

JAN 25 2011

2011 OK CR 2
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. MOHIE
CLERK

IN RE:)
ADOPTION OF THE 2010) **FOR PUBLICATION**
REVISIONS TO THE OKLAHOMA)
UNIFORM JURY INSTRUCTIONS-) CASE NO. CCAD-2011-1
CRIMINAL (SECOND EDITION))

ORDER ADOPTING AMENDMENTS TO OKLAHOMA UNIFORM JURY INSTRUCTIONS-CRIMINAL (SECOND EDITION)

¶1 On March 23, 2010, The Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Jury Instructions submitted its report and recommendations to the Court for adoption of amendments to Oklahoma Uniform Jury Instructions-Criminal (Second Edition). The Court has reviewed the report by the committee and recommendations for the adoption of the 2010 proposed revisions to the Uniform Jury Instructions. Pursuant to 12 O.S. 2001, § 577.2, the Court accepts that report and finds the revisions should be ordered adopted.

¶2 **IT IS THEREFORE ORDERED ADJUDGED AND DECREED** that the report of The Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Jury Instructions shall be accepted, the revisions shall be available for access via the internet from this Court's web site at www.okcca.net on the date of this order and provided to West Publishing Company for publication. The Administrative Office of the Courts is requested to duplicate and provide copies of the revisions to the judges of the District Courts and the District

Courts of the State of Oklahoma are directed to implement the utilization of these revisions effective on the date of this order.

¶3 **IT IS FURTHER ORDERED ADJUDGED AND DECREED** the amendments to existing OUJI-CR 2d instructions, and the adoption of new instructions, as set out in the following designated instructions and attached to this order, are adopted to wit:

1-4; 1-8; 4-128; 4-146; 4-147; 4-147A; 4-148; 6-11; 8-36; 8-37; 8-38; 8-39; 9-6A; 9-10A

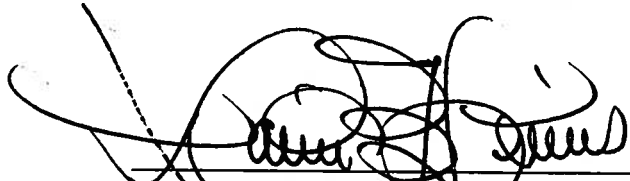
¶4 The Court also accepts and authorizes the updated committee comments to be published, together with the above styled revisions and each amended page in the revisions to be noted at the bottom as follows "(2010 Supp.)".

¶5 **IT IS THE FURTHER ORDER OF THIS COURT** that the members of The Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Criminal Jury Instructions be commended for their ongoing efforts to provide up-to-date Uniform Jury Instructions to the bench and the bar of the State of Oklahoma.

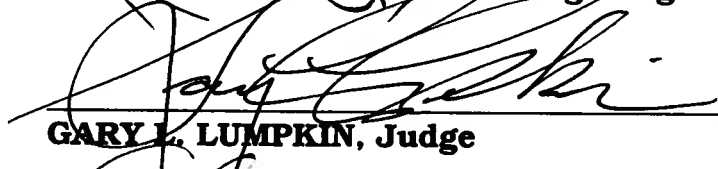
¶6 **IT IS SO ORDERED.**

¶7 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 25th
day of January, 2011.

Arlene Johnson
ARLENE JOHNSON, Presiding Judge



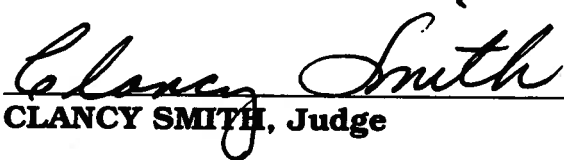
DAVID B. LEWIS, Vice Presiding Judge



GARY L. LUMPKIN, Judge

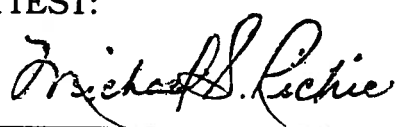


CHARLES A. JOHNSON, Judge



CLANCY SMITH, Judge

ATTEST:



Clerk

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 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.

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.

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 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. ~~Do not read newspaper reports or obtain information from the internet or 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.~~

This case must be decided solely upon the evidence presented to you in this ~~court~~ 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.

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.

OUJI-CR 4-128
FORCIBLE ORAL 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 ~~(threats of) force/violence~~ means of force or violence, or threats of force or violence that are accompanied by the apparent power of execution.]

OR

[Fourth, by a person over the age of eighteen on a child under the age of sixteen.]

OR

[Fourth, committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent].

OR

[Fourth, committed by a state/county/municipal/ (political subdivision) employee/contractor/[employee 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].

OR

Fourth, where the victim was **between at least sixteen and 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.

Statutory Authority: 21 O.S. Supp. ~~2006~~ 2010, §§ 886, 888; 21 O.S. 2001, § 887.

Notes on Use

This instruction is intended for use in forcible oral sodomy cases under 21 O.S. Supp. ~~2006~~ 2010, § 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. Supp. ~~2006~~ 2010, § 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. Supp. 2006 2010, §§ 886, 888. Force is not an element of sodomy under 21 O.S. Supp. 2006 2010, § 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. 2006 2010, § 888, however, unless the victim was under 16 years of age 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.

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. 2006 2010, § 886) as a lesser included offense of forcible sodomy (21 O.S. 2006 2010, § 888), where the charge involved heterosexual activity and the defendant raised the defense of consent.

Penetration is required under 21 O.S. 2001, § 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.

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 (~~Okl. Cr. 1967~~); *Brinkley v. State*, 1936 OK CR 117, 60 Okl. Cr. 106, 61 P.2d 1023, 60 Okl. Cr. 106 (1936).

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 (~~Okl. Cr. 1977~~); *Hay v. State*, 1968 OK CR 209, 447 P.2d 447 (~~Okl. Cr. 1968~~).

Fear (Second-Degree Robbery) -

- A. [Fear of unlawful ~~future~~ 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. 1991, § 794.

~~Fear of Immediate Injury (First Degree Robbery) – Fear of immediate injury to the person is of such nature as, in reason and common experience, is likely to induce a person to part with his/her property against his/her will and temporarily to suspend his/her power to exercise will. To establish robbery, fear of immediate injury must be employed either to obtain or to retain possession of property, or to prevent or to overcome resistance to its taking. Fear used only as means of escape is not sufficient to establish robbery.~~

~~Reference: Parnell v. State, 1964 OK CR 14, 389 P.2d 370.~~

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. ~~Supp. 2000~~ 2001 & Supp. 2010, §§ 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. ~~1991~~ 2001, §§ 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. ~~1991~~ 2001, § 103.

Serious Bodily Injury (First Degree Robbery) -- A bodily injury that is grave and not trivial which gives rise to (select applicable factors): a substantial risk of death; unconsciousness; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [If applicable, add the following: Bruising, swelling, and even a few stitches are not alone sufficient for a serious bodily injury].

References: *Owens v. State*, 2010 OK CR 1, 229 P.3d 1261; 21 O.S. 2001, § 797; 10A O.S. Supp. 2010, § 1-1-105 (31); 27A O.S. 2001, § 2-6-202.

Committee Comment

The Committee has reviewed the decision in *Owens v. State*, 2010 OK CR 1, 229 P.3d 1261, and determined that the examples of serious bodily injury must be germane to the act of robbery or the taking of property and so not all of the examples in 10A O.S. Supp. 2010 § 1-1-105 (31); and 27A O.S. 2001, § 2-6-202. have been incorporated into the definition.

Wrongful - Without legal authority.

References: *Traxler v. State*, 1952 OK CR 162, ~~96 Okl. Cr. 231~~, 251 P.2d 815, 96 Okl. Cr. 231 (1953); BLACK'S LAW DICTIONARY 1446 (5th ed. 1979).

OUJI-CR 4-147

ABUSE OF CHARGE BY CARETAKER/(OTHER PERSON) - ELEMENTS

No person may be convicted of abuse by (a caretaker)/(an other person) unless the State has proved beyond a reasonable doubt each element of the crime.

These elements are:

First, (a caretaker)/(an other person);

[Second, abused/(committed financial neglect to)/neglected/(sexually abused)/exploited;

Third, an **incapacitated/vulnerable** adult who was entrusted in his/her care].

OR

[Second, caused/secured/permited an **incapacitated/vulnerable** adult who was entrusted in his/her care;

Third, to be abused/(subjected to financial neglect)/neglected/(sexually abused)/exploited].

OR

[Second, secured the **abuse/(financial neglect)/(sexual abuse)/exploitation;**

Third, of an **incapacitated/vulnerable** adult who was entrusted in his/her care].

[Note – Use only if applicable: You are further instructed that consent

shall not be a defense to this crime.]

Statutory Authority: 21 O.S. 2001 Supp. 2010, § 843.1.

Notes on Use

Under 43A O.S. Supp. 2010, § 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.

OUJI-CR 4-147A
VERBAL ABUSE ~~OF CHARGE~~ BY CARETAKER - ELEMENTS

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

First, a caretaker;

[Second, verbally abused;

Third, an adult who was entrusted in **his/her** care].

OR

[Second, knowingly caused/~~secured~~/permitted an adult who was entrusted in **his/her** care;

Third, to be verbally abused.]

OR

[Second, knowingly secured the verbal abuse;

Third, of an adult who was entrusted in his/her care.]

Statutory Authority: 21 O.S. 2001, § 843.2.

OUJI-CR 4-148
ABUSE ~~OF CHARGE~~ 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 by a caretaker/(person providing services to a vulnerable adult)].

Reference: 43A O.S. ~~2001~~ Supp. 2010, § 10-103(8).

Vulnerable Adult -- An incapacitated person or an individual who, because of physical or mental disability, 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 ~~carry out the activities of daily living~~ 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. ~~2001~~ Supp. 2010, § 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. ~~2001~~ Supp. 2010, § 10-103(6).

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. ~~2001~~ Supp. 2010, § 10-103(9).

Incapacitated ~~Adult~~ 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. ~~2001~~ Supp. 2010, § 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 {causing/permitting 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. ~~2001~~ Supp. 2010, § 10-103~~(10)~~ (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. 2010, § 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)]/[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. ~~2001~~ Supp. 2010, § 10-103~~(11)~~ (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: 21 O.S. 2001, § 843.2(B).

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, ~~but such circumstantial evidence must exclude every reasonable hypothesis except that of guilt, and proof amounting to mere probability or even strong suspicion is insufficient.~~ 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

SUPPLEMENT 2010

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 (~~Okl. Cr. 1988~~) ("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 OUI-CR 9-5, *infra*.

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 [~~Specify Specific Mens Rea~~ Insert Specific Intent Required By the Statute]. A person is entitled to the defense of voluntary intoxication if that person was incapable of forming the specific criminal intent of [Specify Specific Mens Rea 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, ~~24 Okl. Cr. 292~~, 217 P. 1070, 24 Okl. Cr. 292 (1923). 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 not available in murder cases. *Perryman v. State*, 1916 OK CR 76, ~~12 Okl. Cr. 500~~, 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, 93 Okl. Cr. 251, 226 P.2d 998, 93 Okl. Cr. 251 (1951); *Huffman, supra*; *Cheadle v. State*, 1915 OK CR 59, ~~11 Okl. Cr. 566~~, 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, ~~61 Okl. Cr. 435~~, 69 P.2d 411, 61 Okl. Cr. 435, 446 (1937). 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, 83 Okl. Cr. 177, 174 P.2d 395, 83 Okl. Cr. 177 (1946).

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 exculpatory 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, 94 Okl. Cr. 145, 232 P.2d 166, 94 Okl. Cr. 145, 157 (1951).

OUI-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 (~~Okl. Cr. 1982~~) ("where drugs are voluntarily taken, the law of voluntary intoxication shall apply"); *Gibson v. State*, 1972 OK CR 249, ¶ 38, 501 P.2d 891 (~~Okl. Cr. 1972~~); *Myers v. State*, 1946 OK CR 109, 83 Okl. Cr. 177, 174 P.2d 395, 83 Okl. Cr. 177, 186 (1946).

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.

OUI-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 the crime of [~~Crime Charged in Information/Indictment~~ 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).

OUI-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. 2004 2009, §§ 2-101 et seq., United States and homeopathic pharmacopoeias and National Formulary.

References: 63 O.S. 2001 & Supp. 2004 2009, §§ 2-101 et seq.

~~Incapable of Forming Specific Criminal Intent - The state in which one's mental powers have been overcome through intoxication, rendering it impossible to form a criminal intent.~~

~~Reference: *Miller v. State*, 1977 OK CR 189, ¶ 18, 567 P.2d 105, 109. Regarding other forms of mens rea, see *Fairchild v. State*, 1999 OK CR 49, ¶¶ 51, 52, 998 P.2d 611, 622-23.~~

Intoxication - A state in which a person is so far 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. ~~2004~~ 2009, § 2-101(26).

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.

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.

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).