testimony remained positive and unqualified after cross-examination; and (5) whether the witness' prior **description/identification** of the **person/thing** was accurate.

In deciding whether the witness had an adequate opportunity to observe the subject of the identification, you should consider the capability of the witness, the length of time of observation, the distance between the witness and the subject, lighting conditions, whether the witness was under stress, whether the witness had seen or known the subject before, and any other circumstance supported by the evidence.

In deciding how much weight to give to identification testimony, you should consider whether the identification was based on the witness's own recollection and the circumstances of the identification. These circumstances may include, but are not limited to, whether the identification was made by selecting the subject from a group of similar persons or the subject alone, the length of time between when the witness observed the subject and the identification, and whether anything during that time may have affected the identification. You should also consider whether the witness described the subject before the identification, and if so, how specific the description was.

Notes on Use

This instruction should be given if an eyewitness identification is a critical element of the prosecution's case and there is a serious question concerning the reliability of the identification. *McDoulett v. State*, 1984 OK CR 81, ¶ 9, 685 P.2d 978, 980.

Committee Comments

In *Mathieus v. State*, 1989 OK CR 47, ¶ 9, 778 P.2d 491, 493, the Oklahoma Court of Criminal Appeals held that a defendant was entitled to a cautionary instruction substantially similar to this instruction because the eyewitness did not have an opportunity to view the perpetrator and was not positive in the identification. Similarly, in *McDoulett v. State*, 1984 OK CR 81, ¶ 10, 685 P.2d 978, 980, the Court of Criminal Appeals ruled that the trial court committed reversible error by refusing to give a requested cautionary instruction, because the witness was not in a position to observe the assailant clearly and her prior description was inaccurate. In *Webb v. State*, 1987 OK CR 253, ¶ 11, 746 P.2d 203, 206, however, the Court of Criminal Appeals found that a cautionary instruction was not warranted because after applying the five factors listed in the instruction to the facts of that case, it concluded that the likelihood of misidentification was not substantial. *See also Pisano v. State*, 1981 OK CR 137, ¶¶ 11-12, 636 P.2d 358, 361, (cautionary instruction was unnecessary because 4 conditions for reliability of identification prevailed); *Hall v. State*, 1977 OK CR 193, ¶¶ 8-9, 565 P.2d 57, 60 (no necessity for instruction on unreliability of eyewitness testimony because identification appeared reliable); *Moreau v. State*, 1975 OK CR 14, ¶¶ 14-15, 530 P.2d 1061, 1066 (4 factors regarding reliability of identification were satisfied).

The Court of Criminal Appeals stated in *McDoulett*, 1984 OK CR 81, ¶ 12, 685 P.2d 978, 981, that the list of factors that the jury may wish to consider in evaluating the credibility of eyewitness identifications is not

exclusive. For additional factors that may be appropriate, see 1 Edward J. Devitt et al.,*Federal Jury Practice & Instructions* § 14.10 (4th ed. 1992).

(2016 SUPP.)

OUJI-CR 9-20

EVIDENCE - IMPEACHMENT BY PRIOR INCONSISTENT STATEMENTS

Evidence has been presented that on some prior occasion **(the defendant)/ ([Name of Witness]) (made a statement)/(acted in a manner)** inconsistent with **his/ her** testimony in this case. This evidence is called impeachment evidence and it is offered to show that the **defendant's/witness's** testimony is not believable or truthful. If you find that **(a statement was made)/(the acts occurred)**, you may consider this impeachment evidence in determining what weight and credit to give the testimony of **(the defendant)/(that witness)**. You may not consider this impeachment evidence as proof of innocence or guilt. You may consider this impeachment evidence only to the extent that you determine it affects the believability of the **defendant/witness**, if at all.

[However, if you find the statements of **(the defendant)/ ([Name of Witness])** were made **[Specify When, Where, and To Whom the Statements Were Made],** the statements may also be considered as proof of innocence or guilt.]

Notes on Use

The bracketed paragraph should be used if there were any prior inconsistent statements admitted at trial that the jury may also consider for proof of innocence or guilt, either because they are not hearsay under the definitions in 12 O.S.Supp. 2008, § 2801, or because they come within any of the exceptions to the hearsay rule in 12 O.S.Supp. 2008, §§ 2803 , 2804. The instruction should clearly specify which prior inconsistent statements may also be used for substantive purposes.

The trial court should be especially careful when giving more than one limiting instruction to avoid inconsistencies between them. *See Lewis v. State*, 1998 OK CR 24 ¶ 22, 970 P.2d 1158, 1168 (limiting instructions on other crimes evidence and the basis of opinion testimony were confusing and contradictory when given together because the only evidence of other crimes came in as the basis of opinion testimony).

Committee Comments

Many Oklahoma cases place the onus on the trial court of clearly informing the jury as to the restricted permissible use of impeachment evidence. *See, e.g., Pettigrew v. State*, 1959 OK CR 116, 346 P.2d 957; *Gillaspy v. State*, 1953 OK CR 38, 255 P.2d 302, 96 Okl. Cr. 347; *Farley v. State*, 1950 OK CR 163, 226 P.2d 1002, 93 Okl. Cr. 192; Akins v. State, 1950 OK CR 28, 215 P.2d 569, 91 Okl. Cr. 47;*Dunham v. State*, 1943 OK CR 126, 143 P.2d 834, 78 Okl. Cr. 54; *Broshears v. State*, 1920 OK CR 35, 187 P. 254, 17 Okl. Cr. 192; Thomas v. State, 1917 OK CR 103, 164 P. 995, 13 Okl. Cr. 414; Sturgis v. State, 1909 OK CR 66, 102 P. 57, 2 Okl. Cr. 362. Refusal to give this limiting instruction upon request is reversible error. *Cloud v. State*, 1929 OK CR 25, 273 P. 1012, 41 Okl. Cr. 395;*Thomas v. State*, *supra*. The Court of Criminal Appeals has held that under certain circumstances, such as where a substantial part of the State's presentation of evidence consists of impeachment of the in-court testimony of its own witnesses, a "positive duty" devolves upon the court to admonish the jurors with respect to the proper use they may make of impeachment evidence, and failure to fulfill this obligation constitutes reversible error. *Leeks v. State*, 1952 OK CR 110, 245 P.2d 764, 95 Okl. Cr. 326. The court has termed the failure to instruct concerning the limited effect of impeachment evidence as harmless error where such evidence was not deemed to form a substantial part of the State's case. *Sykes v. State*, 1977 OK CR 311, 572 P.2d 247; Foreman

v. State, 1927 OK CR 249, 259 P. 176, 38 Okl. Cr. 50. However, the Commission is of the opinion that this limiting instruction should be given on the court's own motion in every instance of impeachment, particularly where the impeachment evidence consists of substantively inadmissible statements of the defendant admitted for the limited purpose of affecting his credibility under the rule of *Harris v. New York*, 401 U.S. 222 (1971).

Section 2607 of the Oklahoma Evidence Code, 12 O.S.1991, § 2607, constitutes a major change in Oklahoma law by providing: "The credibility of a witness may be attacked by any party, including the party calling him." Thus, to forestall potential abuse of this provision by use of a witness at trial solely in order to impeach him with a substantively inadmissible prior inconsistent statement, the Commission reiterates that this limiting instruction should be given by the trial judge in every instance of impeachment, whether requested or not. Section 2613, 12 O.S.1991, § 2613 , sets forth the formal requirements for impeachment of a witness by prior inconsistent statements.

In *Omalza v. State*, 1995 OK CR 80, ¶¶ 50-54, 65-66, 911 P.2d 286, 303, 305, the jury was given contradictory instructions on the use of prior inconsistent statements, and the Oklahoma Court of Criminal Appeals ruled that these instructions were inadequate to properly inform the jury of the applicable law.

2009 SUPPLEMENT

OUJI-CR 9-21

EVIDENCE - IMPEACHMENT BY PRIOR BAD ACTS

Evidence has been presented that **(the defendant)/([Name of Witness])** has committed conduct that may affect **his/her** credibility. This evidence is called impeachment evidence, and it is offered to show that the **defendant's/witness's** testimony is not believable or truthful. If you find that this conduct occurred, you may consider this impeachment evidence in determining what weight and credit to give the credibility of **(the defendant)/([Name of Witness])**. You may not consider this impeachment evidence as proof of innocence or guilt. You may consider this impeachment evidence only to the extent that you determine it affects the believability of the **defendant/witness**, if at all.

Statutory Authority: 12 O.S. 1991, § 2608(B).

Notes on Use

The trial court should be especially careful when giving more than one limiting instruction to avoid inconsistencies between them. *See Lewis v. State*, 1998 OK CR 24 ¶ 22, 970 P.2d 1158, 1168 (limiting instructions on other crimes evidence and the basis of opinion testimony were confusing and contradictory when given together because the only evidence of other crimes came in as the basis of opinion testimony).

Committee Comments

Prior to the adoption of section 2608(B), Oklahoma cases consistently forbade the use of specific instances of past conduct not constituting a conviction to impeach the credibility of any witness. *Brown v. State*, 1971 OK CR 257, 487 P.2d 963; *Foster v. State*, 1965 OK CR 146, 407 P.2d 1002; *Clardy v. State*, 95 Okl. Cr. 89, 240 P.2d 456 (1952); *Guest v. State*, 56 Okl. Cr. 129, 34 P.2d 1082 (1934); *Litchfield v. State*, 8 Okl. Cr. 164, 126 P. 707 (1912). Section 2608(B) permits inquiry into past conduct of a witness only where that former conduct is determined by the court, in its discretion, to be probative of truth and veracity. The latitude of the inquiry on cross-examination is also within the discretion of the court. *United States v. Estell*, 539 F.2d 697 (1Oth Cir. 1976).

Should the witness deny commission of the prior conduct on cross-examination, the attorney must "take the answer." As the first sentence of section 2608(B) specifies, no proof of specific instances of past unsavory conduct by extrinsic proof is permitted.

(2000 Supp.)

OUJI-CR 9-22

EVIDENCE - IMPEACHMENT OF A WITNESS BY FORMER CONVICTION

Evidence has been presented that **[Name of Witness]** has heretofore been convicted of **(a criminal offense)/(criminal offenses)**. This evidence is called impeachment evidence, and it is offered to show that the witness's testimony is not believable or truthful. If you find that **(this conviction)/(these convictions)** occurred, you may consider this impeachment evidence in determining what weight and credit to give the credibility of that witness. You may not consider this impeachment evidence as proof of innocence or guilt of the defendant. You may consider this impeachment evidence only to the extent that you determine it affects the believability of the witness, if at all.

Notes on Use

The trial court should be especially careful when giving more than one limiting instruction to avoid inconsistencies between them. *See Lewis v. State*, 1998 OK CR 24 ¶ 22, 970 P.2d 1158, 1168 (limiting instructions on other crimes evidence and the basis of opinion testimony were confusing and contradictory when given together because the only evidence of other crimes came in as the basis of opinion testimony).

(2000 Supp.)

OUJI-CR 9-23

EVIDENCE - IMPEACHMENT OF A DEFENDANT BY FORMER CONVICTION

Evidence has been presented that the defendant has heretofore been convicted of **(another offense)/(other offenses)** distinct from that charged in the information. This evidence is called impeachment evidence, and it is offered to show that the defendant's testimony is not believable or truthful. If you find that **(this conviction)/(these convictions)** occurred, you may consider this impeachment evidence in determining what weight and credit to give the credibility of the defendant. You may not consider this impeachment evidence as proof of innocence or guilt. You may consider this impeachment evidence only to the extent that you determine it affects the believability of the defendant, if at all. A person may not be convicted of the commission of one offense by any proof tending to show that **he/she** may have committed another offense.

Statutory Authority: 12 O.S. 1991, § 2609.

Notes on Use

The trial court should be especially careful when giving more than one limiting instruction to avoid inconsistencies between them. *See Lewis v. State*, 1998 OK CR 24 ¶ 22, 970 P.2d 1158, 1168 (limiting instructions on other crimes evidence and the basis of opinion testimony were confusing and contradictory when given together because the only evidence of other crimes came in as the basis of opinion testimony).

Committee Comments

The adoption of section 2609 changed previous Oklahoma law by permitting introduction, within a ten-year limit, of crimes involving "dishonesty or false statement," and crimes punishable by more than one year imprisonment, in the discretion of the court, to impeach the credibility of a witness. Before section 2609 was adopted, impeachment was allowed by convictions involving "moral turpitude" under the vague temporal standard of "not remote."

Countless cases have approved the giving of limiting instructions when the defendant, or any other witness, has been impeached through introduction of past convictions. *See, e.g., Samples v. State*, 1959 OK CR 6, 337 P.2d 756; *Farley v. State*, 93 Okl. Cr. 192, 226 P.2d 1002 (1950); *Tillman v. State*, 82 Okl. Cr. 276, 169 P.2d 223 (1946); *Smith v. State*, 78 Okl. Cr. 375, 148 P.2d 994 (1944); *Spivey v. State*, 69 Okl. Cr. 397, 104 P.2d 263 (1940).

The Court of Criminal Appeals has refused to find reversible error in several cases where an instruction regarding the utility of the defendant's former conviction(s) was neither requested by the defendant nor given by the court. *Wolf v. State*, 1962 OK CR 123, 375 P.2d 283; *Galbert v. State*, 1954 OK CR 152, 278 P.2d 245. It is the position of the Commission that the limiting instruction should be given only when requested by the party who called the impeached witness, since trial strategy may dictate that the jury's attention not be directed again at the close of the evidence to the fact that a party, or the witness of a party, has been convicted previously.

(2000 Supp.)

OUJI-CR 9-24

EVIDENCE - RIGHT OF ATTORNEY TO INTERVIEW WITNESSES

An attorney has the right to interview **his/her** witnesses for the purpose of learning the testimony the witness will give. The fact that the witness has talked to an attorney and told the attorney what **he/she** would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

Committee Comments

The Commission has been unable to find any Oklahoma cases discussing either the admissibility of evidence that the witness was interviewed by the attorney prior to trial, or the propriety of an instruction on this point. Nevertheless, the Commission has determined that, should cross-examination elicit the fact of pretrial interviews, this cautionary instruction should be given upon request. The instruction should not be used other than under circumstances where cross-examination evokes this information.

(2000 Supp.)

OUJI-CR 9-25

EVIDENCE - USE OF ACCOMPLICE TESTIMONY

No person may be convicted on the testimony of an accomplice unless the testimony of such a witness is corroborated by other evidence.

(2000 Supp.)

OUJI-CR 9-26

EVIDENCE - ACCOMPLICE DEFINED

An "accomplice" is one who, with criminal intent, is involved with others in the commission of a crime. A person becomes an accomplice either by being present and participating in a crime or, regardless of whether **he/she** is present during the commission of a crime, by aiding and abetting before or during its commission, or by having advised or encouraged its commission.

(2000 Supp.)

OUJI-CR 9-27

EVIDENCE - CORROBORATING EVIDENCE DEFINED

"Corroborating evidence" is supplementary evidence which tends to connect the defendant with the commission of the crime charged.

Notes on Use

This Instruction should be given only for cases involving accomplice testimony or testimony of co-conspirators who meet the definition of an accomplice, *See* 22 O.S. 2021, § 742: OUJI-CR 9-25 through 9-32.

(2024 Supp.)

OUJI-CR 9-28

EVIDENCE - CORROBORATING EVIDENCE

NEEDED FOR ACCOMPLICE TESTIMONY

Evidence corroborative of the testimony of an accomplice need not directly connect the defendant with the commission of the crime. It is sufficient if it tends to connect the defendant with its commission. This corroborating evidence, however, must show more than the mere commission of the offense or the circumstances thereof. Such evidence need not be direct, but may be entirely circumstantial.

It is not essential that the corroborating evidence, if any, cover every material point testified to by the accomplice, or that it be sufficient, standing alone, to establish the fact of the commission of the crime charged. It is sufficient corroboration if you, in your discretion, find from the evidence, beyond a reasonable doubt, that the testimony of the accomplice is corroborated as to some material fact or facts by independent evidence tending to connect the defendant with the commission of the crime. If the testimony of an accomplice is so corroborated, you shall give **his/her** testimony such weight and credit as you find it is entitled to receive.

(2000 Supp.)

OUJI-CR 9-29

EVIDENCE - DETERMINATION OF ACCOMPLICE STATUS BY JURY

As to the witness, **[Name of Witness]**, you are instructed that you are to determine whether or not **he/she** is an accomplice to the crime of which the defendant here stands charged. If you determine that **he/she** is an accomplice, you cannot convict the defendant upon the testimony of **[Name of Witness]**, unless you find that **his/her** testimony is corroborated as provided in these instructions.

Committee Comments

The trial court should be aware that the Court of Criminal Appeals decided in *Matthews v. State*, 1997 OK CR 3, ¶ 20, 953 P.2d 336, 343, that a defendant was entitled to an instruction requiring corroboration of the testimony of a witness who was an accomplice in a crime other than that for which the defendant was being tried. The test for determining whether a witness is an accomplice is whether the witness and defendant both could be indicted for the same offense. *Id.*; *Carter v. State*, 1994 OK CR 49, ¶ 29, 879 P.2d 1234, 1246, *cert. denied*, 513 U.S. 1172 (1995).

(2000 Supp.)

OUJI-CR 9-30

EVIDENCE - NECESSITY OF CORROBORATION

WHERE COURT DETERMINES WITNESS IS AN ACCOMPLICE

You are instructed that the witness, **[Name of Witness]**, is what is termed in law as an accomplice to the crime of **(which the defendant stands charged)/(Specify Crime)**. For that reason you cannot convict the defendant upon the testimony of **[Name of Witness]** unless you find that **his/her** testimony is corroborated as required in these instructions.

Committee Comments

The Court of Criminal Appeals decided in *Matthews v. State*, 1997 OK CR 3, ¶ 20, 953 P.2d 336, 343, that a defendant was entitled to an instruction requiring corroboration of the testimony of a witness who was an accomplice in a crime other than that for which the defendant was being tried. The test for determining whether a witness is an accomplice is whether the witness and defendant both could be indicted for the same offense. *Id.*; *Carter v. State*, 1994 OK CR 49, ¶ 29, 879 P.2d 1234, 1246, *cert. denied*, 513 U.S. 1172 (1995).

(2000 Supp.)

OUJI-CR 9-31

EVIDENCE - WHEN CORROBORATION BY ACCOMPLICE IS INSUFFICIENT

One accomplice cannot corroborate the testimony of another accomplice so as to authorize conviction on the testimony of two or more accomplices alone.

(2000 Supp.)

OUJI-CR 9-32

EVIDENCE - DETERMINING WHEN CORROBORATION

BY ACCOMPLICE IS SUFFICIENT

In determining the question as to whether or not the testimony of an accomplice has been corroborated, you must first set aside **his/her** testimony entirely and then examine all of the remaining testimony, evidence, facts, and circumstances, and ascertain from such examination whether there is any evidence tending to show the commission of the offense charged and tending to connect the defendant with the offense. If there is, then the testimony of the accomplice is corroborated.

Statutory Authority: 22 O.S. 2001, § 742.

Committee Comments

It is settled law that inclusion of the testimony of an accomplice in the State's case obliges the trial court to instruct the jurors with respect to the requisite of corroboration of that testimony, in order to insure that a conviction rests on bases other than the unsupported testimony of one whose motives for testifying may be questionable. *Glaze v. State*, 1977 OK CR 206, 565 P.2d 710;*Kern v. State*, 1997 OK CR 95, 522 P.2d 644;*Allen v. State*, 1974 OK CR 91, 522 P.2d 243; *Williams v. State*, 1974 OK CR 7, 518 P.2d 322;*McCormick v. State*, 1969 OK CR 244, 464 P.2d 942, *cert. denied*, 397 U.S. 934 (1970). However, the requirements embodied in the statutory policies expressed in 22 O.S. 2001, § 742, relate only to a criminal trial on the merits, a proceeding from which a conviction can result; these requirements have no application to a preliminary examination. *Bennett v. State*, 1977 OK CR 303, 570 P.2d 345.

The trial court's obligation with respect to instructing the jury has been articulated by the Court of Criminal Appeals as follows:

> [I]f a witness is clearly shown to be an accomplice as a matter of law, the trial court must instruct the jury that the witness is an accomplice and that his testimony must be corroborated. It is only where the facts of a case are reasonably susceptible to alternative findings that the witness is or is not an accomplice that the issue becomes one of fact requiring submission to the jury under the appropriate instruction.

Howard v. State, 1977 OK CR 93, ¶ 26, 561 P.2d 125, 130. Thus, selection of the appropriate accomplice instruction depends upon whether the witness is deemed to be an accomplice as a matter of law or whether the issue of the witness's status as an accomplice is a question of fact for the jury. An instruction covering each situation is included. Obviously, only one of these two instructions is to be given regarding any particular witness. These instructions are substantially similar to those approved in *Kern v. State, supra* (accomplice status determined by jury as question of fact); *Young v. State*, 1968 OK CR 190, 446 P.2d 79 (accomplice status determined as matter of law).

The quantum of proof necessary to establish corroboration need not be sufficient, in itself, to warrant a verdict of guilt; sufficiency is established "if the accomplice is corroborated with respect to one material fact by independent evidence tending to connect defendant with the commission of the crime." *Doser v. State*, 88 Okl. Cr. 299, 340, 203 P.2d 451, 472 (1949). *See also Tillman v. State*, 82 Okl. Cr. 276, 169 P.2d 223 (1946); *Mitchell v. State*, 59 Okl. Cr. 393, 60 P.2d 627 (1936). However, execution of the statutory policies expressed in section 742 mandates that the corroborating proof be independent of the testimony of another accomplice.

Refusal to instruct the jury with respect to accomplice testimony has been held to constitute reversible error, *Williams v. State, supra*, although the refusal to instruct has been termed nonprejudicial where a review of the record reflects abundant evidence of corroboration. *Allen v. State, supra; Stidham v. State*, 1973 OK CR 143, 507 P.2d 1312.

The question of whether a cautionary instruction regarding the credibility of an accomplice is warranted was resolved in the negative in *Allen, supra*, on the ground that a cautionary instruction is required only where "statements made by an accomplice or informer are uncorroborated." 1974 OK CR 91, ¶ 10, 522 P.2d at 246. Explication of the reasoning in *Allen* is necessary .

The defendant's argument in *Allen* was based on a case holding that, where incriminating testimony of an informer is uncorroborated, special cautionary instructions as to the testimony of the informer and his credibility are required. *Smith v. State*, 1971 OK CR 223, 485 P.2d 771. Logically, however, no such rule could be applied to accomplices, because by statute a defendant cannot be convicted on the uncorroborated testimony of an accomplice. Thus, a cautionary instruction on the credibility of an uncorroborated accomplice would never be called for, simply because the evidence would not be sufficient to support a conviction.

However, in *Allen*, the court based its decision affirming the conviction on the fact that the accomplice testimony was corroborated, whereas in *Smith* it was not. Instead of stating that the *Smith* rule is inapplicable to accomplice testimony, the court in *Allen* stated that "the cautionary instructions discussed [in *Smith*] are explicitly limited to those occasions when statements made by an accomplice or informer are uncorroborated. ... This requirement is, of course, necessary with uncorroborated testimony...." 1974 OK CR 91, ¶ 10, 522 P.2d at 246. A proper reading of *Smith* limits its rule to testimony of informers; the only reference in *Smith* to accomplices was in a quote from a United States Supreme Court opinion in which the Court stated that a defendant is entitled to a cautionary instruction where credibility of an accomplice or informer is in issue. *Lee v. United States*, 343 U.S. 747, 757 (1952).

The Oklahoma Court of Criminal Appeals ordered this Instruction modified in *Pink v. State*, 2004 OK CR 37, ¶ 23, 104 P.3d 584, 593, to the form shown above in order to specify that in determining whether accomplice testimony has been corroborated, the jury **must** (rather than may) be able to eliminate the accomplice testimony and determine that there is other evidence tending to show both that the charged offense was committed and the defendant was connected with the offense.

2006 SUPPLEMENT

OUJI-CR 9-33

EVIDENCE - USE OF COCONSPIRATOR TESTIMONY

NO INSTRUCTION SHOULD BE GIVEN

Committee Comments

In *Pink v. State*, 2004 OK CR 37, ¶ 28, 104 P.3d 584 , 593, the Oklahoma Court of Criminal Appeals decided that the independent corroboration requirement for accomplice testimony does not apply to coconspirator testimony, and it directed that this instruction as well as OUJI-CR 9-35 through 9-39 were erroneous and should not be used. Independent corroboration is still required, however, if the alleged coconspirator's testimony was the testimony of an accomplice. For the instruction for corroboration of accomplice testimony, see OUJI-CR 9-32, *supra.* The Court also ruled that OUJI-CR 9-34 was unnecessary.

(2008 Supp.)

OUJI-CR 9-34

EVIDENCE - COCONSPIRATOR DEFINED

NO INSTRUCTION SHOULD BE GIVEN.

(2008 Supp.)

OUJI-CR 9-35

EVIDENCE - CORROBORATIVE EVIDENCE NEEDED FOR COCONSPIRATOR TESTIMONY

NO INSTRUCTION SHOULD BE GIVEN.

(2008 Supp.)

OUJI-CR 9-36

EVIDENCE - DETERMINATION OF COCONSPIRATOR STATUS BY JURY

NO INSTRUCTION SHOULD BE GIVEN.

(2008 Supp.)

OUJI-CR 9-37

EVIDENCE - NECESSITY OF CORROBORATION WHEN COURT DETERMINES WITNESS IS A COCONSPIRATOR

NO INSTRUCTION SHOULD BE GIVEN.

(2008 Supp.)

OUJI-CR 9-38

EVIDENCE - WHEN CORROBORATION
BY COCONSPIRATOR IS INSUFFICIENT

NO INSTRUCTION SHOULD BE GIVEN.

(2008 Supp.)

OUJI-CR 9-39

EVIDENCE - DETERMINING WHEN CORROBORATION BY COCONSPIRATOR IS SUFFICIENT

NO INSTRUCTION SHOULD BE GIVEN.

(2008 Supp.)

OUJI-CR 9-40

EVIDENCE - CORROBORATION OF TESTIMONY IN RAPE PROSECUTION

[NO INSTRUCTION SHOULD BE GIVEN]

Committee Comments

The Oklahoma Court of Criminal Appeals held as follows in*Gilmore v. State*, 1993 OK CR 27, ¶ 11, 855 P.2d 143, 144: "Corroboration is necessary for admission of a rape victim's testimony only where the testimony is so unsubstantial and incredible as to be unworthy of belief." Thus, testimony of a rape victim should not be admitted into evidence without corroboration if it is unworthy of belief. On the other hand, if the testimony is believable or is corroborated, then an instruction concerning corroboration is unnecessary. *Ray v. State*, 1988 OK CR 199, ¶ 8, 762 P.2d 274, 277 (no error for trial court to refuse instruction on corroboration where Court of Criminal Appeals determined that testimony was corroborated and not inconsistent, uncertain, or contradictory). In other words, the trial court, rather than the jury, has the responsibility for determining whether the testimony of a rape victim is so unworthy of belief as to require corroboration.

(2000 Supp.)

OUJI-CR 9-41

EVIDENCE - CREDIBILITY OF DEFENDANT AS A WITNESS

A defendant who wishes to testify is a competent witness. The defendant's testimony is to be judged in the same way as that of any other witness.

Statutory Authority: 22 O.S. 1991, § 701.

Committee Comments

The defendant puts his credibility in issue by choosing to take the witness stand, as does every other witness. The jury should be instructed that its obligations include assessing the worth of the defendant's testimony as that of any other witness is gauged. The defendant's testimony may be credited or disbelieved, a determination within the fact-finding capacity of the triers of fact, of which they should be made aware. *See, e.g., Clark v. State*, 95 Okl. Cr. 119, 239 P.2d 797 (1952); *Boggs v. State*, 56 Okl. Cr. 119, 34 P.2d 1078 (1934); *Gerdner v. State*, 39 Okl. Cr. 68, 262 P. 1077 (1928); *McNeill v. State*, 18 Okl. Cr. 1, 192 P. 256 (1920).

(2000 Supp.)

OUJI-CR 9-42

EVIDENCE - CREDIBILITY OF OPINION WITNESSES

Testimony has been introduced of certain witnesses who purport to be skilled in their line of endeavor or who possess peculiar knowledge acquired by study, observation, and practice.

You may consider the testimony of these witnesses, and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine. You are not required to surrender your own judgment to that of any person testifying, based on that person's education, training or experience. You need not give controlling effect to the opinion of such witnesses for their testimony, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive.

Committee Comments

This instruction is similar to an instruction approved by the Court of Criminal Appeals in *Sharp v. State*, 1965 OK CR 133, 407 P.2d 593. In order to reduce the likelihood that the jury will give undue deference to opinion testimony, references to expert witnesses have been removed from the instruction and replaced by the term "opinion witness testimony." The admissibility of opinion testimony, both from lay witnesses and experts, is governed by 12 O.S. 1991, §§ 2701-2705.

In *Toms v. State*, 95 Okl. Cr. 60, 239 P.2d 812 (1952), the Court of Criminal Appeals stated:

> [Expert testimony is permissible any time] when the conclusions to be drawn by the jury depend on the existence of facts which are not common knowledge and which are particularly within the knowledge of men whose experience or study enables them to speak with authority on those facts, and in those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence.

Id. at 66, 239 P.2d, at 818. An expert is not allowed to testify as to matters which are generally within the knowledge or understanding of most persons. *Gossett v. State*, 1962 OK CR 75, 373 P.2d 285; *Plumlee v. State*, 1961 OK CR 42, 361 P.2d 223.

When an expert witness is permitted to testify, he may testify not only as to the facts, but also as to opinions and conclusions drawn from the facts. *Toms v. State*, *supra*. However, the jury is not bound by the testimony or conclusions of the expert. *Barnhart v. State*, 1956 OK CR 105, 302 P.2d 793; *Toms v. State*, *supra*.

The Court of Criminal Appeals has determined that the jury should be instructed that evidence in the form of expert testimony is not conclusive upon their factual findings, but should be afforded whatever weight the jury deems it is entitled to receive. *Rouse v. State*, 1979 OK CR 31, 594 P.2d 787; *Peterson v. State*, 1970 OK CR 93, 473 P.2d 293; *Daggs v. State*, 1957 OK CR 95, 317 P.2d 279; *Barnhart v. State*, *supra; Toms v. State*, *supra*. Although the failure so to instruct the jury has been found to be a basis for modification of sentence, rather than reversal of conviction, it was stated in *Daggs*, *supra*.

> In some cases, the failure to so instruct might constitute grounds for reversal, and in others grounds for modification because of the great weight the jury might attach to such expert testimony in the absence of an instruction covering the same, especially if the results of the case hinged on the expert testimony. Failure to so instruct, in such event, might constitute a material failure.

1957 OK CR 95, ¶ 7, 317 P.2d at 282.

(2000 Supp.)

OUJI-CR 9-42A

EVIDENCE - USE OF INFORMATION

RELIED UPON BY OPINION WITNESSES

In addition to testimony from **[Name(s) of Opinion Witness(es)]** as to **his/her/their opinion(s)**, you have also heard **his/her/their** testimony as to information **he/she/they** relied upon in reaching **his/her/their conclusion(s)**. This testimony was admitted solely to enable you to evaluate **his/her/their** opinion testimony, and you should not consider it for any other purpose in reaching a verdict.

Notes on Use

This Instruction is only needed when testimony concerning the basis for the opinion of a witness is admitted and the basis of the opinion would not otherwise be admissible, for example, if the opinion is based on hearsay. *Lewis v. State*, 1998 OK CR 24, ¶ 22, 970 P.2d 1158, 1167-68; *Ake v. State*, 1989 OK CR 30, ¶ 31, 778 P.2d 460, 467. It should normally be given both at the time the basis for the opinion testimony is admitted and with the final jury instructions.

The trial court should be especially careful when giving more than one limiting instruction to avoid inconsistencies between them. *See Lewis v. State*, 1998 OK CR 24 ¶ 22, 970 P.2d 1158, 1168 (limiting instructions on other crimes evidence and the basis of opinion testimony were confusing and contradictory when given together because the only evidence of other crimes came in as the basis of opinion testimony).

(2000 Supp.)

OUJI-CR 9-43

EVIDENCE - CREDIBILITY OF INFORMERS

The testimony of an informer who provides evidence against a defendant for **pay/(immunity from punishment)/(personal advantage/ vindication)** must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or by prejudice against the defendant is for you to determine.

Committee Comments

The necessity for a cautionary instruction concerning the credibility of informants is delineated in three Oklahoma appellate decisions. The Court of Criminal Appeals held in *Smith v. State*, 1971 OK CR 223, 485 P.2d 771, that a specific cautionary instruction with respect to the weight to be afforded the wholly unsubstantiated and uncorroborated testimony of an informer was required. In *Smith*, the defendant's conviction for sale of marijuana was reversed, in part due to the failure of the trial court to instruct the jury to be cautious in assessing the credibility of an informer whose testimony was uncorroborated, and the sole evidence placing the defendant at the scene of the crime. This denial was held tantamount to the abrogation of fair-trial rights, although the defendant did not request a cautionary instruction at trial. The court buttressed its holding by reliance on language found in *Lee v. United States*, 343 U.S. 747, 757 (1952):

> The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.

485 P.2d, at 773.

In contrast, in *Gee v. State*, 1975 OK CR 133, 538 P.2d 1102, the court held the failure of the trial judge to give a cautionary instruction on informers' testimony was not error. and affirmed the defendant's conviction for sale of heroin.

According to the court, the defendant's reliance on *Smith* was misplaced because, in *Smith*, the informer had been promised a substantial benefit for rendering effective work as an informant, and because the defendant's presence at the scene of the crime was established solely by the testimony of the informant. Furthermore, the court in *Smith* had specifically prefaced its conclusion that a cautionary instruction was required with the phrase, "under these facts." Thus, reasoned the court, from *Smith* there emerges no "fundamental requirement that a trial court give cautionary instructions when an informant is used...." 1975 OK CR 133, ¶ 11, 538 P.2d at 1106.

In *Gee*, the informant's husband had narcotics charges pending against him, and she testified that she voluntarily did the informant work for the police because she hoped her husband would receive a lighter sentence as a result of her work for the police. However, she testified she was not paid for the work and received no promises with regard to consideration for her husband. Despite the possible motive for fabrication by the informer, the court distinguished *Gee* from *Smith* on the basis that no promises were made to the informer in *Gee*, as were made in *Smith*.

A second, more important, distinction was that the informant's testimony in *Gee* was corroborated by the testimony of a police officer, who testified that he saw the defendant with the informant at the crime scene when the sale allegedly took place.

Finally, the court in *Gee* noted that the defendant had not requested that a cautionary instruction on the informant's testimony be given and that the judge had instructed the jury properly by giving the general credibility instruction.

The court concluded its discussion of this issue with the statement that "[i]n view of the fact that the attorney did not object to any instructions given nor submit any requested instructions," no error occurred. 1975 OK CR 133, ¶ 14, 538 P.2d at 1106. The questions left unanswered in *Gee* are whether it would have been error to refuse to give a requested instruction on the credibility of the informant's testimony, and, if so, whether such error would have been prejudicial. In spite of the court's concluding remark about no objection to the instructions given or submission of requested instructions, in light of the court's prior discussion of the informant being promised nothing and the informant's testimony being corroborated, it is clear that failure to give a requested instruction in this case would not have been prejudicial, if indeed it would have constituted error at all.

In *Roquemore v. State*, 1973 OK CR 366, 513 P.2d 1318, the defendant's conviction for the sale of marijuana was reversed. The bases of the reversal were the introduction of highly prejudicial evidence in the form of letters written by the defendant making reference to LSD and improper closing argument by the prosecutor with respect to punishment and the role of the Pardon and Parole Board. Thus, the court's discussion of the cautionary instruction for the informant's testimony was dicta.

The chief witness against the defendant was an informant who conceded on the stand that he had also sold marijuana and had been promised immunity from prosecution for cooperating with the police. The court determined that, although the informant's testimony was corroborated, a cautionary instruction as to the informant's testimony was nevertheless required, due to the existence of some discrepancies with respect to items turned over to the officers on the night in question, as well as uncertainty with respect to the degree of visibility enjoyed by the observing officers. The court also stressed the fact that the informant stood to gain by his testimony, and declared that "better judgment would dictate that a cautionary instruction be given, when the informer stands to gain by his testimony." 1973 OK CR 366, ¶ 11, 513 P.2d at 1320.

Thus, the Commission has concluded that the cautionary instruction, as framed, is appropriate in any case where an informant's evidence is tinged by the prospect of reciprocal benefits in exchange for his/her testimony, whether the testimony is corroborated or not. Where the informant has been the recipient of no promises or advantages, the instruction is required, under the mandate of *Gee*, only if the informant's evidence is deemed by the court to be wholly unsubstantiated or uncorroborated.

(2000 Supp.)

OUJI-CR 9-43A

EVIDENCE - CREDIBILITY OF JAILHOUSE INFORMANT TESTIMONY

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:

(1) whether the informant has received, been offered, or reasonably expects anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony;

(2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement;

(3) whether the informant has ever changed **his/her testimony/statement**;

(4) the criminal history of the informant; and

(5) any other evidence relevant to the informant's credibility.

Notes on Use

In *Dodd v. State*, 2000 OK CR 2, ¶ 26, 993 P.2d 778, 784, the Oklahoma Court of Criminal Appeals required the use of this Instruction whenever jailhouse informant testimony has been admitted by the trial court.

In addition, the Court of Criminal Appeals required the prosecution to make available to the defense the following pretrial discovery:

> At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make in the future to the informant (emphasis added); (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.

Id. ¶ 25, 993 P.2d at 784.

(2016 SUPP.)

OUJI-CR 9-44

EVIDENCE - DEFENDANT'S RIGHT NOT TO TESTIFY

The defendant is not compelled to testify, and the fact that a defendant does not testify cannot be used as an inference of guilt and should not prejudice **him/her** in any way. You must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into your discussions or deliberations in any manner.

Notes on Use

This instruction should be given only if it is requested by the defendant.

Committee Comments

The above instruction is modeled after those required by *Carter v. Kentucky*, 450 U.S. 288 (1981), and *Bruno v. United States*, 308 U.S. 287 (1939). In *Carter*, the Court held that "a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." The Court held that the right to have such an instruction given, when requested by the defendant, was guaranteed under the Due Process Clause of the Fourteenth Amendment. *Carter* disagrees with prior decisions by the Court of Criminal Appeals. *See Ellis v. State*, 1977 OK CR 13, 558 P.2d 1191; *Brannin v. State*, 1962 OK CR 121, 375 P.2d 276.

(2000 Supp.)

OUJI-CR 9-45

VICTIM IMPACT EVIDENCE -- CAPITAL CASES

The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. This evidence is simply another method of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.

As it relates to the death penalty: Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstance has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances.

As it relates to the other sentencing options: You may consider this victim impact evidence in determining the appropriate punishment as warranted under the law and facts in the case.

Statutory Authority: 21 O.S. 2016, § 710.10(C).

Notes on Use

This instruction is for use in death penalty cases. It should not be given if affirmatively waived by the defendant and his attorney.

The Court of Criminal Appeals held in *Cooper v. State*, 1997 OK CR 22, ¶¶ 3-4, 894 P.2d 420, 422, that it was improper for the trial court to order a second stage for the sole purpose of presenting victim impact evidence to the jury before the jury recommended a sentence. 21 O.S. 2011, § 142A-8 authorizes victim impact statements to be presented "at the sentence proceeding". Separate sentencing proceedings should not be conducted before a jury, except in cases where the death penalty is sought and in bifurcated proceedings for enhanced sentencing after former conviction of a felony. The Court of Criminal Appeals has not ruled on whether victim impact statements are admissible in a bifurcated proceeding for enhanced sentencing after former conviction of a felony. Accordingly, the Committee has not prepared a jury instruction for such cases.

Committee Comments

This instruction is taken from *Cargle v. State*, 1995 OK CR 77, ¶ 77, 909 P.2d 806, 828-29. *Cargle* has been modified by the Tenth Circuit Court of Appeals in *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003). The United States Supreme Court decided in *Bosse v. Oklahoma*, 137 S.Ct. 1 (2016), that it was improper for relatives of a victim in a murder case to recommend a death sentence to a jury.

(2017 Supp.)

OUJI-CR 9-46

REENACTMENT EVIDENCE

The **State/defendant** is about to present evidence in the form of a **video/computer animation/[other]**, which is intended to help illustrate certain testimony or evidence being presented to you. The exhibit being presented is not an actual recording or video of the event that is shown. Rather, the exhibit is offered simply as a "reenactment." The exhibit is intended to help you better understand the **State's/defendant's** position about how an event occurred (or did not occur) and that party's understanding of the evidence supporting this interpretation. The exhibit is intended to assist you in your role as jurors, and like all evidence, it may be accepted or rejected by you, in whole or in part.

Notes on Use

This Instruction should be given contemporaneously with the presentation of video, computer-based, or other comparable "reenactment" evidence. *See Dunkle v. State*, 2006 OK CR 29, ¶ 71, 139 P.3d 228.

Committee Comments

In *Harris v. State*, 2000 OK CR 20, ¶¶ 16-17, 13 P.3d 489, the Oklahoma Court of Criminal Appeals offered the following guidelines for the use of video or computer-based reenactment evidence:

> In order for a video or computer crime scene reenactment to be seen by a jury, as an aid to illustrate an experts witness' testimony, the court should require (1) that it be authenticated - the trial court should determine that it is a correct representation of the object portrayed, or that it is a fair and accurate representation of the evidence to which it relates, (2) that it is relevant, and (3) that its probative value is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." See 12 O.S.1991, §§ 2401-2403, 2901.
>
> The court should give an instruction, contemporaneous with the time the evidence is presented, that the exhibition represents only a re-creation of the proponent's version of the event; that it should in no way be viewed as an actual recreation of the crime, and like all evidence, it may be accepted or rejected in whole or in part. The court must also ensure that the other party has prior opportunity to examine the reenactment and underlying data. The trial court should also mark the video reenactment as a court's exhibit so that the record may be preserved.

(1/2007 Supp.)

OUJI-CR 9-47

EVIDENCE - REFUSAL TO TAKE BLOOD ALCOHOL TEST

Evidence has been introduced of the defendant's refusal to take a test to determine the blood alcohol level in **his/her** body at the time of **his/her** arrest. You must first determine whether this refusal is evidence of guilt.

To find that the defendant's refusal to take the blood alcohol test is evidence of guilt, you must find beyond a reasonable doubt that:

First, the defendant refused the test,

Second, with a consciousness of guilt,

Third, in order to avoid arrest or conviction for the crime with which **he/she** is now charged.

[Note: If the defendant has offered evidence explaining the refusal, give the following: The defendant has offered evidence explaining **his/her** refusal to take the blood alcohol test. You must consider this explanation in determining whether the defendant's refusal is evidence of guilt.]

If after a consideration of all the evidence on this issue, you find beyond a reasonable doubt that the defendant refused the blood alcohol test with a consciousness of guilt in order to avoid arrest or conviction, then the defendant's refusal to take the blood alcohol test is a circumstance which you may consider with all the other evidence in this case in determining the question of the defendant's guilt. However, if you have a reasonable doubt that the defendant refused the blood alcohol test with a consciousness of guilt in order to avoid arrest or conviction, then the defendant's refusal to take the blood alcohol test is not a circumstance for you to consider.

Notes on Use

This limiting Instruction should be used if evidence of the defendant's refusal to take a blood alcohol test is admitted. This Instruction is required in order to maintain consistency with the flight instruction and to avoid shifting the burden of proof to the defendant. *Harris v. State*, 1989 OK CR 15, ¶¶ 8-9, 773 P.2d 1273 , 1277-78 (Lumpkin, J., specially concurring).

Committee Comments

The Court of Criminal Appeals held in *Harris v. State*, 1989 OK CR 15, ¶ 7, 773 P.2d 1273 , 1274, that the admission of evidence of refusal to take a blood alcohol test in a prosecution for driving under the influence of alcohol did not violate either the United States or Oklahoma Constitutions.

(2008 Supp.)

OUJI-CR 10-1

GENERAL CLOSING CHARGE - INTRODUCTION

Since all the evidence in this case has been given to you, it is now my duty, under the law, to give you the instructions that apply in this trial. The instructions contain all rules of the law that are to be applied by you in this case, and all the rules of law by which you are to weigh the evidence and determine the facts in issue in deciding this case and in reaching a verdict. You must consider the instructions as a whole and not as a part to the exclusion of the rest. All the testimony and evidence which it is proper for you to consider has been introduced in this case. You should not consider any matter of fact or of law except what has been given to you while this court is or has been in session.

Notes on Use

OUJI-CR 10-1 through OUJI-CR 10-10 must be given in every trial, except that OUJI-CR 10-8A should b given only if the court has permitted the jurors to take notes during the trial.

(2000 Supp.)

OUJI-CR 10-2

GENERAL CLOSING CHARGE - FUNCTION OF THE JURY

It is your responsibility as jurors to determine the facts from the evidence, to follow the rules of law as stated in these instructions, to reach a fair and impartial verdict of guilty or not guilty based upon the evidence[, and to determine punishment if you should find the defendant guilty] pursuant to your instructions. You must not use any method of chance in arriving at a verdict, but must base your verdict on the judgment of each juror.

Notes on Use

The bracketed language should be used only in non-bifurcated trials and should be deleted if there are separate stages for the jury to determine guilt and punishment. *See Myers v. State*, 2006 OK CR 12, ¶ 66, 133 P.3d 312.

(2007 Supp.)

OUJI-CR 10-3

GENERAL CLOSING CHARGE - CHARGING INSTRUCTION

The defendant, **[Name of Defendant]**, is charged in the **information/indictment** with **[State Crime Charged and Summarize Material Facts of Information or Indictment]** on or about **[Date]** in **[County]** County, Oklahoma.

To this charge the defendant has entered a plea of not guilty.

(2000 Supp.)

OUJI-CR 10-4

GENERAL CLOSING CHARGE - PRESUMPTION OF INNOCENCE

[The/Each] defendant is presumed innocent of the crime charged, and the presumption continues unless, after consideration of all the evidence, you are convinced of **his/her/(each defendant's)** guilt beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt.

The defendant must be found not guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the crime.

(2000 Supp.)

OUJI-CR 10-5

GENERAL CLOSING CHARGE - DEFINITION OF EVIDENCE

Evidence is the testimony received from the witnesses under oath, stipulations made by the attorneys, and the exhibits admitted into evidence during the trial.

(2000 Supp.)

OUJI-CR 10-6

GENERAL CLOSING CHARGE - INFORMATION OR INDICTMENT NOT EVIDENCE

The **information/indictment** in this case is the formal method of accusing the defendant of a crime. The information is not evidence of guilt, and the law is that you should not allow yourselves to be influenced against the defendant by reason of the filing of the **information/indictment**.

(2000 Supp.)

OUJI-CR 10-7

GENERAL CLOSING CHARGE - JUDICIAL RULINGS

The Court has made rulings in the conduct of the trial and the admission of evidence. In so doing I have not expressed nor intimated in any way the weight or credit to be given any evidence or testimony admitted during the trial. Nor have I indicated in any way the conclusions to be reached by you in this case.

(2000 Supp.)

OUJI-CR 10-8

GENERAL CLOSING CHARGE - CREDIBILITY OF WITNESSES

It is your responsibility to determine the credibility of each witness and the weight to be given the testimony of each witness. In determining such weight or credibility, you may properly consider: the interest, if any, which the witness may have in the result of the trial; the relation of the witness to the parties; the bias or prejudice of the witness, if any has been apparent; the candor, fairness, intelligence, and demeanor of the witness; the ability of the witness to remember and relate past occurrences, the means of observation, and the opportunity of knowing the matters about which the witness has testified. From all the facts and circumstances appearing in evidence and coming to your observation during the trial, aided by the knowledge which you each possess in common with other persons, you will reach your conclusions. You should not let sympathy, sentiment or prejudice enter into your deliberations, but should discharge your duties as jurors impartially, conscientiously, and faithfully under your oaths and return such verdict as the evidence warrants when measured by these instructions.

(2000 Supp.)

OUJI-CR 10-8A

GENERAL CLOSING CHARGE - NOTETAKING BY JURORS

You have been permitted to take notes during the testimony of this case. If you have done so you may refer to them during deliberations, and discuss the contents of your notes with other jurors. In your deliberations, give no more or no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts, but are simply aids to your memory. It is the testimony from the witness stand which must be the basis of your determination of the facts, and ultimately, your verdict in the case.

Notes on Use

This Instruction is recommended **IF** the court permits jurors to take notes.

Committee Comments

The Court of Criminal Appeals first affirmed the discretion of the trial court to permit jurors to take notes during trial in *Glazier v. State*, 1973 OK CR 386, ¶ 15, 514 P.2d 87, 91. The*Glazier* opinion included dicta that jurors should not be allowed to take their notes into the jury room while deliberating, but in *Cohee v. State*, 1997 OK CR 30, ¶ 4, 942 P.2d 211, 212, the Court of Criminal Appeals repudiated this dicta, and it held that jurors may use their notes during deliberations. This Instruction is based on one suggested by the Oklahoma Supreme Court in *Sligar v. Bartlett*, 1996 OK 144, n.2, 916 P.2d 1383, 1387.

(2000 Supp.)

OUJI-CR 10-9

GENERAL CLOSING CHARGE - OBJECTIONS

From time to time during this trial, the attorneys have made objections that I have ruled on. You should not speculate upon the reasons why objections were made. If I approved or sustained an objection, you should not speculate on what might have been said or what might have occurred had the objection not been sustained by me.

(2000 Supp.)

OUJI-CR 10-10

GENERAL CLOSING CHARGE - CLOSING INSTRUCTION

After you have retired to consider your verdict, select one of your number as foreperson and enter upon your deliberations. [If you have questions during your deliberations, you may submit them to the bailiff, and I will attempt to answer them as fully as the law permits.] When you have agreed on a verdict, your foreperson alone will sign it, and you will, as a body, return it in open court. Your verdict must be unanimous. Forms of verdict will be furnished. You will now listen to the argument of counsel, which is a proper part of this trial.

Notes on Use

This instruction (or one of the alternatives in OUJI-CR 10-10A or 10-10B below) should be the last instruction to be given. The trial court is not required to give the second sentence of the instruction, which is in brackets.

Committee Comments

In Cohee v. State, 1997 OK CR 30, Attachment 1, 942 P.2d 211, 215 the Court of Criminal Appeals approved guidelines for trial courts when conducting jury trials in criminal cases. The guidelines included: "The trial court may instruct the jury that it may submit questions to the court during deliberations, and that the court will attempt to answer those questions as fully as the law permits."

(2003 Supp.)

OUJI-CR 10-10A

GENERAL CLOSING CHARGE -

CLOSING INSTRUCTION - NONUNANIMOUS VERDICT

After you have retired to consider your verdict, select one of your number as foreperson and enter upon your deliberations. Your verdict does not need to be unanimous, and it can be based on an agreed verdict of five (5) of you.

If your verdict is unanimous, your foreperson alone will sign it. If your verdict is not unanimous, it must be signed by each juror who concurs in the verdict. After you have reached your verdict, you will, as a body, return it in open court. Forms of verdict will be furnished. You will now listen to the argument of counsel, which is a proper part of this trial.

Notes on Use

This Instruction should be used in trials involving only petty offenses.

Committee Comments

This Instruction is based on the instruction used in *Watson v. State*, 1997 OK CR 42, n.1, 943 P.2d 1087, 1088. The Court of Criminal Appeals held the jury was properly instructed that it could render a less than unanimous verdict for petty offenses punishable by imprisonment for six months or less. *Id.* ¶ 10, 943 P.2d at 1090.

(2000 Supp.)

OUJI-CR 10-10B

GENERAL CLOSING CHARGE -

CLOSING INSTRUCTION - PARTLY UNANIMOUS AND PARTLY

NONUNANIMOUS VERDICT

After you have retired to consider your verdict, select one of your number as foreperson and enter upon your deliberations. Your verdict must be unanimous for the **crime(s)** of **[Specify Crime(s) That Are Punishable by Imprisonment for More Than Six Months]** in **[Specify Count(s)]**. Your verdict does not need to be unanimous for the **crime(s)** of **[Specify Crime(s) That Are Punishable by Six Months Imprisonment or Less]** in **[Specify Count(s)]**, and it can be based on an agreed verdict of **(five (5))/(nine (9))** of you.

If your verdict is unanimous, your foreperson alone will sign it. If your verdict is not unanimous, it must be signed by each juror who concurs in the verdict. After you have reached your verdict, you will, as a body, return it in open court. Forms of verdict will be furnished. You will now listen to the argument of counsel, which is a proper part of this trial.

Notes on Use

This Instruction should be used in trials where offenses punishable by imprisonment for more than six months are tried together with offenses punishable by imprisonment for less than six months.

If the case is tried to a six person jury, the last sentence of the first paragraph should state that the verdict can be based on an agreed verdict of five jurors. If the case is tried to a twelve person jury, the last sentence of the first paragraph should state that the verdict can be based on an agreed verdict of nine jurors.

Committee Comments

This Instruction is based on the instruction used in *Watson v. State*, 1997 OK CR 42, n.1, 943 P.2d 1087, 1088. The Court of Criminal Appeals held the jury was properly instructed that it could render a less than unanimous verdict for petty offenses punishable by imprisonment for six months or less. *Id.* ¶ 10, 943 P.2d at 1090.

(2000 Supp.)

OUJI-CR 10-11

DEADLOCKED JURY CHARGE

This case has taken approximately **[Specify Number]** hours of trial time. You have deliberated for approximately **[Specify Number]** hours. You report to me that you are experiencing difficulty in arriving at a verdict.

This is an important case and a serious matter to all concerned. You are the exclusive judges of the facts; the court is the judge of the law. Now I most respectfully and earnestly request of you that you return to your jury room and resume your deliberations. Further open and frank discussion of the evidence and law submitted to you in this case may aid you in arriving at a verdict.

This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision. No juror should ever agree to a verdict that is contrary to the law in the court's instructions, nor find a fact or concur in a verdict which in good conscience he or she believes to be untrue.

This does mean that you should give respectful consideration to each other's views and talk over any differences of opinion in the spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion, that this case may be completed. Each juror should respect the opinion of his or her fellow jurors, as he or she would have them respect his or hers, in an earnest and diligent effort to arrive at a just verdict under the law and the evidence.

You may be as leisurely in your deliberations as the case may require and take all the time necessary. The giving of this instruction at this time in no way means that it is more important than any other instruction. On the contrary, you should consider this instruction together with and as part of the instructions which I previously gave you.

In stating the foregoing, I again repeat: you are the judges of the facts; the court is the judge of the law. In making all statements made to you I have not, nor do I now, express or intimate, nor indicate, in any way the conclusions to be reached by you in this case, nor do I intend in any way or manner to coerce a verdict, nor directly or indirectly to force a verdict in this case. I only ask that you return to your jury room and, again, diligently and earnestly under your oaths resume your deliberations.

Committee Comments

This "*Allen*" charge is virtually identical to that denominated "a model of fairness" by the Court of Criminal Appeals in *Pickens v. State*, 1979 OK CR 99, ¶¶ 10-11, 600 P.2d 356, 357-58. Similar instructions have been approved in numerous cases. *See e.g., Thomas v. State*, 1987 OK CR 113, ¶¶ 20-21, 741 P.2d 482, 488.

(2000 Supp.)

OUJI-CR 10-12

INSTRUCTION UPON DISCHARGE

You have now completed your duties as jurors in this case and are discharged. The question may arise whether you are free to discuss this case with anyone. This is entirely your decision. If any person tries to discuss the case over your objection, or becomes critical of your service, please report it to me immediately.

Notes on Use

This instruction should be given when the jury is discharged.

(2000 Supp.)

OUJI-CR 10-13

RETURN OF VERDICT -- BASIC INSTRUCTION

If you find beyond a reasonable doubt that the defendant committed the crime of **[Crime Charged]**, you shall return a verdict of guilty by marking the Verdict Form **[for the crime of (Crime Charged)]** appropriately.

If you have a reasonable doubt of the defendant's guilt of the charge of **[Crime Charged]**, or you find that the State has failed to prove each element of **[Crime Charged]** beyond a reasonable doubt, you shall return a verdict of not guilty by marking the Verdict Form **[for the crime of (Crime Charged)]** appropriately.

If you find the defendant guilty, you shall then determine the proper punishment. The crime of **[Crime Charged]** is punishable by **[State Range of Punishment (including any mandatory fine)]**. [**You may also impose a fine of not exceeding one/ten thousand dollars ($1,000/10,000).**] When you have decided on the proper punishment, you shall fill in the appropriate space on the Verdict Form **[for the crime of (Crime Charged)]** and return the verdict to the Court.

Notes on Use

This instruction should be used in cases where there are no lesser included offenses charged, and there is no sentence enhancement for prior convictions. For instructions in cases involving lesser included offenses, see OUJI-CR 10-23 through 10-27. For instructions in cases involving sentence enhancement for prior convictions, see OUJI-CR 10-15 through 10-22. OUJI-CR 10-13A or 10-13B should be used for crimes listed in 21 O.S. Supp. 2017, § 13.1, and OUJI-CR 10-13C should be used for crimes requiring post-imprisonment community supervision.

For any offense for which no fine is otherwise provided by law, the punishment may include a fine imposed under 21 O.S. 2011, § 64. *Daniels v. State*, 2016 OK CR 2, ¶ 5, 369 P.3d 381, 384; *Fite v. State*, 1993 OK CR 58, ¶¶ 8-11, 873 P.2d 293, 295. The Oklahoma Court of Criminal Appeals has provided an example of a proper instruction in *Daniels v. State*, as follows: "The crime of SHOOTING WITH INTENT TO KILL is punishable by imprisonment in the state penitentiary not exceeding life. In addition, you may also impose a fine not exceeding ten thousand ($10,000.00) dollars." 2016 OK CR 2, ¶ 5, 369 P.3d 381, 384.

If there are multiple counts, this instruction should be repeated for each count, and the instruction should conclude with the statement: "You may find the defendant guilty of [one or both] [some or all] counts or not guilty of [one or both] [some or all] counts."

The Committee recommends individual Verdict Forms on separate sheets of paper for each Count. A Verdict Form to go with this instruction is provided in OUJI-CR 10-14, *infra*.

(2018 Supp.)

OUJI-CR 10-13A

REQUIRED SERVICE OF 85% OF SENTENCE

A person convicted of [**Specify Crime in 21 O.S. Supp. 2019, § 13.1**] shall be required to serve not less than eighty-five percent (85%) of the sentence imposed before becoming eligible for consideration for parole and shall not be eligible for any credits that will reduce the length of imprisonment to less than eighty-five percent (85%) of the sentence imposed.

Statutory Authority: 21 O.S. 2011, § 12.1, 21 O.S. Supp. 2019, § 13.1

Notes on Use

This Instruction must be given in trials for crimes specified in 21 O.S. Supp. 2019, § 13.1 that occurred after the effective date of the inclusion of the offense in the statute. *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-283. There are also other statutes besides 21 O.S. Supp. 2019, § 13.1 that mandate limitations on parole and credits. *See, e.g.*, 21 O.S. 2011, § 801 (robbery with dangerous weapon); 47 O.S. 2011, § 1503(J) (operation of chop shop); 63 O.S. Supp. 2019, § 2-401(F) (distribution of controlled dangerous substance within 2,000 feet of a school); 63 O.S. Supp. 2019, § 2-401(G) (manufacture of controlled dangerous substance). This Instruction should be modified as appropriate to incorporate the crimes in these statutes. If life imprisonment is an option, OUJI-CR 10-13B should be used instead of this Instruction.

Committee Comments

In *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-283, the Oklahoma Court of Criminal Appeals referred to the current policy of the Oklahoma Pardon and Parole Board and stated that "parole for any sentence over 45 years ... is calculated based upon a sentence of 45 years." The *Anderson* case involved a life sentence, however, and so, this statement was not a part of the Court's holding. Section 13.1 as well as the other statutes that mandate limitations on parole and credits do not provide exceptions for sentences for over 45 years. Accordingly, the Committee has concluded that this Instruction should be given even if the possible sentence is for more than 45 years.

Because *Anderson* did not address the issue of the possibility of commutation of a sentence by the Governor upon a recommendation by a majority of the Pardon and Parole Board, in accordance with Okla. Const. Art. 6, § 10, this Instruction does not address this issue.

(2019 Supp.)

OUJI-CR 10-13B

REQUIRED SERVICE OF 85% OF SENTENCE WHERE LIFE IMPRISONMENT IS AN OPTION

A person convicted of [**Specify Crime in 21 O.S. Supp. 2019, § 13.1**] shall be required to serve not less than eighty-five percent (85%) of the sentence imposed before becoming eligible for consideration for parole and shall not be eligible for any credits that will reduce the length of imprisonment to less than eighty-five percent (85%) of the sentence imposed.

If a person is sentenced to life imprisonment, the calculation of eligibility for parole is based upon a term of forty-five (45) years, so that a person would be eligible for consideration for parole after thirty-eight (38) years and three (3) months. However, if a person is not granted parole, he or she will be imprisoned for the remainder of his or her natural life while serving a sentence of life imprisonment.

Notes on Use

The Oklahoma Court of Criminal Appeals directed trial courts to use this Instruction in *Runnels v. State*, 2018 OK CR 27, ¶ 35, 426 P.3d 614, 621.

(2019 Supp.)

OUJI-CR 10-13C

MANDATORY POST-IMPRISONMENT SUPERVISION

You are advised that **[if you recommend a sentence of imprisonment for two years or more,] [Name of Defendant]** shall be required to serve a term of post-imprisonment community supervision under conditions determined by the Department of Corrections, in addition to the actual imprisonment. Any term of post-imprisonment community supervision shall be for at least three years, and I will determine the actual term of post-imprisonment community supervision after your verdict. [If the sentence is life or life without the possibility of parole, there will be no postimprisonment community supervision.]

Statutory Authority: 22 O.S. 2011, § 991a(A)(1)(f), 21 O.S. 2011, §§ 681, 741, 843.1, 843.5, 867, 885, 886, 888, 891, 1021, 1021.2, 1021.3, 1040.13a, 1087, 1088, 1111.1, 1115 and 1123

Notes on Use

This instruction must be given for the following offenses that are listed in 22 O.S. 2011, § 991a(A)(1)(f): 21 O.S. 2011, §§ 681, 741, 843.1 (for offenses involving sexual abuse or sexual exploitation), 843.5 (for offenses involving sexual abuse or sexual exploitation), 867, 885, 886, 888, 891, 1021, 1021.2, 1021.3, 1040.13a, 1087, 1088, 1111.1, 1115 and 1123. The bracketed language in the first sentence should be deleted for the crime of kidnapping under 21 O.S. 2011, § 741. The last bracketed sentence should be given only if the punishment range includes life or life without parole.

2012 SUPPLEMENT

OUJI-CR 10-13D

RETURN OF VERDICT – DRIVING UNDER THE INFLUENCE OF ALCOHOL/(AN INTOXICATING SUBSTANCE)

If you find beyond a reasonable doubt that the defendant committed the crime of driving under the influence of **alcohol/(an intoxicating substance)**, you shall return a verdict of guilty by marking the Verdict Form appropriately.

If you have a reasonable doubt of the defendant's guilt of the charge of driving under the influence of **alcohol/(an intoxicating substance),** or you find that the State has failed to prove each element of driving under the influence of **alcohol/(an intoxicating substance)** beyond a reasonable doubt, you shall return a verdict of not guilty by marking the Verdict Form appropriately.

If you find the defendant guilty, you shall then determine the proper punishment. The crime of driving under the influence of **alcohol/(an intoxicating substance)** is punishable by:

1. Imprisonment in jail for not less than ten days nor more than one year,

and

2. A fine of not more than One Thousand Dollars.

In addition, the defendant will be required to obtain an alcohol and drug substance abuse evaluation and follow all the recommendations made in the evaluation.

OR

[For a Second Offense]

If you find the defendant guilty of driving under the influence of **alcohol/(an intoxicating substance)** after a previous conviction of driving under the influence of **alcohol/(an intoxicating substance),** you shall then determine the proper punishment.

If you find the defendant guilty of driving under the influence of **alcohol/(an intoxicating substance)** after a previous conviction of driving under the influence, the defendant shall be required to obtain an alcohol and drug substance abuse evaluation. The crime of driving under the influence after a previous conviction of driving under the influence is punishable by:

1. Following all the recommendations made in the assessment and evaluation for treatment at the defendant's expense; or

2. Placement in the custody of the Department of Corrections for not less than one year nor more than five years, and a fine of not more than Two Thousand Five Hundred Dollars; or

3. Treatment, imprisonment and a fine within the limitations set out in paragraphs 1 and 2 above.

If the recommendations made in the assessment and evaluation for treatment do not include residential or inpatient treatment for a period of not less than five days, the defendant shall serve a term of imprisonment of at least five days.

OR

[After a Felony Conviction]

If you find the defendant guilty of driving under the influence of **alcohol/(an intoxicating substance)** after a previous felony conviction of driving under the influence, you shall then determine the proper punishment. If you find the defendant guilty of driving under the influence after a previous felony conviction of driving under the influence, the defendant shall be required to obtain an alcohol and drug substance abuse evaluation and assessment of the defendant's receptivity to treatment and prognosis. The crime of driving under the influence after a previous felony conviction of driving under the influence is punishable by:

1. Following all the recommendations made in the assessment and evaluation for treatment at the defendant's expense, two hundred forty hours of community service, and use of an ignition interlock device that, without tampering or intervention by another person, will prevent the defendant from operating a motor vehicle if the defendant has a blood or breath alcohol concentration of two-hundredths (0.02) or greater; or

2. Placement in the custody of the Department of Corrections for jail for not less than one year nor more than ten years, and a fine of not more than Five Thousand Dollars; or

3. Treatment, imprisonment and a fine within the limitations set out in paragraphs 1 and 2 above.

If the defendant does not undergo residential or inpatient treatment for at least ten days, the defendant shall serve a term of imprisonment of at least ten days.

OR

[After Two Felony Conviction]

If you find the defendant guilty of driving under the influence of **alcohol/(an intoxicating substance)** after two previous felony convictions of driving under the influence, you shall then determine the proper punishment. If you find the defendant guilty of driving under the influence after two previous felony convictions of driving under the influence, the defendant shall be required to obtain an alcohol and drug substance abuse evaluation and assessment of the defendant's receptivity to treatment and prognosis. The crime of driving under the influence after two previous felony convictions of driving under the influence is punishable by:

1. Following all the recommendations made in the assessment and evaluation for treatment at the defendant's expense, followed by not less than one (1) year of supervision and periodic testing at the defendant's expense, four hundred eighty hours of community service, and use of an ignition interlock device for a minimum of thirty days that, without tampering or intervention by another person, will prevent the defendant from operating a motor vehicle if the defendant has a blood or breath alcohol concentration of two-hundredths (0.02) or greater; or

2. Placement in the custody of the Department of Corrections for jail for not less than one year nor more than twenty years, and a fine of not more than Five Thousand Dollars; or

3. Treatment, imprisonment and a fine within the limitations set out in paragraphs 1 and 2 above.

If the defendant does not undergo residential or inpatient treatment, the defendant shall serve a term of imprisonment of at least ten days.

When you have decided on the proper punishment, you shall fill in the appropriate space on the Verdict Form for the crime of driving under the influence of **alcohol/(an intoxicating substance)/[(after a previous conviction of driving under the influence)/(after a previous felony conviction of driving under the influence)/(after two previous felony convictions of driving under the influence)]** and return the verdict to the Court.

Statutory Authority: 47 O.S. 2021, § 11-902(A)-(C).

Notes on Use

The trial judge should select the appropriate alternative for the first or subsequent offense for driving under the influence of alcohol. For an instruction for aggravated driving under the influence, see OUJI-CR 10-13F, *infra*..

(2024 Supp.)

OUJI-CR 10-13E

RETURN OF VERDICT -- AGGRAVATED DRIVING UNDER THE INFLUENCE

If you find beyond a reasonable doubt that the defendant committed the crime of aggravated driving under the influence of **alcohol/(an intoxicating substance)/[(after a previous conviction of driving under the influence)/(after a previous felony conviction of driving under the influence)/(after two previous felony conviction of driving under the influence)]**, you shall return a verdict of guilty by marking the Verdict Form appropriately.

If you have a reasonable doubt of the defendant's guilty of the charge of aggravated driving under the influence of **alcohol/(an intoxicating substance)/ [(after a previous conviction of driving under the influence)/(after a previous felony conviction of driving under the influence)/(after two previous felony convictions of driving under the influence)]**, or you find that the State has failed to prove each element of aggravated driving under the influence of **alcohol/(an intoxicating substance)/[(after a previous conviction of driving under the influence)/(after a previous felony conviction of driving under the influence)/ (after two previous felony convictions of driving under the influence)]** beyond a reasonable doubt, you shall return a verdict of not guilty by marking the Verdict Form appropriately.

If you find the defendant guilty, you shall then determine the proper punishment. If you find the defendant guilty of aggravated driving under the influence of **alcohol/(an intoxicating substance)/[(after a previous conviction of driving under the influence)/(after a previous felony conviction of driving under the influence)/(after two previous felony convictions of driving under the influence)]**, the defendant shall be required to obtain an alcohol and drug substance abuse evaluation and assessment of the defendant's receptivity to treatment and prognosis, and shall follow all the recommendations made in the assessment and evaluation for treatment followed by not less than one (1) year of supervision and periodic testing at the defendant's expense, and use of an ignition interlock device for a minimum of ninety days that, without tampering or intervention by another person, will prevent the defendant from operating a motor vehicle if the defendant has a blood or breath alcohol concentration of two-hundredths (0.02) or greater.

[Misdemeanor Aggravated DUI]

In addition to the requirements set out above, the crime of aggravated driving under the influence of **alcohol/(an intoxicating substance)** is punishable by:

1. Imprisonment in jail for not less than ten days nor more than one year, and

2. A fine of not more than One thousand Dollars.

OR

[For a Second D.U.I. Offense]

In addition to the requirements set out above, the crime of aggravated driving under the influence after a previous conviction of driving under the influence is punishable by:

1. Following all the recommendations made in the assessment and evaluation for treatment at the defendant's expense; or

2. Placement in the custody of the Department of Corrections for not less than one year nor more than five years, and a fine of not more than Two Thousand Five Hundred Dollars; or

3. Treatment, imprisonment and a fine within the limitations set out in paragraphs 1 and 2 above.

If the recommendations made in the assessment and evaluation for treatment do not include residential or inpatient treatment for a period of not les than five days, the defendant shall serve a term of imprisonment of at least five days.

OR

[After a Felony Conviction of D.U.I.]

In addition to the requirements set out above, the crime of aggravated driving under the influence after a previous felony conviction of driving under the influence is punishable by:

1. Following all the recommendations made in the assessment and evaluation for treatment at the defendant's expense, two hundred forty hours of community service, and use of an ignition interlock device that, without tampering or intervention by another person, will prevent the defendant from operating a motor vehicle if the defendant has a blood or breath alcohol concentration of two-hundredths (0.02) or greater; or

2. Placement in the custody of the Department of Corrections for not less than one year nor more than ten years, and a fine of not more than Five Thousand Dollars; or

3. Treatment, imprisonment and fine within the limitations set out in paragraphs 1 and 2 above.

If the defendant does not undergo residential or inpatient treatment for at least ten days, the defendant shall serve a term of imprisonment of at least ten days.

OR

[After Two Felony D.U.I. Convictions]

In addition to the requirements set out above, the crime of aggravated driving under the influence after two previous felony convictions of driving under the influence is punishable by:

1. Following all the recommendations made in the assessment and evaluation for treatment at the defendant's expense, followed by not less than one (1) year of supervision and periodic testing at the defendant's expense, four hundred eighty hours of community service, and use of an ignition interlock device for a minimum of ninety days that, without tampering or intervention by another person, will prevent the defendant from operating a motor vehicle if the defendant has a blood or breath alcohol concentration of two-hundredths (0.02) or greater; or

2. Placement in the custody of the Department of Corrections for jail for not less than one year nor more than twenty years, and a fine of not more than Five Thousand Dollars; or

3. Treatment, imprisonment and fine within the limitations set out in paragraphs 1 and 2 above.

If the defendant does not undergo residential or inpatient treatment, the defendant shall serve a term of imprisonment of at least ten days.

When you have decided on the proper punishment, you shall fill in the appropriate space on the Verdict Form for the crime of aggravated driving under the influence of **alcohol/(an intoxicating substance)/[(after a previous conviction of driving under the influence)/(after a previous felony conviction of driving under the influence)/(after two previous felony convictions of driving under the influence)]**, and return the verdict to the Court.

Statutory Authority: 47 O.S.2021, § 11-902(D).

(2024 Supp.)

OUJI-CR 10-13F

RETURN OF VERDICT-- CHILD SEXUAL ABUSE/EXPLOITATION

If you find beyond a reasonable doubt that the defendant committed the crime of child sexual **abuse/exploitation,** you shall return a verdict of guilty by marking the Verdict Form for the crime of child sexual **abuse/exploitation** appropriately.

If you have a reasonable doubt of the defendant's guilt of the charge of child sexual **abuse/exploitation,** or you find that the State has failed to prove each element of the crime of child sexual **abuse/exploitation** beyond a reasonable doubt, you shall return a verdict of not guilty by marking the Verdict Form the crime of child sexual **abuse/exploitation** appropriately.

If you find the defendant guilty, you shall then determine the proper punishment. The crime of child sexual **abuse/exploitation** is punishable by imprisonment in the custody of the Department of Corrections not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year. Alternatively, you may impose a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00)], or both such fine and imprisonment. If you find the defendant guilty and you also find beyond a reasonable doubt that the victim of the crime was under twelve years of age on the date of the offense, then the crime of child sexual **abuse/exploitation** is punishable by imprisonment in the custody of the Department of Corrections for not less than twenty-five (25) years nor more than life imprisonment, and by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00).

When you have decided on the proper punishment, you shall fill in the appropriate space on the Verdict Form for the crime of child sexual **abuse/exploitation** and return the verdict to the Court.

Statutory Authority: 21 O.S. 2021, §§ 12.1, 13.1, 843.5(E), (F), (H), (I).

Committee Comments

The Oklahoma Court of Criminal Appeals ruled in *Williams v. State,* 2021 OK CR 19, ¶ 5, 496 P.3d 621, 624, that the trial court erred when it failed to instruct that the jury was required to find that the victim was under twelve years of age in a prosecution for indecent or lewd acts with a child under sixteen. It stated as follows: "The jury should have been instructed that in order to assess punishment starting at not less than twenty-five years imprisonment, they had to find beyond a reasonable doubt that the victim was under twelve years of age when the crimes were committed." *Id.* (citing *Chadwell v. State,* 2019 OK CR 14, ¶¶ 5-7, 446 P.3d 1244, 1246-47).

(2024 Supp.)

OUJI-CR 10-14

VERDICT FORM (BASIC)

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

VERDICT

COUNT 1 -- **[CRIME CHARGED]**

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

_____ Guilty and fix punishment at _____.

_____ Not Guilty.

_____
FOREI

(2000 Supp.)

OUJI-CR 10-14A

VERDICT FORM - CHILD SEXUAL ABUSE/EXPLOITATION

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF
THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY
THE STATE OF OKLAHOMA,

The State of Oklahoma Plaintiff, Vs JOHN DOE, Defendant.	)))))))	Case No. _____

VERDICT

COUNT 1 -- CHILD SEXUAL **ABUSE/EXPLOITATION**

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

_____ Guilty and fix punishment at _____.

_____ Guilty and **[Initials of Victim]** was under 12 years of age at the time of the offense and fix punishment at _____.

_____ Not Guilty.

_____
FOREPERSON

Notes on Use

This Verdict Form should be used only if evidence is presented that the victim was less than twelve years of age at the time of the incident.

(2024 Supp.)

OUJI-CR 10-15

RETURN OF VERDICT -- PRIOR CONVICTIONS (FIRST STAGE)

If you find beyond a reasonable doubt that the defendant committed the crime of **[Crime Charged]**, you shall return a verdict of guilty by marking the Verdict Form appropriately. If you have a reasonable doubt of the defendant's guilt to the charge of **[Crime Charged]**, or if you find that the State has failed to prove each element of **[Crime Charged]** beyond a reasonable doubt, you shall return a verdict of not guilty by marking the Verdict Form appropriately. The issue of punishment is not before you at this time.

Notes on Use

In cases where sentence enhancement is sought for prior convictions, the jury must return its verdict in two stages unless the defendant has waived bifurcation. This instruction should then be used with either OUJI-CR 10-19 (if the defendant stipulates to the prior convictions after a finding of guilt in the first stage), *infra*, or OUJI-CR 10-21 (if the defendant contests the prior convictions), *infra*. OUJI-CR 10-17 should be used instead of this instruction if the defendant has waived bifurcation or the prosecution introduced the prior convictions after the defendant took the stand.

If there are multiple counts, the pattern for this instruction should be repeated for each count, and the instruction should conclude with the statement: "You may find the defendant guilty to (one or both)/(some or all) counts or not guilty to (one or both)/(some or all) counts."

A Verdict Form to go with this instruction is provided in OUJI-CR 10-16, *infra*.

(2000 Supp.)

OUJI-CR 10-16

VERDICT FORM -- PRIOR CONVICTIONS (FIRST STAGE)

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

VERDICT

COUNT 1 -- **[CRIME CHARGED]**

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

_____ Guilty.

_____ Not Guilty.

_____
FOREI

(2000 Supp.)

RETURN OF VERDICT --

PRIOR CONVICTIONS ADMITTED (SINGLE STAGE)

If you find beyond a reasonable doubt that the defendant committed the crime of [**Crime Charged**], you shall return a verdict of guilty by marking the Verdict Form appropriately. If you have a reasonable doubt of the defendant's guilt to the charge of [**Crime Charged**], or you find that the State has failed to prove each element of [**Crime Charged**] beyond a reasonable doubt, you shall return a verdict of not guilty by marking the Verdict Form appropriately.

The defendant has admitted that **he/she** has [**Specify Number**] previous **conviction(s)**. You may not consider **this/these** previous **conviction(s)** as proof of guilt in the case before you. You may consider the previous **conviction(s)** for the purpose of determining the punishment if you find that the defendant is guilty of the crime of [**Crime Charged**] in the present case.

The punishment for [**Crime Charged**] after [**Number**] previous **conviction(s)** is imprisonment in the custody of the Department of Corrections for a term of [**Specify Term Provided in 21 O.S. 2011 & Supp. 2019, § 51.1(A) or 51.1a**] years. When you have decided on the proper punishment, you should fill in the appropriate space on the verdict form and return the verdict to the Court.

Statutory Authority: 21 O.S. 2011 & Supp. 2019, §§ 51.1, 51.1a.

Notes on Use

This instruction should be used if the defendant has waived bifurcation and admitted the prior convictions or the prior convictions were introduced by the prosecutor after the defendant took the stand.

A Verdict Form to go with this instruction is provided in OUJI-CR 10-18, *infra*.

Committee Comments

The defendant may waive bifurcation expressly so that the jury will be made aware of the severity of punishment when it makes its determination of guilt. *See Jones v. State*, 1974 OK CR 172, ¶ 18, 527 P.2d 169, 173 (waiver of bifurcation is within the discretion of the trial court), *overruled on other grounds*, *Fulton v. State*, 1975 OK CR 200, ¶ 4, 541 P.2d 871, 872. *But cf. Lenion v. State*, 1988 OK CR 230, 763 P.2d 381 (no waiver if defendant merely fails to request bifurcation). *See also Eslinger v. State*, 1987 OK CR 53, ¶ 19, 734 P.2d 830, 834 (defendant not entitled to bifurcated trial if he confessed to former convictions under oath); *Ray v. State*, 1990 OK CR 15, ¶¶ 7-8, 788 P.2d 1384, 1386 (bifurcation waived when defendant testified in own behalf); *Reed v. State*, 1978 OK CR 58, ¶¶ 14-17, 580 P.2d 159, 162-63 (two-stage proceeding was not necessary where defendant admitted prior conviction on cross-examination).

(2019 Supp.)

OUJI-CR 10-18

VERDICT FORM -- PRIOR CONVICTIONS (SINGLE STAGE)

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

VERDICT

COUNT 1 -- **[CRIME CHARGED]**

AFTER **[NUMBER]** PREVIOUS CONVICTIONS

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

_____ Guilty and fix punishment at _____.

_____ Not Guilty.

_____
FOREI

(2000 Supp.)

OUJI-CR 10-19

RETURN OF VERDICT --

PRIOR CONVICTIONS STIPULATED (SECOND STAGE)

By your verdict in the first part of this trial you have already found the defendant guilty of the crime of [**Crime Charged**]. You must now determine the proper punishment.

The defendant has admitted that **he/she** has [**Specify Number**] previous **conviction(s)**. The punishment for [**Crime Charged**] after [**Specify Number**] previous **conviction(s)** is imprisonment in the custody of the Department of Corrections for a term of [**Specify Term Provided in 21 O.S. 2011 & Supp. 2019, § 51.1(A) or 51.1a**] years. When you have decided on the proper punishment, you should fill in the appropriate space on the verdict form and return the verdict to the Court.

_____

Statutory Authority: 21 O.S. 2011 & Supp. 2019, §§ 51.1, 51.1a.

Notes on Use

This instruction should be used in cases where sentence enhancement is sought for prior convictions and the defendant has stipulated to the fact of the prior convictions. For a second stage instruction for cases where the defendant has not stipulated to the prior convictions, see OUJI-CR 10-21.

If there are multiple counts, the pattern for this instruction should be repeated for each count.

A Verdict Form for the second stage where the prior convictions have been stipulated to is provided OUJI-CR 10-20, *infra*.

(2019 Supp.)

OUJI-CR 10-20

VERDICT FORM -- PRIOR CONVICTIONS STIPULATED (SECOND STAGE)

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

VERDICT (SECOND STAGE)

COUNT 1 -- **[CRIME CHARGED]**

AFTER **[NUMBER]** PREVIOUS CONVICTIONS

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, fix Defendant's punishment as follows:

_____ .

_____

FOREI

OUJI-CR 10-21A

PRIOR CONVICTIONS ADMITTED AS PROPENSITY EVIDENCE DURING FIRST STAGE

Evidence has been presented in the first stage of trial as to past criminal acts the defendant committed which is evidence of the defendant's propensity to commit crimes involving sexual misconduct. That evidence was proper for you to consider in determining the defendant's guilt.

In the second stage of trial, the court has determined as a matter of law that the sexual propensity evidence constitutes [**specify number**] alleged prior **conviction(s)** for your consideration in sentencing. **[Additionally, evidence has been presented of [specify number] alleged prior conviction(s).]** It remains the prosecution's burden to prove beyond a reasonable doubt the existence of each alleged prior conviction, and only those alleged prior convictions, proven to your satisfaction can be considered in determining punishment.

Notes on Use

This Instruction should be given in the second stage of sentencing when prior convictions have been admitted during the first stage either after OUJI-CR 10-19, if the prior convictions are stipulated, or after OUJI-CR 10-21, if the prior convictions are contested,. In most cases, prior convictions are not admissible for proof of guilt, but they may be admissible to show propensity for sexual assault or child molestation under 12 O.S. 2011, §§ 2413, 2414. Under 21 O.S. 2011, § 51.1(B), prior convictions that arose out of the same transaction or occurrence or series of events closely related in time and location are to be counted as a single conviction for purposes of sentencing enhancement. If prior convictions arising out of the same transaction have not been admitted during the first stage, the trial court may count or list only the prior convictions that arose from separate transactions in OUJI-CR 10-17, 10-19, or 10-21, and this instruction should not be used. However, if the jury has already heard evidence of multiple prior convictions that arose from the same transaction, this instruction is needed in order to inform the jury that it is not to consider for sentencing purposes all of the prior convictions that were admitted during the first stage for proof of guilt.

Committee Comments

The Oklahoma Court of Criminal Appeals observed in *Levering v. State*, 2013 OK CR 19, ¶ 7, 315 P.3d 392, 395, that it was not unusual for multiple charges and convictions to have arisen out of a transactionally related series of sex related offenses, and that transactionally related offenses may not be relied on for sentencing enhancement under 21 O.S. 2011, § 51.1(B). The Court of Criminal Appeals suggested the following instruction to explain the relationship between propensity evidence offered for guilt purposes and prior convictions used for sentencing enhancement:

Evidence has been presented in the first stage of trial as to past criminal acts the defendant committed against S.E. which is evidence of the defendant's propensity to commit crimes involving sex. That evidence was proper for you to consider in determining the defendant's guilt.

In the second stage of trial, the court has determined as a matter of law that the sexual propensity evidence constitutes one prior conviction for your consideration in sentencing. Additionally, evidence has been presented of two other prior convictions. It remains the prosecution's burden to prove beyond a reasonable doubt the existence of each alleged prior conviction, and only those prior convictions proven to your satisfaction can be considered in determining punishment.

Levering v. State, 2013 OK CR 19, ¶ 13, 315 P.3d 392, 396. This instruction is based on the suggested instruction in *Levering* with modifications to make it more generic.

(2014 Supp.)

OUJI-CR 10-21

RETURN OF VERDICT --

PRIOR CONVICTIONS CONTESTED (SECOND STAGE)

By your verdict in the first part of this trial you have already found the defendant guilty of the crime of **[Crime Charged]**. You must now determine the proper punishment.

The defendant has been charged with having previously been convicted of: **[List Prior Convictions]**. The law presumes that the defendant has NOT been previously convicted as the State has charged. You may consider the previous **conviction(s)** only if the State has proved beyond a reasonable doubt:

1. The fact of the **conviction(s)**; and

2. That the defendant is the same person who was previously convicted.

The punishment for **[Crime Charged]** after 2 **[or more]** previous convictions is imprisonment in the State penitentiary for a term of [**Specify Term Provided in 21 O.S. Supp. 2004, § 51.1(B) or (C)**] years. If you find the defendant guilty of **[Crime Charged]** after 2 **[or more]** previous convictions, you shall return a verdict of guilty by marking the verdict form appropriately, fill in the appropriate space on the verdict form and return the verdict to the court. If you have a reasonable doubt of the defendant's guilt to the charge of **[Crime Charged]** after 2 **[or more]** previous convictions, you shall then consider whether the defendant is guilty of **[Crime Charged]** after 1 previous conviction.

The punishment for **[Crime Charged]** after 1 previous conviction is imprisonment in the State penitentiary for a term of [**Specify Term Provided in 21 O.S. 2001 & Supp. 2004, § 51.1(A), 51.1a, or 51.3**] years. If you find the defendant guilty of **[Crime Charged]** after 1 previous conviction, you shall return a verdict of guilty by marking the verdict form appropriately, fill in the appropriate space on the verdict form and return the verdict to the court. If you have a reasonable doubt of the defendant's guilt to the charge of **[Crime Charged]** after 1 previous conviction, you shall then determine the proper punishment for the crime of **[Crime Charged]** without regard to a previous conviction.

The crime of **[Crime Charged]** without a previous conviction is punishable by imprisonment in the State penitentiary for a term of **[State Range of Punishment]**.

When you have decided on the proper punishment, you shall fill in the appropriate space on the verdict form and return the verdict to the Court.

Statutory Authority: 21 O.S. 2001 and Supp. 2004, §§ 51.1, 51.1a, 51.3.

Notes on Use

This instruction should be used for the second stage of the jury deliberation in cases where sentence enhancement is sought for prior convictions. All paragraphs of the instruction should be used where the defendant is charged with 2 or more prior convictions, but the third paragraph should be omitted if the defendant is charged with only 1 prior conviction.

If there are multiple counts, the pattern for this instruction should be repeated for each count.

A Verdict Form for the Second Stage where two prior convictions are charged is provided in OUJI-CR 10-22, *infra*.

Committee Comments

The prosecution has the burden of proving that the defendant on trial is the same person as the defendant listed on a prior judgment of conviction. *Cooper v. State*, 1991 OK CR 54, ¶¶ 6-8, 810 P.2d 1303, 1306 (*overruling Henager v. State*, 1986 OK CR 20, ¶¶ 46-48, 716 P.2d 669, 676).

(2005 Supp.)

OUJI-CR 10-22

VERDICT FORM -- PRIOR CONVICTIONS CONTESTED (SECOND STAGE)

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

VERDICT (SECOND STAGE)

COUNT 1 -- **[CRIME CHARGED]**

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

[Check and complete only one.]

_____ Guilty of the crime of **[Crime Charged]** after two (2) [or more] previous convictions and fix punishment at _____.

_____ Guilty of the crime of **[Crime Charged]** after one (1) previous conviction and fix punishment at _____.

_____ Guilty of the crime of **[Crime Charged]** and fix punishment at _____.

_____
FOREI

(2000 Supp.)

OUJI-CR 10-23

LESSER INCLUDED OFFENSES - INTRODUCTION

You may find the defendant guilty of any offense, the commission of which is necessarily included in the **crime(s)** charged. You may also find the defendant guilty of an attempt to commit the charged crime or of an attempt to commit any included crime.

Statutory Authority: 22 O.S. 1991, § 916.

(2000 Supp.)

OUJI-CR 10-24

LESSER INCLUDED OFFENSES - AS APPROPRIATE

The defendant is charged with **[Crime Charged In the Information/ Indictment]** You are instructed that, in addition to evidence concerning the crime of **[Crime Charged in the Information/Indictment]** evidence has also been introduced concerning the crime of **[Lesser Included Crime]**. No person may be convicted of **[Lesser Included Crime]** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

[Give Elements of Lesser Included Crime.]

If you have a reasonable doubt of the defendant's guilt of the charge of **[Crime Charged In the Information/Indictment]** you must then consider the charge of **[Lesser Included Crime]**.

[Give Only If Needed for Other Lesser Included Offenses.]

[You are instructed that, in addition to the evidence concerning the crime of **[Crime Charged In the Information/Indictment]** evidence has been introduced concerning the crime of **[First Included Crime]**, and evidence has also been introduced concerning the crime of **[Second Included Crime]**.

If you have a reasonable doubt of the defendant's guilt on the charges of **[List Crime Charged In the Information and First Included Crime]**, you must then consider the charge of **[Second Included Crime]**. No person may be convicted of **[Second Included Crime]** unless the State has proved beyond a reasonable doubt each element of the crime. These elements are: **[Give Elements of Second Included Offense.]**

[Repeat Pattern As Needed for Additional Included Offenses]

You are not required to determine unanimously that the defendant is not guilty of the crime charged before you consider a lesser included offense. If you have a reasonable doubt as to which offense the defendant may be guilty of, you may find **him/her** guilty only of the lesser offense. if you have a reasonable doubt as to the guilt of the defendant on all such offenses, you must find **him/her** not guilty of any crime.

If you find the defendant guilty of any of the above named crimes, you shall then determine the proper punishment.

The crime of **[Crime Charged in the Information/Indictment]** is punishable by **[State Range of Punishment]**.

The crime of **[First Included Crime]** is punishable by **[State Range of Punishment]**.

The crime of **[Second Included Crime]** is punishable by **[State Range of Punishment]**.

[Repeat As Needed for Additional Included Crimes]

When you have decided on the proper punishment, you shall fill in the appropriate space on the Verdict Form and return the verdict to the Court.

Notes on Use

A Verdict Form for 2 Lesser Included Offenses is provided in OUJI-CR 10-25 below.

Committee Comments

Former OUJI-CR 10-27 is incorporated into this instruction in order to avoid the problem that was notes by the Oklahoma Court of Criminal Appeals in*Graham v. State*, 2001 OK CR 18 , 27 P.3d 1026. In addition, the instruction clarifies that the jury does not have to unanimously acquit the defendant of the chraged offense before

considering lesser included offenses.

The statute governing lesser included offenses is 22 O.S. 2001, § 916, which provides: "The jury may find the defendant guilty of any offenses, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." In addition, 22 O.S. 2001, § 915 provides: "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

Over the years, the Oklahoma Court of Criminal Appeals has used a variety of approaches to determine which crimes are lesser included offenses of other crimes. *Shrum v. State*, 1999 OK CR 41, ¶ 7, 991 P.2d 1032 , 1035. In the *Shrum* case, the Oklahoma Court of Criminal Appeals formally adopted the evidence test to determine what constitutes a lesser included offense of a charged crime. Under the evidence test, the court looks to the evidence proved at trial in addition to the statutory elements of the crimes and the allegations in the indictment or information, to decide whether to give a jury instruction on a particular lesser included offense. *See also Childress v. State*, 2000 OK CR 10, ¶¶ 21-25, 1 P.3d 1006 (following *Shrum* in applying the evidence test). The Court provided the following direction to trial courts as to how to apply this test:

In practice, if the trial court sua sponte proposes the lesser included offense instruction that is supported by the evidence and the defendant objects, the defendant shall have the right to affirmatively waive any lesser included offense instruction that the evidence supports and proceed on an "all or nothing approach." [Citation omitted.] If the State requests the lesser included offense instruction and the defendant objects, the trial court should review the Information together with all material that was made available to the defendant at preliminary hearing and through discovery to determine whether the defendant received adequate notice that the State's case raised lesser related offenses that should be deemed included. [Footnote 9. If a witness' testimony materially changes at trial which gives rise to evidence of a lesser offense of which the defendant did not have notice, the State's requested instruction should be declined. To avoid such problems, prosecutors may elect to charge the accused in the alternative pursuant to 22 O.S.1991, § 404.] [Citation omitted.] However, if the trial court proposes or the State requests the lesser included offense instruction and the defense does not object, we will presume the defendant desired the lesser included offense instruction as a benefit.

Shrum, 1999 OK CR 41, ¶ 11, 991 P.2d at 1036-37.

Examples of the application of the evidence test are found in the *Shrum* and *Childress* cases, *supra*. The Court of Criminal Appeals ruled in the *Shrum* case that the trial court did not err in giving a jury instruction on first degree heat of passion manslaughter in a case where the defendant was charged with first degree malice murder and the defendant had not objected to the instruction at the trial. The Court of Criminal Appeals followed *Shrum* in *Childress v. State*, *supra*, where it ordered a new trial because the trial court refused to give instructions that the defendant had requested on a lesser related offense. The defendant in the *Childress* case was charged with first degree malice murder and larceny of a domestic animal. Although the elements of second degree felony murder are not contained in the elements of first degree malice murder, the Court of Criminal Appeals held that the defendant was entitled to an instruction on second degree felony murder because larceny of a domestic animal is a predicate felony for second degree felony murder, and there was sufficient evidence presented at trial to support an instruction for second degree felony murder. 2000 OK CR 10, ¶ 25, 1 P.3d at 1012-13.

In addition, if a crime is divided into degrees and the evidence at trial tends to prove a lesser degree of the crime than the charged crime, the jury should be instructed on the lesser degree of the crime. E.g., *Brown v. State*, 1983 OK CR 174, ¶ 6, 674 P.2d 46, 47.

(2003 Supp.)

OUJI-CR 10-25

VERDICT FORM -- LESSER INCLUDED OFFENSES

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	Case No. _____
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

VERDICT

COUNT 1 -- **[CRIME CHARGED IN THE INFORMATION/INDICTMENT]**

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

[CRIME CHARGED IN THE INFORMATION/INDICTMENT]

_____Guilty of the crime of **[Crime Charged In the Information/ Indictment]** and punishment is set at _____.

_____ Not Guilty of the crime of **[Crime Charged In the Information/ Indictment]**.

OR

[FIRST LESSER INCLUDED CRIME]

_____Guilty of the crime of **[First Lesser Included Offense]** and punishment is set at _____.

_____ Not Guilty of the crime of **[First Lesser Included Offense]**.

OR

[SECOND LESSER INCLUDED CRIME]

_____ Guilty of the crime of **[Second Lesser Included Offense]** and punishment is set at _____.

_____ Not Guilty of the crime of **[Second Lesser Included Offense]**.

_____
FOREI

Notes on Use

This Verdict Form is for single stage proceedings. If the trial is bifurcated, the punishment clauses should be removed.

In the event the jury is unable to reach a unanimous verdict, the trial judge should instruct the jury to return a verdict as to any of the offenses as to which it can reach agreement beginning with the crime charged in the information.

(2000 Supp.)

OUJI-CR 10-26

LESSER INCLUDED OFFENSES - ATTEMPTS

You are instructed that, in addition to the submission of evidence concerning the **crime(s)** of **[Crime Charged In the Information/Indictment and Lesser Included Offenses]** you may find the defendant guilty of an attempt to commit **[List Appropriate Attempt(s)]**.

[Give Appropriate Attempt Instructions, OUJI-CR 2-10 through OUJI-CR 2-15].

(2000 Supp.)

OUJI-CR 10-27

LESSER INCLUDED OFFENSES - REASONABLE DOUBT

NO INSTRUCTION SHOULD BE GIVEN. SEE OUJI-CR 10-24.

Notes on Use

This instruction is incorporated into OUJI-CR 10-24 in order to avoid the problem that was noted by the Oklahoma Court of Criminal Appeals in *Graham v. State*, 2001 OK CR 18, 27 P.2d 1026.

(2003 Supp.)

OUJI-CR 11-1

COMPETENCY - INTRODUCTION

It is now my duty, under the law, to give you the instructions that apply in this trial. The instructions contain all the law that you are to use in deciding this case, and also the rules of law you should follow in reaching a verdict. All the testimony and evidence, which is proper for you to consider, has been introduced in this case. You should not consider any matter of fact or law except what has been given you in open Court, while Court was in session.

You are the judges of the facts, and it is your duty to take the evidence and testimony that you heard in open Court in this case, to accept the law and rules in these instructions, and to apply this law and these rules to the evidence and testimony, and to decide the facts, and render a fair and impartial verdict, as you have sworn to do.

You are instructed that under the laws of the State of Oklahoma no person is subject to any criminal procedures unless he is presently "competent", as that term is defined in these instructions, nor is any person subject to any criminal procedures who is determined to be "incompetent", as that term is defined here.

[Name of Defendant] is a defendant in a criminal prosecution, and an application to determine **his/her** competency has been filed in that criminal prosecution. This trial has been held for you to determine several issues relating to **his/her** competency so that **his/her** capacity to **(stand trial)/(undergo further proceedings)** in the criminal case can be decided.

Notes on Use

The procedure for determining competency is prescribed at 22 O.S. 1991 §§ 1175.1 - 1175.8. Upon request, a hearing on competency may be conducted as a jury trial. 22 O.S. 1991 § 1175.2. However, the jury consists of only 6 persons, 22 O.S. 1991 § 1175.4(B), only 5 jurors are required to return a verdict, *Miller v. State*, 751 P.2d 733, 738 (Okl. Cr. 1988), and the trial may be conducted by a special judge, *Rogers v. Lansdown*, 829 P.2d 687, 688 (Okl. Cr. 1992). *See also State v. Humdy*, 875 P.2d 429, 430 (Okl. Cr. 1994) (competency hearing is civil in nature).

OUJI-CR 11-2

PRESUMPTION OF COMPETENCE

You are instructed that **[Name of Defendant]** is presumed by the law to be competent, as that term is defined in these instructions. The burden of proof rests upon **[Name of Defendant or, if applicable, the prosecution]** to prove to your satisfaction by a preponderance of the evidence that **[Name of Defendant]** is incompetent.

When I say that a party has the burden of proving any proposition by a preponderance of the evidence, I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which such party has the burden of proof is more probably true than not true. The greater weight of the evidence does not mean the greater number of witnesses testifying to a fact, but means what seems to you more convincing and more probably true.

If you find that the greater weight of the evidence proves that **[Name of Defendant]** is incompetent, you should so state in your verdict.

On the other hand, if you do not so find, then you should return a verdict finding **[Name of Defendant]** to be competent.

Committee Comments

The Court of Criminal Appeals modified OUJI-CR 11-2 in *Cooper v. State*, 924 P.2d 751, 752 (Okl.Cr. 1996), to comply with the Mandate from the United States Supreme Court in *Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996).

OUJI-CR 11-3

COMPETENCY -- DEFINITIONS

It is necessary that you understand what certain terms used in these instructions mean in the law. The following definitions apply here:

1. "Competent" or "competency" means the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against **him/her** and to effectively and rationally assist in **his/her** defense.

2. "Dangerous" means a person who because of **his/her (mental illness)/(drug/alcohol dependency)**:

(a) poses a substantial risk of immediate physical harm to himself/herself, as shown by evidence of serious threats of or attempts at suicide or other significant self-inflicted bodily harm;

(b) poses a substantial risk of immediate physical harm to another person or persons, as shown by evidence of violent behavior directed toward another person or persons;

(c) has placed another in a reasonable fear of violent behavior directed towards the other person or serious physical harm as shown by serious and immediate threats;

(d) is in a condition of severe deterioration such that, there is a substantial risk that without immediate intervention severe impairment or injury will result to the person; or

(e) poses a substantial risk of immediate serious physical injury or death to himself/herself, as shown by evidence that the person is unable to provide for and is not providing for the basic physical needs of the person but

(f) a person who is homeless is not necessarily considered dangerous unless the person also meets the requirements just described.

3. "Incompetent" or "incompetency" means any person who is not presently competent. A person may be incompetent due to physical disability.

4. An individual with intellectual disability means a person who has significantly subaverage functioning, IQ of less than 70, manifested before age 18 and existing concurrently with related limitations in two or more of the following applicable adaptive skill areas:

1. Communication;

2. Self-care;

3. Home living;

4. Social skills;

5. Use of community resources;

6. Self-direction;

7. Health and safety;

8. Functional academics;

9. Leisure; and

10. Work.

5. "A person requiring treatment" means either:

(1) A person who represents a risk of harm to self or others because of mental illness; or

(2) A person who is a drug- or alcohol-dependent person and who represents a risk of harm to self or other as a result of drug dependency;

but a person requiring treatment is not:

(1) a person whose mental processes have been weakened or impaired by reason of advanced years, dementia, or Alzheimer's disease,

(2) a person with intellectual or developmental disability,

(3) a person with seizure disorder,

(4) a person with a traumatic brain injury, or

(5) a person who is homeless,

unless **he/she** also meets the other requirements just described.

The mental health or substance abuse history of the person may be used as part of the evidence to determine whether the person is a person requiring treatment or an assisted outpatient. The mental health or substance abuse history of the person shall not be the sole basis for this determination.

6. A reasonable period of time for correction of incompetency through treatment, therapy or training for this particular case is [**Specify Applicable Period Time from 22 O.S.~~Supp. 2008~~ 2021 § 1175.1**].

7. "Public guardian" means the Office of Public Guardian.

Notes on Use

These definitions are taken from 10 O.S. 2021 § 1408, 22 O.S. 2021 § 1175.1 and 43A O.S. 2021 § 1-103, but they have been modified to make them easier to follow. Trial courts are encouraged to modify the definitions further to increase juror comprehension by eliminating portions of the definition that are not applicable to the particular case. For example, if there is no evidence that the defendant is drug- or alcohol-dependent, the part of the definition of a person requiring treatment should not include the reference to drug- or alcohol-dependency, because it would not be pertinent and could therefore be confusing to the jury. On the other hand, the judge should give the definition of a an "individual with intellectual disability" even if there is no evidence offered that the defendant has an IQ of less than 70, because the jury is required by 22 O.S. 2021, § 1175.5 to make a finding with respect to whether the defendant is intellectually disabled.

Committee Comments

In *Valdez v. State*, 1995 OK CR 18, ¶¶ 5-6, 900 P.2d 363, 369, the Oklahoma Court of Criminal Appeals ruled that the definition of competence in 22 O.S. 1991 § 1175.1 (1) satisfies Supreme Court standards.

(2024 Supp.)

OUJI-CR 11-4

LOSS OF MEMORY

The loss of memory concerning events surrounding the crime, standing alone, is insufficient for proving incompetency.

Notes on Use

This instruction should be given only where appropriate.

Committee Comments

See Siah v. State, 837 P.2d 485, 487 (Okl. Cr. 1992).

OUJI-CR 11-5

EXPLANATION OF FORM

In order for the Court to decide whether [**Name of Defendant**] should **(stand trial)/(undergo further proceedings)**, it is necessary that you answer the questions on the verdict form.

The first question on the verdict form that you must answer is, "Is [**Name of Defendant**] incompetent to undergo further criminal proceedings at this time?" If the answer is no, you need not answer the other questions, and you should sign and return the verdict as explained later in these instructions. If the answer is yes, then go to the other questions.

2009 SUPPLEMENT

OUJI-CR 11-6

COMPETENCY - CLOSING INSTRUCTIONS

The Court has made rulings in the conduct of the trial and the admission of evidence. In so doing the Court has not expressed nor intimated in any way the weight or credit to be given any evidence or testimony admitted during the trial, nor indicated in any way the conclusions to be reached by you in this case.

You are the judges of the facts, the weight of the evidence and the credibility of the witnesses. In determining such weight or credit you may consider: The interest, if any, which the witness may have in the result of the trial; the relation of the witness to the parties; the bias or prejudice, if any has been apparent; the candor, fairness, intelligence and demeanor of the witness; the ability of the witness to remember and relate past occurrences, and the means of observation, and opportunity of knowing the matters about which the witness has testified. From all the facts and circumstances appearing in evidence and coming to your observation during the trial, aided by the knowledge which you each possess in common with other persons, you will reach your conclusions. You should not let sympathy, sentiment or prejudice enter into your deliberations, but should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these instructions.

There has been introduced the testimony of witnesses who are represented to be skilled in certain areas. Such witnesses are known in law as expert witnesses. You may consider the testimony of these witnesses and give it such weight as you think it should have, but the value to be given their testimony is for you to determine. You are not required to surrender your own judgment to that of any person testifying as an expert or otherwise. The testimony of an expert, like that of any other witness, is to be given such value as you think it is entitled to receive.

These instructions contain all the law, whether statute or otherwise, to be applied by you in this case, and the rules by which you are to weight the evidence and determine the facts in issue. You must consider the instructions as a whole and not a part to the exclusion of the rest. You must not use any method of chance in arriving at a verdict, but base it on the judgment of each juror concurring there.

After you have retired to consider your verdict select one of the jury as a foreman and then enter upon your deliberations. If you all agree on the verdict in its entirety your foreman alone will sign it. If you do not all agree, but as many as five of you do, then those agreeing will sign the verdict individually. Notify the bailiff when you have a verdict so that you may return it in open Court. You will now listen to and consider the arguments of counsel which are a proper part of this trial.

Notes on Use

The third paragraph of this instruction should be given only if expert witnesses have testified in the case. The Court should not point out to the jury which of the witnesses were experts, since that might put undue emphasis on their testimony.

Committee Comments

The Oklahoma Court of Criminal Appeals stated in *Daggs v. State*, 317 P.2d 279, 282 (Okla. Cr. 1957), that the failure to instruct the jury as to the weight accorded to expert testimony might cause the jury to put undue emphasis on it.

OUJI-CR 11-7

COMPETENCY - VERDICT FORM

_____

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF
THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,

Plaintiff,	)	
	)	
Vs	)	
	)	
JOHN DOE,	)	Case No. _____
Defendant.	)	
	)	

VERDICT

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

1. Is [**Name of Defendant**] incompetent to undergo further criminal proceedings at this time?

YES _____

NO _____

If your answer is no, you need not answer the remainder of the questions. If your answer is yes, then proceed to the next question.

2. Can the incompetency of [**Name of Defendant**] be corrected within a reasonable period of time through treatment, therapy or training? In this case, a reasonable period of time is defined to be [**Specify Applicable Period of Time from 22 O.S. § 1175.1**].

YES _____

NO _____

3. Is [**Name of Defendant**] incompetent because **he/she** is an intellectually disabled person as defined in these instructions?

YES _____

NO _____

4. Is [**Name of Defendant**] a person requiring treatment as defined in these instructions?

YES _____

NO _____

5. If the answers to questions 3 and 4 are no, why is [**Name of Defendant**] incompetent?

_____

6. Is [**Name of Defendant**] presently dangerous as defined in these instructions if released?

YES _____

NO _____

_____ _____
Foreperson

_____ _____

_____ _____

Committee Comments

The Oklahoma Legislature revised the questions that the jury must answer to determine competency in 2004, and this verdict form reflects the 2004 amendments. *See* 22 O.S. 2021, § 1175.5 .

(2024 Supp.)

OUJI-CR 12-1

GRAND JURY -- INTRODUCTORY INSTRUCTION

The purpose of these instructions is to outline your duties and what is expected of you during this grand jury investigation.

Under Article 2, Section 18, of the Oklahoma Constitution, a grand jury is convened by order of a District Judge after the filing of a proper Petition, as has been done in this case. **[Name of Judge]** has ordered the convening of this grand jury, and I have been appointed to conduct this grand jury. Your names were selected as provided by law. You have been summoned and impaneled and sworn to be a grand jury and to investigate the matters set forth in these instructions.

Now, you have been called by reason of the Grand Jury Petition, and that Grand Jury Petition requests that you investigate the following:

[Describe the Primary Purpose of the Investigation.]

However, you as grand jurors have the power to inquire into any matter to determine whether any crime or crimes have been committed, triable in **[Name of County]** County, for which indictments or accusations should be presented to the Court, as will be defined later in these instructions. To reiterate, however, the primary purpose for which you have been called is to **[Again Describe the Primary Purpose of the Investigation]**. You should make that your first order of business.

Statutory Authority: 22 O.S. 1991, §§ 311-346.

Committee Comments

In 1932, the Criminal Court of Appeals of Oklahoma called the grand jury "a superfluous piece of legal machinery," because prosecutors normally conduct investigations and prosecutions without having to use grand juries. *Blake v. State*, 54 Okl. Cr. 62, 67, 14 P.2d 240, 242 (1932). Grand juries have been used for removal of public officers for many years, however, *see* 22 O.S. 1991, §§ 1181-1197, and multicounty grand juries have been authorized in Oklahoma since 1987, *see* 22 O.S. 1991, §§ 350-363.

OUJI-CR 12-2

GRAND JURY -- GENERAL PROCEDURE

The Court will appoint one of you as a foreperson to preside at all sessions of the grand jury.

A grand jury consists of twelve (12) persons. In addition to the twelve (12) grand jurors impaneled, three (3) additional persons have been selected as alternate grand jurors. The alternate grand jurors shall attend all sessions of the grand jury during its term and shall be subject to all laws governing grand jurors. However, no alternate grand juror shall participate in any deliberations of the grand jury until appointed by me to fill a vacancy.

When you retire to the jury room, you will first appoint one of you as clerk. It is the duty of the clerk to take minutes of your proceedings (except the votes of the individual members), record the names and addresses of witnesses who testify, and make an abstract of their testimony, and if an indictment is found, to show that at least nine (9) jurors, without naming them, voted a true bill.

The foreperson shall administer the following oath to any witness appearing before the grand jury:

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

The Court has appointed **[Name of Court Reporter]**, who is a qualified court reporter, to be present and take the testimony of all witnesses. The Court has also appointed a bailiff, **[Name of Bailiff]**, to assist you as needed.

The **attorney(s)** for the State may appear before you to give information or advice concerning any matter before you and to examine the witnesses who may be called by you.

You may at all times ask the advice of the Court or the **attorney(s)** for the State. If you wish to communicate with the Court, you must return as a body into open court. No one can advise you, though, whether the evidence in a matter under investigation is sufficient or insufficient to return a true bill; this is a matter for your determination alone.

The **attorney(s)** for the State will issue subpoenas and other process to enforce the attendance of witnesses, and will draw up indictments and accusations when requested by the grand jury.

Statutory Authority: 22 O.S. 1991, §§ 311, 325-340.

OUJI-CR 12-3

GRAND JURY -- GENERAL POWERS AND DUTIES

You have the power to inquire into all public offenses committed against the State that are triable in **[Name of County]** County, and to present them to the Court by Indictment or Accusation in writing. However, neither the convening nor the continuation of a grand jury dispenses with the right of the **attorney(s)** for the State to file Complaints and Informations, conduct preliminary hearings or other routine matters, unless otherwise specifically ordered by the Court convening the grand Jury.

You may, if you so desire, inspect any or all of the public institutions in **[Name of County]** County and make inquiry into their operation. You are entitled to examine, without charge, any of the public records in the County.

You are required to make a personal inspection of the condition of the County Jail, as to the sufficiency of the same for the safekeeping of prisoners, their convenient accommodation and health, and to inspect the rules and regulations of said Jail, and to make any recommendations that seem proper in your final report.

You are also required to make inquiry into the condition and management of the public prisons in the County, either by personal inspection or other means.

In addition, you are required to make inquiry into the case of every person imprisoned in the public jails within the County on a criminal charge who has not been indicted nor charged by complaint or information.

Statutory Authority: 22 O.S. 1991, §§ 331, 338.

OUJI-CR 12-4

GRAND JURY -- EVIDENCE

Each witness may be interrogated by any member of the jury and the **attorney(s)** for the State.

On the request of the accused, or on your own motion, you shall receive evidence for the accused.

While investigating a charge for the purpose of presenting an Indictment or Accusation, the grand jury may receive the written testimony of the witnesses taken in a preliminary examination of the same charge, and also the sworn testimony prepared by the **attorney(s)** for the State without bringing those witnesses before it. The grand jury may also hear evidence live from witnesses testifying before it and receive written evidence. The grand jury shall vote on each Indictment or Accusation separately.

It is your duty to weigh all of the evidence submitted to you and when you have reason to believe that there is other evidence, you may order it produced, and the **attorney(s)** for the State shall subpoena witnesses for your investigation.

If any member of the grand jury knows, or has reason to believe, that a public offense has been committed that is triable in the County, **he/she** must declare the same to the other jurors, and they must investigate it.

Statutory Authority: 22 O.S. 1991, §§ 333, 335, 337.

OUJI-CR 12-5

GRAND JURY -- INDICTMENTS AND ACCUSATIONS

An "indictment" is a document charging a person with an offense under the laws of the State, presented to a court by a grand jury. When a document charges grounds for the removal of a public official from office, it is termed an "accusation."

The presentment of an Indictment or Accusation is a serious matter and it should not be found unless all of the evidence before you, when taken together, would in your judgment, if unexplained or uncontradicted, warrant a conviction by a trial jury.

An Indictment or Accusation cannot be found without agreement of at least nine (9) grand jurors. When so found, it must be endorsed "A True Bill," and signed by your foreperson.

The names of all the witnesses examined as to the facts in the particular Indictment or Accusation must appear on it.

An Indictment or Accusation, when found by the grand jury, must be presented to the Court by your foreperson in the presence of its members.

Statutory Authority: Okla. Const. Art. 2, § 18.

OUJI-CR 12-6

GRAND JURY -- INQUIRY INTO ACTS OF PUBLIC OFFICERS

As a grand jury you have a duty to inquire into the willful and corrupt misconduct in office of public officers of every description in **[Name of County]** County or any of its subdivisions.

Any public officer, not subject to impeachment, whether elected or appointed to any governmental office under the laws of Oklahoma may be removed from office for any of the following causes:

FIRST: Habitual or willful neglect of duty.

SECOND: Gross partiality in office.

THIRD: Oppression in office.

FOURTH: Corruption in office.

FIFTH: Extortion or willful overcharge of fees in office.

SIXTH: Willful maladministration.

SEVENTH: Habitual drunkenness.

EIGHTH: Failure to produce and account for all public funds and property in his hands at any settlement or inspection authorized or required by law.

Any public officer may be removed or ousted from office for any act of commission or omission or neglect which may be committed, done or omitted during his present, or any previous or preceding term in such office.

An Accusation in writing, charging an officer with any of the causes for removal as stated above may be presented to the Court. In the case of a State officer, an Accusation may be presented when such officer resides or has his office for the usual transaction of business in **[Name of County]** County.

Statutory Authority: 22 O.S. 1991, §§ 338, 1181-1184.

OUJI-CR 12-7

GRAND JURY -- SECRECY OF PROCEEDINGS

Every member of the grand jury must keep secret whatever was said or how any juror voted on any matter before it.

It is a criminal offense for a grand juror to disclose the testimony of a witness examined before the grand jury, except when required by the Court in a legal proceeding; or for a grand juror or other official to disclose that an Indictment for a felony has been presented until the Defendant's arrest.

You cannot be questioned for anything you say or any vote you give in the grand jury on any matter before the jury, except for perjury of a juror in making an Accusation or giving testimony to other jurors.

No one is allowed at your sessions except the members of the grand jury, the **attorney(s)** for the State, the Court Reporter, the witness actually under examination, one (1) attorney to advise such witness, when such witness so requests, and, when necessary, during the examination of a witness, an interpreter.

No one, except members of the grand jury, shall be permitted to be present during your deliberations or voting.

Statutory Authority: 22 O.S. 1991, §§ 340-344.

Committee Comments

The Oklahoma Court of Criminal Appeals discussed the secrecy of grand jury proceedings in *In re Proceedings of Multicounty Grand Jury*, 847 P.2d 812 (Okl. Cr. 1993). It held that the traditional secrecy of grand jury proceedings extended to witness immunity hearings, and that neither the public nor the media should be allowed to be present at witness immunity hearings in connection with grand jury proceedings.

OUJI-CR 12-8

GRAND JURY -- FINAL REPORT

When you have completed your investigations, you may in your discretion, make a written report to the Court on the condition and operation of any public office or public institution that you investigated. You may make any recommendations concerning any matter investigated, but the report may not charge any public officer, or other person, with willful misconduct or malfeasance, nor reflect on the management of any public office as being willful and corrupt misconduct. Such matters may only be brought before the Court by Indictment or Accusation.

Statutory Authority: 22 O.S. 1991, § 346.

OUJI-CR 12-9

GRAND JURY -- LENGTH OF SESSION

No grand jury may be convened or remain in session during the period beginning thirty (30) days before a statewide primary, primary runoff, or general election and ending ten (10) days after the statewide primary, primary runoff, or general election. However, the grand jury may complete the matters presented to it and make its final report at any time before the legal time of adjournment for the particular grand jury.

Statutory Authority: 22 O.S. 1991, § 345.

Notes on Use

This instruction does not apply to multicounty grand juries.

OUJI-CR 12-10

GRAND JURY -- FINAL ADMONITION

The Court admonishes you that it is your sworn duty to be fair and impartial in all your investigations, and you must present no person through malice, hatred or ill will, nor leave any unpresented through fear or affection, or for any reward or the promise or hope thereof, but in all presentments or Indictments it is your duty to present the truth, the whole truth and nothing but the truth according to the best of your skill and understanding.

After you have retired to the jury room, you will perform your duties as a separate and independent body, subject only to the natural supervisory powers of this Court and the instructions now given you, or which may be given you in open court later. You may hold your deliberations during whatever reasonable hours that seem proper, and may recess from time to time, as may be most suitable to the early completion of your duties; bearing in mind at all times the secrecy of the proceedings of the grand jury. I recommend to you that you keep the hours that closely accord with the usual hours of court at the **[Name of County]** County Courthouse, which are between the hours of 9:00 a.m. and 5:00 p.m. You are to keep the Court advised of your recess each day and the time you shall next convene. If you desire an extended recess, you should apply to the Court for permission.

The law requires that I appoint one of your number as foreperson of the grand jury, and accordingly, I will appoint **[Name of Foreperson]** to serve as your foreperson.

CHAPTER 13

JUVENILE DELINQUENCY

Introductory Note

These instructions are for use in hearings to determine if a child is delinquent under the Oklahoma Juvenile Code, 10 O.S. Supp. 1996, §§ 7301-1.1 - 7307-1.8. Delinquency hearings are subject to a right to jury trial. 10 O.S. Supp. 1996, § 7303-4.1. The procedure for conducting delinquency hearings is found in 10 O.S. Supp. 1996, § 7303-4.2. The Court of Criminal Appeals has jurisdiction of appeals from juvenile delinquency proceedings. 10 O.S. Supp. 1996, § 7303-6.2.

The instructions in Part A are to be given at the beginning of trial and cover voir dire and other introductory matters. These instructions serve as a guide to the trial judge in questioning the jury panel prior to questioning by counsel. They need not be reduced to writing and distributed to the jury along with the other instructions in the case.

The instructions in Part B are to be given at the conclusion of the trial.

OUJI-CR 13-1

ROLE OF THE JUROR

For those who have been summoned as jurors, I remind you that jury service is a legal obligation as well as a civic duty. Each of you is an officer of the court just as the judge, the **attorney(s)** representing the prosecution, and the **attorney(s)** representing the defense. Your office as juror is one of extreme public trust. The services you perform as juror are as important and essential to the administration of justice as those performed by the judge and the attorneys.

As prospective jurors you will take an oath to answer completely and truthfully all questions asked you by myself and the attorneys.

OUJI-CR 13-2

VOIR DIRE OATH

Do you, and each of you, solemnly **swear/affirm** to well and truly answer questions asked of you concerning your qualifications to sit as jurors in the case now on trial, **(so help you God?)/(this you do affirm under the penalties of perjury)**?

OUJI-CR 13-3

PURPOSE OF PROCEEDING

This jury trial is a special proceeding in which a **child/juvenile**, that is a person under the age of eighteen (18), is charged with committing a criminal offense. All cases of **children/juveniles** shall be heard separately from the trial of cases against adults, and these cases are subject to special rules of law. A six-person jury will be selected to hear this case in which the State of Oklahoma has filed a Petition alleging that a **child/juvenile** under the age of eighteen (18) has committed a criminal offense. The sole purpose of this proceeding is the determination by the jury of the status of the **child/juvenile** with reference to the question of whether or not **he/she** is a delinquent child. The jury shall determine this one question on the basis of whether or not the State proves to your satisfaction beyond a reasonable doubt each element of the criminal offense with which the **child/juvenile** is charged.

OUJI-CR 13-4

CHARGE

[Name of Child] is charged with committing the offense of **[Name of Crime]** against **[Name the Alleged Victim(s)]**.

OUJI-CR 13-5

FAIR AND IMPARTIAL JURY

Both the State of Oklahoma and the **[Name of Child]** are entitled to jurors who approach this case with open minds and agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice, or sympathy. Jurors must not be influenced by preconceived ideas as to the facts or as to the law. You are undoubtedly qualified to serve as a juror but you may not be qualified to serve as a juror in this particular case. Hence, the law permits unlimited challenges for cause. Moreover, the law grants both the State and **[Name of Child]** three (3) peremptory challenges. A peremptory challenge permits either the State or **[Name of Child]** to excuse a prospective juror for any reason allowed by law. If you are excused from being a juror in this particular case, it is no reflection on you. You well may be chosen to serve as a juror in another case.

OUJI-CR 13-6

EXAMINATION BY THE COURT

I will now ask you a number of questions to determine your qualifications to serve as jurors in this case. To determine your qualifications I will need to obtain information from each of you, including some personal information. The purpose of these questions is to obtain a fair jury and it is not to embarrass you. If any of my questions should touch on sensitive subjects that you do not want to have heard by everyone present, you should tell me, and you can then come forward so that we can discuss those matters privately.

1. Do you reside in **[Name of County]** County?

2. The **attorney(s)** for the State **is/are [Name the Attorney(s)]**. Do any of you know the **attorney(s)** for the State? Has the District Attorney's office handled any matter for any of you?

3. The **attorney(s)** for **[Name of Child] is/are [Name the Attorney(s)]**. Do any of you know the **attorney(s)** for **[Name of Child]**? **Has/Have** the **attorney(s)** for **[Name of Child] [or his/her law firm]** represented you on any legal matter?

4. Do any of you know **[Name of Child]**?

5. **Do/Did** any of you know **[Name the Alleged Victim(s)]**, or any member of **his/her/their** family?

6. The witnesses who may be called in this case are **[Name the Witness(es)]**: Do any of you know any of the witnesses, or any member of their families?

7. Have any of you read or heard the alleged facts of this case? Have you expressed or formed an opinion concerning this case? Would any information you have read or heard concerning this case influence your ability to hear or decide this case impartially? Have you discussed this case with anyone prior to today?

8. Have any of you had any experience that you feel might affect your consideration of this case?

9. Are you or is anyone in your immediate family employed or involved with a law enforcement agency or organization? Have you or has anyone in your immediate family been connected with law enforcement in the past? Do you hold or have you held a "Reserve Deputy Commission," a "Special Deputy Commission," or an "Honorary Deputy Commission"?

10. Have any of you ever been charged with or accused of a crime or a delinquent offense? Have any of your close friends or relatives ever been charged with or accused of a crime or a delinquent offense?

11. Have any of you ever been involved with the Department of Human Services or Juvenile Services?

12. Have any of you ever been victims of a crime? Have any of your close friends or relatives ever been victims of a crime?

13. I will instruct you on the law and the rules by which the jury reaches a verdict. Your duty as jurors is to accept and follow the law as included in the instructions and rules given to you by me. If selected as a juror, will each of you accept and follow the law as included in the instructions and rules that I will give to you?

One instruction I will give is that **[Name of Child]** is presumed innocent of the alleged offense, and the presumption continues unless after consideration of all the evidence you are convinced that **[Name of Child]** committed the offense beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes the allegations of the petition beyond a reasonable doubt. **[Name of Child]** must be found not delinquent unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the alleged offense. If selected as a juror, will each of you presume **[Name of Child]** innocent unless each element of the alleged offense is proven beyond a reasonable doubt?

14. Having been asked these questions, do any of you know at this time any reason why you could not be a fair and impartial

juror? If so please raise your hand.

15. The court now requests that each of you give your name, your spouse's name if you are married, your occupation, your spouse's occupation, and the number of children you have. Please speak slowly and clearly. Let us begin with **[Note: Indicate the juror who is to begin.]**

OUJI-CR 13-7

EXAMINATION BY THE ATTORNEYS

The attorneys for the State and **[Name of Child]** will now ask you questions. The questions are not designed to pry into your personal affairs but to discover if you have any information or opinions concerning this case which you cannot lay aside, or personal experiences in your life which might cause you to favor or disfavor the State or the defendant or persons who may be witnesses. The questions may further be designed to ascertain your attitude on social, religious and moral issues. These questions are necessary to assure the State and **[Name of Child]** an impartial jury.

The attorney for the State will proceed first.

OUJI-CR 13-8

OATH TO THE JURY

Do you, and each of you, solemnly **swear/affirm** that you will well and truly try, and true deliverance make, of the issues submitted to you in the case now on trial, and a true verdict render, according to the law and evidence, **(so help you God?)/(this you do affirm under the penalties of perjury)**?

OUJI-CR 13-9

OPENING INSTRUCTION

You have been selected and sworn as the jury to determine whether **[Name of Child]** is a delinquent child. The State alleges in the petition in this case that **[Name of Child]** is a delinqent child because **he/she** did on or about **[Date]** commit the offense of **[Name of Crime]** against **[Name of Victim]**.

The petition in this case is the formal method of accusing **[Name of Child]** of a delinquent act. The petition is not evidence and the law is that you should not allow yourselves to be influenced against **[Name of Child]** by reason of the filing of the petition.

[Name of Child] has denied the allegations in the petition. A denial puts in issue each element of the alleged offense with which **[Name of Child]** is charged, and a denial requires the State to prove each element of the alleged offense beyond a reasonable doubt.

[Name of Child] is presumed innocent of the alleged offense and the presumption continues unless after consideration of all the evidence you are convinced guilt that **[Name of Child]** committed the alleged offense beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes that **[Name of Child]** committed the alleged offense beyond a reasonable doubt. **[Name of Child]** must be found not delinquent unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the alleged offense.

Evidence is the testimony received from the **witness(es)** under oath, agreements as to fact made by the attorneys, and the exhibits admitted into evidence during the trial.

It is your responsibility as jurors to determine the facts from the evidence, to follow the law as stated in the instructions from the judge, and to reach a verdict of not delinquent or delinquent based upon the evidence. This is the only question for you to determine.

It is your responsibility as jurors to determine the credibility of each witness and the weight to be given the testimony of the witness. In order to make this determination, you may properly consider the overall reaction of the witness while testifying; **his/her** frankness or lack of frankness; **his/her** interest and bias, if any; the means and opportunity the witness had to know the facts about which **he/she** testifies; and the reasonableness or unreasonableness of **his/her** testimony in light of all the evidence in the case. You are not required to believe the testimony of any witness simply because **he/she** is under oath. You may believe or disbelieve all or part of the testimony of any witness. It is your duty to determine what testimony is worthy of belief and what testimony is not worthy of belief.

It is my responsibility as the judge to insure the evidence is presented according to the law, to instruct you as to the law, and to rule on objections raised by the attorneys. No statement or ruling by me is intended to indicate any opinion concerning the facts or evidence.

It is the responsibility of the attorneys to present evidence, to examine and cross-examine witnesses, and to argue the evidence. No statement or argument of the attorneys is evidence.

From time to time during the trial, the attorneys may raise objections. When an objection is made, you should not speculate on the reason why it is made. When an objection is approved or sustained by me, you should not speculate on what might have occurred or what might have been said had the objection not been sustained.

Throughout the trial you should remain alert and attentive. Do not form or express an opinion on the case until it is submitted to you for your decision. Do not discuss this case among yourselves until that time. Do not discuss this case with anyone else or permit anyone else to discuss this case in your presence. Do not talk to the attorneys, **[Name of Child]**, or the **witness(es)**. If anyone should attempt to discuss this case with you, report the incident to me or to the bailiff immediately. Do not read, or view or listen to any news report of this trial. This case must be decided solely upon the evidence presented to

you in this court, free from any outside influence.

At this point in the trial, the attorney for the State reads the petition, announces the denial of **[Name of Child]**, and presents an opening statement. The attorney for **[Name of Child]** may present an opening statement after the attorney for the State, or may elect to reserve **his/her** opening statement until the conclusion of the evidence by the State. Opening statements are not evidence but serve as guides so that you may better understand and evaluate the evidence when it is presented.

Following the opening statements, witnesses are called to testify. Witnesses are sworn and then examined and cross-examined by the attorneys. Exhibits may also be introduced into evidence.

After the evidence is completed, I will instruct you on the law applicable to the case. The attorneys are then permitted closing arguments. Closing arguments are not evidence and are permitted for purposes of persuasion only.

When closing arguments are completed, the case will be submitted to you. You will then retire to consider your verdict.

The attorney for the State may now proceed.

OUJI-CR 13-10

INTRODUCTION TO CLOSING INSTRUCTIONS

Since all the evidence in this case has been given to you, it is now my duty, under the law, to give you the instructions that apply in this trial. The instructions contain all rules of the law that are to be applied by you in this case, and all the rules of law by which you are to weigh the evidence and determine the facts in issue in deciding this case and in reaching a verdict. You must consider the instructions as a whole and not as a part to the exclusion of the rest. All the testimony and evidence which it is proper for you to consider has been introduced in this case. You should not consider any matter of fact or of law except what has been given to you while this court is or has been in session.

OUJI-CR 13-11

FUNCTION OF THE JURY

It is your responsibility as jurors to determine the facts from the evidence, to follow the rules of law as stated in these instructions, and to reach a fair and impartial verdict of delinquent or not delinquent based upon the evidence, as you have sworn you would do. You must not use any method of chance in arriving at a verdict, but must base your verdict on the judgment of each juror.

OUJI-CR 13-12

CHARGING INSTRUCTION

[Name of Child] is charged in the petition with committing the offense of **[State Offense Charged and Summarize Material Facts of Petition]** on or about **[Date]** in **[County]** County, Oklahoma.

[Name of Child] has denied the allegations in the petition.

OUJI-CR 13-13

PRESUMPTION OF INNOCENCE

[Name of Child] is presumed innocent of the offense alleged against him/her, and the presumption continues unless, after consideration of all the evidence, you are convinced of every element of the offense beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes every element of the offense beyond a reasonable doubt.

[Name of Child] must be found not delinquent unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the offense.

OUJI-CR 13-14

DEFINITION OF DELINQUENT CHILD

The term "delinquent child," as used in these instructions, means any person under the age of 18 years who has **[violated a (federal/state law)/(municipal ordinance)/(lawful order of the court pursuant to the Oklahoma Juvenile Code)]/[habitually violated traffic laws/ordinances]**.

The only question to be decided by you is whether or not **[Name of Child]** is delinquent. If you find **[Name of Child]** is delinquent, the Court will determine his/her treatment or placement. Do not let speculation about **his/her** treatment or placement influence your verdict.

OUJI-CR 13-15

ELEMENTS OF OFFENSE

It is a violation of a **(federal/state law)/(municipal ordinance)** to commit **a/an [Specify Crime, e.g., Assault and Battery]**. The elements of **[Specify Crime]** are: **[List Elements From Other Jury Instructions]**.

OUJI-CR 13-16

DEFINITION OF EVIDENCE

Evidence is the testimony received from the witnesses under oath, stipulations made by the attorneys, and the exhibits admitted into evidence during the trial.

OUJI-CR 13-17

PETITION NOT EVIDENCE

The petition in this case is the formal method of accusing **[Name of Child]** of a delinquent act. The petition is not evidence, and the law is that you should not allow yourselves to be influenced against **[Name of Child]** by reason of the filing of the petition.

OUJI-CR 13-18

JUDICIAL RULINGS

The Court has made rulings in the conduct of the trial and the admission of evidence. In so doing I have not expressed nor intimated in any way the weight or credit to be given any evidence or testimony admitted during the trial. Nor have I indicated in any way the conclusions to be reached by you in this case.

OUJI-CR 13-19

CREDIBILITY OF WITNESSES

It is your responsibility to determine the credibility of each witness and the weight to be given the testimony of each witness. In determining such weight or credibility, you may properly consider: the interest, if any, which the witness may have in the result of the trial; the relation of the witness to the parties; the bias or prejudice of the witness, if any has been apparent; the candor, fairness, intelligence, and demeanor of the witness; the ability of the witness to remember and relate past occurrences, the means of observation, and the opportunity of knowing the matters about which the witness has testified. From all the facts and circumstances appearing in evidence and coming to your observation during the trial, aided by the knowledge which you each possess in common with other persons, you will reach your conclusions. You should not let sympathy, sentiment or prejudice enter into your deliberations, but should discharge your duties as jurors impartially, conscientiously, and faithfully under your oaths and return such verdict as the evidence warrants when measured by these instructions.

OUJI-CR 13-20

TESTIMONY OF CHILD

You are instructed that **[Name of Child]** is a competent witness. His/her testimony is to be judged in the same way as that of any other witness.

OR

[Name of Child] is not compelled to testify, and the fact that **[Name of Child]** did not testify cannot be used as an inference that **[Name of Child]** committed a delinquent act and should not prejudice him in any way. You must not permit that fact to weigh in the slightest degree against **[Name of Child]**, nor should this fact enter your discussions or deliberations in any manner.

Notes on Use

The trial court should use the first alternative if the child did testify. The second alternative should be used if the child did not testify, and it is requested by the child. *See Carter v. Kentucky*, 450 U.S. 288 (1981). This Instruction is based on OUJI-CR 9-41 and OUJI-CR 9-44.

OUJI-CR 13-21

CREDIBILITY OF OPINION WITNESSES

Testimony has been introduced of certain witnesses who purport to be skilled in their line of endeavor or who possess peculiar knowledge acquired by study, observation, and practice.

You may consider the testimony of these witnesses, and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine. You are not required to surrender your own judgment to that of any person testifying, based on that person's education, training or experience. You need not give controlling effect to the opinion of such witnesses for their testimony, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive.

Notes on Use

This Instruction is based on OUJI-CR 9-42.

OUJI-CR 13-22

EVIDENCE - INFERENCES

You should consider only the evidence introduced while the court is in session. You are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified when considered with the aid of the knowledge which you each possess in common with other persons. You may make deductions and reach conclusions which reason and common sense lead you to draw from the fact which you find to have been established by the testimony and evidence in the case.

OUJI-CR 13-23

DIRECT EVIDENCE DEFINED

"Direct evidence" is the testimony of a person who asserts actual, personal knowledge of a fact, such as the testimony of an eyewitness. "Direct evidence" may also be an exhibit such as a photograph which demonstrates the existence of a fact. It is proof which points immediately to a question at issue and which proves the existence of a fact without inference or presumption.

OUJI-CR 13-24

CIRCUMSTANTIAL EVIDENCE DEFINED

"Circumstantial evidence" is the proof of facts or circumstances which gives rise to a reasonable inference of other connected facts that tend to show the guilt or innocence of a defendant. It is proof of a chain of facts and circumstances that indicates either guilt or innocence.

OUJI-CR 13-25

DIRECT AND CIRCUMSTANTIAL EVIDENCE - WEIGHT

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Circumstantial evidence would be considered by you together with all the other evidence in the case in arriving at your verdict.

OUJI-CR 13-26

CIRCUMSTANTIAL EVIDENCE

The State relies **[in part]** in its case upon circumstantial evidence. In order to warrant a verdict that **[Name of Child]** is a delinquent child upon circumstantial evidence, each fact necessary to prove every element of the alleged offense must be established by the evidence beyond a reasonable doubt. All of the facts and circumstances, taken together, must establish to your satisfaction beyond a reasonable doubt that **[Name of Child]** committed the alleged offense.

Committee Comments

OUJI-CR 13-22 through 13-26 are based on OUJI-CR 9-1 through 9-5.

2015 SUPPLEMENT

OUJI-CR 13-27

OBJECTIONS

From time to time during this trial, the attorneys have made objections that I have ruled on. You should not speculate upon the reasons why objections were made. If I approved or sustained an objection, you should not speculate on what might have been said or what might have occurred had the objection not been sustained by me.

OUJI-CR 13-28

CLOSING INSTRUCTION

After you have retired to consider your verdict, select one of your number as foreperson and enter upon your deliberations. When you have agreed on a verdict, your foreperson alone will sign it, and you will, as a body, return it in open court. Your verdict must be unanimous. Forms of verdict will be furnished. You will now listen to the argument of counsel, which is a proper part of this trial.

OUJI-CR 13-29

VERDICT FORM

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF

THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

IN THE MATTER OF,	)	
	)	
	)	CASE NO. _____
	)	
[NAME OF CHILD].	)	

VERDICT

COUNT 1 -- **[OFFENSE CHARGED]**

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

[Name of Child] is:

_____ Delinquent.

_____ Not Delinquent.

_____
FOREPERSON

OUJI-CR 13-30

INSTRUCTION UPON DISCHARGE

You have now completed your duties as jurors in this case and are discharged. Since this proceeding has been conducted in private, you are not to discuss this case with anyone.

OR

You have now completed your duties as jurors in this case and are discharged. The question may arise whether you are free to discuss this case with anyone. This is entirely your decision. If any person tries to discuss the case over your objection, or becomes critical of your service, please report it to me immediately.

Notes on Use

Unless the trial judge orders otherwise, an initial delinquency hearing is conducted in private. 10 O.S. Supp. 1996, § 7303-4.2. Second or subsequent delinquency proceedings are public, however. Accordingly, if an initial delinquency was conducted in private, the first alternative should be used; otherwise, the second alternative should be used.