



Administrative Office of the Courts

Nashville City Center, Suite 600

511 Union Street

Nashville, Tennessee 37219

615 / 741-2687 or 800 / 448-7970

FAX 615 / 741-6285

DEBORAH TAYLOR TATE
Director

MEMORANDUM (7/25/16)

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 19th edition of the book was published in 2015. The Administrative Office of the Courts' website includes Word and WordPerfect "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" version of newly-created and/or substantially revised instructions, are attached to the memorandum which appears on the AOC's website. If the committee changed a comment and/or footnote but did not change the text of an instruction, the instruction will be listed below but it will not be posted on the AOC's website.

4.01 – Criminal attempt (other than attempted first degree murder with serious bodily injury)

- a) Add the following as new Comment 4:

Criminal attempt is a lesser-included offense of any charged offense in every case in which: (1) the charged offense has a requisite intent element; and (2) the proof has fairly raised the completed offense. *State v. Thorpe*, 463 S.W.3d 851, 863 (Tenn. 2015). There are several situations in which Tennessee courts have held that the omission of an attempt instruction did not constitute reversible error when the proof showed the offense was either completed or did not occur at all. *See, e.g., State v. Marcum*, 109 S.W.3d 300, 304 (Tenn. 2003); *State v. Biggs*, 218 S.W.3d 643, 658 (Tenn. Crim. App. 2006). However, in those cases, the Defendant was challenging the omission of the attempt instruction, rather than the inclusion of the instruction. *See Marcum*, 109 S.W.3d at 301. Because "it is no defense to prosecution for criminal attempt that the offense attempted was actually committed," Tenn. Code Ann. § 39-12-101(c), proof, even uncontroverted proof, that a defendant completed a crime, in and of itself, does not shield a defendant from a conviction for criminal attempt of the crime allegedly completed even though the State did not adduce proof in a prosecution for criminal attempt that the defendant failed to complete the target crime. Proof sufficient to support a defendant's conviction of a completed offense is, logically and legally, sufficient to support that defendant's conviction of criminal attempt to commit that offense. *State v. Thorpe*, 463 S.W.3d 851, 861-63 (Tenn. 2015).

4.01(a) – Criminal attempt, To Wit: First Degree Murder where the victim suffers serious bodily injury

- a) Add the following as new Comment 4:

Criminal attempt is a lesser-included offense of any charged offense in every case in which: (1) the charged offense has a requisite intent element; and (2) the proof has fairly raised the completed offense. *State v. Thorpe*, 463 S.W.3d 851, 863 (Tenn. 2015). There are several situations in which Tennessee courts have held that the omission of an attempt instruction did not constitute reversible error when the proof showed the offense was either completed or did not occur at all. *See, e.g., State v. Marcum*, 109 S.W.3d 300, 304 (Tenn. 2003); *State v. Biggs*, 218 S.W.3d 643, 658 (Tenn. Crim. App. 2006). However, in those cases, the Defendant was challenging the omission of the attempt instruction, rather than the inclusion of the instruction. *See Marcum*, 109 S.W.3d at 301. Because “it is no defense to prosecution for criminal attempt that the offense attempted was actually committed,” Tenn. Code Ann. § 39-12-101(c), proof, even uncontroverted proof, that a defendant completed a crime, in and of itself, does not shield a defendant from a conviction for criminal attempt of the crime allegedly completed even though the State did not adduce proof in a prosecution for criminal attempt that the defendant failed to complete the target crime. Proof sufficient to support a defendant's conviction of a completed offense is, logically and legally, sufficient to support that defendant's conviction of criminal attempt to commit that offense. *State v. Thorpe*, 463 S.W.3d 851, 861-63 (Tenn. 2015).

6.02(a) – Aggravated Assault (For offenses committed on or after 7/1/13)

- a) Add the word “or” between “neck” and “by” in the definition for “strangulation” paragraph which begins “[Only for offenses committed on or after 7/1/15: “Strangulation” so that it reads as follows:

“Strangulation” means intentionally or knowingly impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person, ...

6.08(a) – Domestic Assault (for offenses committed on or after 4/10/08)

- a) Add the following to Comment one after the first sentence and T.C.A. citations which end “... 39-13-101(b).”:

A third offense bodily injury domestic assault is an E felony if the defendant had a certain relationship with the victim. T.C.A. §39-13-111(c).

6.08(b) – Domestic assault (causing bodily injury to the victim): Supplemental instruction number one

- a) Insert the language in attachment one to this memorandum as new instruction 6.08(b).

7.08(b) – Vehicular homicide (intoxication)

- a) Remove the first sentence of the second paragraph of Comment One and substitute the following three sentences. The rest of the paragraph remains the same:

For offenses committed on or after 1/1/17, the defendant is ineligible for probation. For offenses committed prior to 7/1/15, any sentence of ten years or less is eligible for probation. For offenses committed on or after 7/1/15, but prior to 1/1/17, the following mandatory minimum rules apply: There is a mandatory minimum sentence of forty-eight (48) consecutive hours of incarceration before a defendant is eligible for release on probation.

7.08(c) – Vehicular homicide (.08% alcohol concentration)

- a) Remove the first sentence of the second paragraph of Comment One and substitute the following three sentences. The rest of the paragraph remains the same:

For offenses committed on or after 1/1/17, the defendant is ineligible for probation. For offenses committed prior to 7/1/15, any sentence of ten years or less is eligible for probation. For offenses committed on or after 7/1/15, but prior to 1/1/17, the following mandatory minimum rules apply: There is a mandatory minimum sentence of forty-eight (48) consecutive hours of incarceration before a defendant is eligible for release on probation.

8.01 – Kidnapping

- a) The language in bold at the beginning of paragraph five should be revised to read as follows:
[only include if another offense against the person^{fn} was committed during the alleged kidnapping as to that same victim^{fn}, is charged in the indictment and is submitted to the jury:
- b) Add a footnote to the above sentence after the word “person” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:
This bracketed language is only required when an additional crime against the person, such as robbery, rape or assault, is also charged as to that same victim in the indictment. Crimes against property, such as aggravated burglary, do not raise due process concerns. State v. Alston, 465 S.W. 3d 555, 564 (Tenn. 2015).
- c) Add a footnote to the above revised sentence after the word “victim” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:
This jury instruction is not required when a defendant is not charged with additional crimes against the same victim. This language articulated in State v. White, 362 S.W. 3d 559 (Tenn. 2012), was only intended to address the due process concerns that arise when a defendant is charged with kidnapping a victim along with other crimes, such as robbery, rape or assault, that involve some inherent confinement of that victim. State v. Teats, 468 S.W. 3d 495 (Tenn. 2015) and State v. Williams, 468 S.W. 3d 510 (Tenn. 2015).

8.02 – Aggravated Kidnapping

- a) The language in bold at the beginning of paragraph five should be revised to read as follows:
[only include if another offense against the person^{fn} was committed during the alleged aggravated kidnapping as to that same victim^{fn}, is charged in the indictment and is submitted to the jury:
- b) Add a footnote to the above sentence after the word “person” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:
This bracketed language is only required when an additional crime against the person, such as robbery, rape or assault, is also charged as to that same victim in the indictment. Crimes against property, such as aggravated burglary, do not raise due process concerns. State v. Alston, 465 S.W. 3d 555, 564 (Tenn. 2015).
- c) Add a footnote to the above revised sentence after the word “victim” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:

This jury instruction is not required when a defendant is not charged with additional crimes against the same victim. This language articulated in State v. White, 362 S.W. 3d 559 (Tenn. 2012), was only intended to address the due process concerns that arise when a defendant is charged with kidnapping a victim along with other crimes, such as robbery, rape or assault, that involve some inherent confinement of that victim. State v. Teats, 468 S.W. 3d 495 (Tenn. 2015) and State v. Williams, 468 S.W. 3d 510 (Tenn. 2015).

8.03 – Especially aggravated kidnapping

- a) The language in bold at the beginning of paragraph five should be revised to read as follows:
[only include if another offense against the person^{fn} was committed during the alleged especially aggravated kidnapping as to that same victim^{fn} is charged in the indictment and is submitted to the jury:
- b) Add a footnote to the above sentence after the word “person” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:
This bracketed language is only required when an additional crime against the person, such as robbery, rape or assault, is also charged as to that same victim in the indictment. Crimes against property, such as aggravated burglary, do not raise due process concerns. State v. Alston, 465 S.W. 3d 555, 564 (Tenn. 2015).
- c) Add a footnote to the above revised sentence after the word “victim” and renumber any remaining footnotes according. The text of the footnote should read as follows:
This jury instruction is not required when a defendant is not charged with additional crimes against the same victim. This language articulated in State v. White, 362 S.W. 3d 559 (Tenn. 2012), was only intended to address the due process concerns that arise when a defendant is charged with kidnapping a victim along with other crimes, such as robbery, rape or assault, that involve some inherent confinement of that victim. State v. Teats, 468 S.W. 3d 495 (Tenn. 2015) and State v. Williams, 468 S.W. 3d 510 (Tenn. 2015).

8.05 – False imprisonment

- a) The language in bold at the beginning of paragraph five should be revised to read as follows:
[only include if another offense against the person^{fn} was committed during the alleged false imprisonment as to that same victim^{fn} is charged in the indictment and is submitted to the jury:
- b) Add a footnote to the above sentence after the word “person” and renumber any remaining footnotes accordingly. The text of the footnote should read as follows:
This bracketed language is only required when an additional crime against the person, such as robbery, rape or assault, is also charged as to that same victim in the indictment. Crimes against property, such as aggravated burglary, do not raise due process concerns. State v. Alston, 465 S.W. 3d 555, 564 (Tenn. 2015).
- c) Add a footnote to the above revised sentence after the word “victim” and renumber any remaining footnotes according. The text of the footnote should read as follows:
This jury instruction is not required when a defendant is not charged with additional crimes against the same victim. This language articulated in State v. White, 362 S.W. 3d 559 (Tenn. 2012), was only intended to address the due process concerns that arise when a defendant is charged with kidnapping a victim along with other crimes, such as robbery, rape or assault,

that involve some inherent confinement of that victim. State v. Teats, 468 S.W. 3d 495 (Tenn. 2015) and State v. Williams, 468 S.W. 3d 510 (Tenn. 2015).

8.08(b) – Trafficking for commercial sex act

- a) Add the following bracketed paragraph at the end of the instruction:

[Only for offenses committed on or after 3/23/16: It is not a defense to prosecution for this offense that *[the intended victim of the offense was a law enforcement officer]* *[the victim of the offense was a minor who consented to the act or acts constituting the offense].*]

- b) Add the next sequentially numbered footnote to the above new paragraph. The text of the footnote should read as follows:

T.C.A. §39-13-309(d).

9.04 – Carjacking

- a) Add the following to Comment one after the existing first sentence:

There shall be no release eligibility for a person committing this offense **on or after July 1, 2016**, until the person has served seventy-five percent (75%) of the sentence imposed by the court less sentence credits earned and retained. However, no sentence reduction credits authorized by §41-21-236 or any other provision of law, shall operate to reduce the sentence imposed by the court such person must serve by more than fifteen percent (15%). T.C.A. §40-35-501(t).

10.05(d) – Statutory rape by an authority figure

- a) Change element 3(c) to read as follows:

(c) that the defendant had, at the time of the alleged unlawful sexual contact, *[parental]* *[custodial]* authority over the victim **[only for offenses committed prior to 7/1/16: and used such authority]** **[only for offenses committed on or after 7/1/16: by virtue of the defendant’s legal, professional, or occupational status and used the position]** to accomplish the sexual penetration;

- b) Replace the current language of Comment One with the following:

Statutory rape by an authority figure is a Class B felony. If the offense was committed prior to 7/1/16 it is a Class C felony. T.C.A. §39-13-532(b).

10.08- Promoting prostitution

- a) Add the following paragraph as the last paragraph of the instruction after the definition of [“Minor”...]:

[Only for offenses committed on or after 7/1/16: It is an exception to this offense that (i) the person promoting the prostitute and the prostitute being promoted were the same person; and (ii) the intent of the promotion was the solicitation of business for only the prostitute engaging in the promotion.]

10.08(a) – Promoting prostitution of a [minor] [person with an intellectual disability]

- a) Add the following paragraph as the last paragraph of the instruction after the definition of [“Minor”...]:

[**Only for offenses committed on or after 7/1/16:** It is an exception to this offense that (i) the person promoting the prostitute and the prostitute being promoted were the same person; and (ii) the intent of the promotion was the solicitation of business for only the prostitute engaging in the promotion.]

10.17(b) – Violation of sex offender residential or work restrictions (for offenses committed on or after August 17, 2009)

- a) Change the period at the end of element 2(l) to a semicolon so that it reads as follows:

... was located;

- b) Add the word “or” centered underneath element 2(l) before 2(m).

- c) Change the period at the end of element 2(m) to a semicolon so that it reads as follows:

... in a private area;

- d) Add the word “or” centered underneath element 2(m) and before new element 2(n).

- e) Add the following as a new subsection (n) to element 2:

(n) **only for offenses committed on or after 7/1/16:** that the defendant knowingly established a primary or secondary residence or any other living accommodation in any public institution of higher learning’s on-campus student residence facilities, including dormitories and apartments.

- f) Add the following after the existing language of footnote 1:

T.C.A. §49-7-162.

10.21- Sexual contact by an authority figure

- a) Replace element 2 with the following language:

that the victim was [**only for offenses committed prior to 7/1/16:** at least thirteen (13) but] less than eighteen (18) years of age and the defendant was at least four (4) years older than the victim and the defendant acted intentionally, knowingly, or recklessly with regard to the age of the alleged victim;

10.22 – Soliciting minors to engage in [certain conduct]

- a) In element 1, change the word “is” to “was” so that it reads, “that the defendant was eighteen (18) years of age or older.”
b) Element 2 should be amended to read as follows:

that the defendant, by means of *[[oral] [written] [electronic] communication] [electronic mail] [internet services]* directly or through another intentionally *[[commanded] [requested] [hired] [persuaded] [invited] [attempted to induce]^{fn} [a person whom the defendant knew or should have known was less than eighteen (18) years of age]] [solicited]^{fn} a law enforcement officer posing as a minor whom the person making the solicitation reasonably believed to be less than eighteen (18) years of age] to engage in certain conduct;*

- c) Add a new footnote after “attempted to induce” and renumber the remaining footnotes accordingly. The text of the new footnote should read as follows:

The trial judge may wish to charge criminal attempt if the language in this bracket is used. See T.P.I. – Crim. 4.01, Criminal Attempt.
- d) Add another new footnote after “solicited” in the revised element 2 above and renumber the remaining footnotes accordingly. The text of the new footnote should read as follows:

The trial judge may wish to charge solicitation if the language in this bracket is used. See T.P.I.- Crim. 4.02, Solicitation.
- e) Before the definition of “intentionally”, add the following definition in brackets:

“Law enforcement officer” means an officer, employee or agent of government who has a duty imposed by law to:
(A) Maintain public order;
or
(B) Make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses;
and
(C) Investigate the commission or suspected commission of offenses.]^{fn}
- f) Add a new footnote to the end of the “law enforcement officer” definition and renumber any remaining footnotes accordingly. The text of the footnote should be as follows:

T.C.A. §39-11-106(a)(21).
- g) Delete the last three bracketed paragraphs before the definition of “intentionally” and replace it with the following after the “intentionally” definition:

[It is no defense that *[the solicitation was unsuccessful] [the conduct solicited was not engaged in] [the law enforcement officer could not engage in the solicited offense] [the minor solicited was unaware of the criminal nature of the conduct solicited]*].^{fn}
- h) Add a new footnote to the end of the above defense and renumber any remaining footnotes accordingly. The text of the footnote should be as follows:

T.C.A. §39-13-528(b)
- i) Change the text of Comment One to read as follows:

A violation of this section shall constitute an offense one (1) classification lower than the most serious crime solicited, unless the offense solicited was a Class E felony, in which case the offense shall be a Class A misdemeanor. T.C.A. §39-13-528(c).
- j) Add a new comment to the comment section as new number four. The text of the new comment should be as follows:

A defendant is subject to prosecution in this state for this offense for any conduct that originates in this state, or for any conduct that originates by a person located outside this state, where the person solicited the conduct of a minor located in this state, or solicited a law enforcement officer posing as a minor located within this state. T.C.A. §39-13-528(d).

11.01- Theft of property

a) Replace the language of Comment One to read as follows:

1. Theft of property or services is graded as follows:
 - (A) A Class A misdemeanor if the value of the property or services obtained is \$1,000 or less [**for offenses committed prior to 1/1/17: \$500 or less**];
 - (B) A Class E felony if the value of the property or services obtained is more than \$1,000, but less than \$2,500 [**for offenses committed prior to 1/1/17: more than \$500 but less than \$1,000**];
 - (C) A Class D felony if the value of property or services obtained is \$2,500 or more [**for offenses committed prior to 1/1/17: \$1,000 or more**] but less than \$10,000;
 - (D) A Class C felony if the value of property or services obtained is \$10,000 or more but less than \$60,000;
 - (E) A Class B felony if the value of property or services obtained is \$60,000 or more [**only for offenses committed on or after 7/1/12: but less than \$250,000**]; and
 - (F) A Class A felony if the value of the property or services obtained is \$250,000 or more].

11.03(a) – Fixing value

a) The six numbered sentences at the end of the instruction after the language “... the value falls within:...” should be deleted and replaced with the following:

[For offenses committed on or after 1/1/17:

1. One thousand dollars (\$1,000) or less;
2. More than one thousand dollars (\$1,000), but less than two thousand five hundred dollars (\$2,500);
3. Two thousand five hundred dollars (\$2,500) or more, but less than ten thousand dollars (\$10,000);
4. Ten thousand dollars (\$10,000) or more, but less than sixty thousand dollars (\$60,000);
5. Sixty thousand dollars (\$60,000) or more, but less than two hundred fifty thousand dollars (\$250,000);
6. Two hundred fifty thousand dollars (\$250,000) or more.]

or

[For offenses committed prior to 1/1/17:

1. Five hundred dollars (\$500) or less;
2. More than five hundred dollars (\$500), but less than one thousand dollars (\$1,000);
3. One thousand dollars (\$1,000) or more, but less than ten thousand dollars (\$10,000);
4. Ten thousand dollars (\$10,000) or more, but less than sixty thousand dollars (\$60,000);
5. Sixty thousand dollars (\$60,000) or more [**only for offenses committed on or after 7/1/12: , but less than two hundred fifty thousand dollars (\$250,000)**];
6. Two hundred fifty thousand dollars (\$250,000) or more].]

11.03(b) – Fixing apparent value

a) The six numbered sentences at the end of the instruction after the language “... the value falls within:...” should be deleted and replaced with the following:

[For offenses committed on or after 1/1/17:

1. One thousand dollars (\$1,000) or less;
2. More than one thousand dollars (\$1,000), but less than two thousand five hundred dollars (\$2,500);
3. Two thousand five hundred dollars (\$2,500) or more, but less than ten thousand dollars (\$10,000);
4. Ten thousand dollars (\$10,000) or more, but less than sixty thousand dollars (\$60,000);
5. Sixty thousand dollars (\$60,000) or more, but less than two hundred fifty thousand dollars (\$250,000);
6. Two hundred fifty thousand dollars (\$250,000) or more.]

or

[For offenses committed prior to 1/1/17:

1. Five hundred dollars (\$500) or less;
2. More than five hundred dollars (\$500), but less than one thousand dollars (\$1,000);
3. One thousand dollars (\$1,000) or more, but less than ten thousand dollars (\$10,000);
4. Ten thousand dollars (\$10,000) or more, but less than sixty thousand dollars (\$60,000);
5. Sixty thousand dollars (\$60,000) or more [**only for offenses committed on or after 7/1/12:** , but less than two hundred fifty thousand dollars (\$250,000);
6. Two hundred fifty thousand dollars (\$250,000) or more].]

11.09– Worthless checks

- a) The six numbered sentences at the end of the instruction after the language “... the value falls within:...” should be deleted and replaced with the following:

[For offenses committed on or after 1/1/17:

1. One thousand dollars (\$1,000) or less;
2. More than one thousand dollars (\$1,000), but less than two thousand five hundred dollars (\$2,500);
3. Two thousand five hundred dollars (\$2,500) or more, but less than ten thousand dollars (\$10,000);
4. Ten thousand dollars (\$10,000) or more, but less than sixty thousand dollars (\$60,000);
5. Sixty thousand dollars (\$60,000) or more, but less than two hundred fifty thousand dollars (\$250,000);
6. Two hundred fifty thousand dollars (\$250,000) or more.]

or

[For offenses committed prior to 1/1/17:

1. Five hundred dollars (\$500) or less;
2. More than five hundred dollars (\$500), but less than one thousand dollars (\$1,000);
3. One thousand dollars (\$1,000) or more, but less than ten thousand dollars (\$10,000);
4. Ten thousand dollars (\$10,000) or more, but less than sixty thousand dollars (\$60,000);
5. Sixty thousand dollars (\$60,000) or more [**only for offenses committed on or after 7/1/12:** , but less than two hundred fifty thousand dollars (\$250,000);
6. Two hundred fifty thousand dollars (\$250,000) or more].]

11.42 – TennCare fraud

- a) Replace the language of Comment One with the following:

For offenses committed prior to 7/1/16, TennCare Fraud is a Class E felony. For offenses committed on or after that date, it is a Class D felony with a \$250 fine for the first offense, a

\$500 fine for a second offense, and a \$1,000 fine for a third or subsequent offense. T.C.A. §71-5-2601(a)(1)(B) and (a)(5)(D).

13.01 – Arson

- a) Remove the last sentence from the definition of “Knowingly”.
- b) Amend the definition of “Intentionally” to read as follows:

“Intentionally” [or “with intent”] means that a person acts intentionally with respect to the nature of the conduct when it is the person’s conscious objective or desire to engage in the conduct.

- c) Add the following to footnote two after the current language:

The “result of conduct” language in the definitions of “knowingly” and “intentionally” has been removed from this instruction, as a line of unpublished cases such as *State v. Brian Allen Osborne*, No. M2014-00352-CCA-R3-CD, 2015 WL 1059066 (Tenn. Crim. App. Mar. 9, 2015) *perm. app. denied* (Tenn. Jun. 12, 2015), citing the reasoning in *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000), have held that this offense is not a result-of-conduct offense.

- d) Add the following to footnote four after the current language:

The “result of conduct” language in the definitions of “knowingly” and “intentionally” has been removed from this instruction, as a line of unpublished cases such as *State v. Brian Allen Osborne*, No. M2014-00352-CCA-R3-CD, 2015 WL 1059066 (Tenn. Crim. App. Mar. 9, 2015) *perm. app. denied* (Tenn. Jun. 12, 2015), citing the reasoning in *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000), have held that this offense is not a result-of-conduct offense.

13.02 – Aggravated Arson

- a) Remove the last sentence from the definition of “Knowingly”.
- b) Amend the definition of “Intentionally” to read as follows:

“Intentionally” [or “with intent”] means that a person acts intentionally with respect to the nature of the conduct when it is the person’s conscious objective or desire to engage in the conduct.

- c) Add the following to footnote two after the current language:

The “result of conduct” language in the definitions of “knowingly” and “intentionally” has been removed from this instruction, as a line of unpublished cases such as *State v. Brian Allen Osborne*, No. M2014-00352-CCA-R3-CD, 2015 WL 1059066 (Tenn. Crim. App. Mar. 9, 2015) *perm. app. denied* (Tenn. Jun. 12, 2015), citing the reasoning in *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000), have held that this offense is not a result-of-conduct offense.

- d) Add the following to footnote four after the current language:

The “result of conduct” language in the definitions of “knowingly” and “intentionally” has been removed from this instruction, as a line of unpublished cases such as *State v. Brian Allen*

Osborne, No. M2014-00352-CCA-R3-CD, 2015 WL 1059066 (Tenn. Crim. App. Mar. 9, 2015) *perm. app. denied* (Tenn. Jun. 12, 2015), citing the reasoning in *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn. 2000), have held that this offense is not a result-of-conduct offense.

14.02- Aggravated burglary

- a) Add the following language at the end of the existing language of Comment One:

For offenses committed on or after 1/1/17, if the defendant has two (2) or more prior convictions for either aggravated burglary or especially aggravated burglary, or a combination of the two (2) offenses prior to or at the time of committing the instant offense, there shall be no release eligibility until the defendant has served eighty-five percent (85%) of the sentence imposed by the court, less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236, or any other law, shall operate to reduce below seventy percent (70%) the percentage of sentence imposed by the court such person must serve before becoming release eligible. T.C.A. § 40-35-501(u).

14.03- Especially aggravated burglary

- a) Add the following language at the end of the existing language of Comment One:

For offenses committed on or after 1/1/17, if the defendant has two (2) or more prior convictions for either aggravated burglary or especially aggravated burglary, or a combination of the two (2) offenses prior to or at the time of committing the instant offense, there shall be no release eligibility until the defendant has served eighty-five percent (85%) of the sentence imposed by the court, less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236, or any other law, shall operate to reduce below seventy percent (70%) the percentage of sentence imposed by the court such person must serve before becoming release eligible. T.C.A. § 40-35-501(u).

21.01(a) – Aggravated child abuse and neglect (for offenses committed prior to July 1, 2005)

21.01(b) - Aggravated child [abuse] [neglect or endangerment] (for offenses committed on or after July 1, 2005, but prior to July 1, 2009)

21.01(c) – Aggravated child [abuse] [neglect] (for offenses committed on or after 7/1/09)

- a) Delete the current version of instruction 21.01(a).
- b) Renumber current instruction 21.01(b) to 21.01(a).
- c) Renumber current instruction 21.01(c) to 21.01(b).
- d) Add a footnote to the title of newly numbered instruction 21.01(a). Renumber subsequent footnotes accordingly.
- e) The text of the newly added footnote should read as follows:

This pattern instruction formerly contained the jury charge for the statutory version of this offense committed prior to July 1, 2005. To obtain that pattern instruction, see T.P.I. 21.01(a) (19th ed. 2015), or an earlier edition.

- f) For 21.01(c) [the new 21.01(b)], replace the last paragraph which begins “[It is an exception to this offense...” with the following:

[Only for offenses committed prior to 7/1/16: It is an exception to this offense that the child was being provided treatment by spiritual means through prayer alone in accordance with the tenets or practices of a recognized church or religious church or religious denomination by a duly accredited practitioner thereof in lieu of medical or surgical treatment. If the defendant proves this exception by a preponderance of the evidence, you must find *[him] [her]* not guilty.]

- g) For 21.01(c) [the new 21.01(b)], add the following language to the end of the text of footnote 21 after removing the existing period so that it reads as follows:

T.C.A. §39-15-402(c) repealed as of 7/1/16.

21.02(a) – Child abuse and neglect (for offenses committed prior to July 1, 2005)

21.02(b) – Child [abuse] [neglect] for offenses committed on or after July 1, 2005

- a) Delete the current version of instruction 21.02(a).
- b) Renumber current instruction 21.02(b) to 21.02.
- c) Add a footnote to the title of newly numbered instruction 21.02. Renumber subsequent footnotes accordingly.
- d) The text of the newly added footnote should read as follows:

This pattern instruction formerly contained the jury charge for the statutory version of this offense committed prior to July 1, 2005. To obtain that pattern instruction, see T.P.I. 21.02(a) (19th ed. 2015), or an earlier edition.

- e) For 21.02(b) [the new 21.02], replace the last paragraph which begins “[It is an exception to this offense...” with the following:

[Only for offenses committed prior to 7/1/16: It is an exception to this offense that the child was being provided treatment by spiritual means through prayer alone in accordance with the tenets or practices of a recognized church or religious church or religious denomination by a duly accredited practitioner thereof in lieu of medical or surgical treatment. If the defendant proves this exception by a preponderance of the evidence, you must find *[him] [her]* not guilty.]

- f) For 21.02(b) [the new 21.02], add the following language to the end of the text of footnote 17 after removing the existing period so that it reads as follows:

T.C.A. §39-15-402(c) repealed as of 7/1/16.

21.03(a)- Parental or custodial child endangerment

- a) Replace the last paragraph which begins “[It is an exception to this offense...” with the following:

[Only for offenses committed prior to 7/1/16: It is an exception to this offense that the child was being provided treatment by spiritual means through prayer alone in accordance with the

tenets or practices of a recognized church or religious church or religious denomination by a duly accredited practitioner thereof in lieu of medical or surgical treatment. If the defendant proves this exception by a preponderance of the evidence, you must find *[him]* *[her]* not guilty.]

- b) Add the following language to the end of the text of footnote 10 after removing the existing period so that it reads as follows:

T.C.A. §39-15-402(c) repealed as of 7/1/16.

21.03(b)- Aggravated parental or custodial child endangerment

- a) Replace the last paragraph which begins “[It is an exception to this offense...” with the following:

[Only for offenses committed prior to 7/1/16: It is an exception to this offense that the child was being provided treatment by spiritual means through prayer alone in accordance with the tenets or practices of a recognized church or religious church or religious denomination by a duly accredited practitioner thereof in lieu of medical or surgical treatment. If the defendant proves this exception by a preponderance of the evidence, you must find *[him]* *[her]* not guilty.]

- b) Add the following language to the end of the text of footnote 17 after removing the existing period so that it reads as follows:

T.C.A. §39-15-402(c) repealed as of 7/1/16.

26.13 – False accusation of child [sex abuse] [brutality] [abuse] [neglect]

- a) At the end of the instruction, add the following definition in brackets:

[Only for offenses committed on or after 7/1/16: “Caretaker” means any relative or other person living, visiting, or working in the child’s home who supervises or otherwise provides care or assistance for the child, such as a babysitter, or who is an employee or volunteer with the responsibility for any child at an educational, recreational, medical, religious, therapeutic, or other setting where children are present. “Caretaker” may also include a person who has allegedly used the child for the purpose of commercial sexual exploitation of a minor, including as a trafficker.]

- b) Add the next sequentially numbered footnote to the above new paragraph. The text of the footnote should read as follows:

T.C.A. §37-1-102(b)(4).

27.05(a) – Evading arrest

- a) Replace element 1 with the following language:

that the defendant by any means of locomotion intentionally [**only for offenses committed on or after 7/1/16: concealed [himself] [herself] [fled]**] from a person [he] [she] knew to be a law enforcement officer;

- b) Replace the semicolon at the end of element 2 with a period.
- c) Remove the word “and” between elements 2 and 3.
- d) Remove element 3 in its entirety.

27.05(b) – Evading arrest while operating motor vehicle

- a) Replace element 5 with the following language:

[(5) that the defendant’s flight created a risk of death or injury to innocent bystanders [**only for offenses committed on or after 7/1/16: pursuing law enforcement officers]** or other third parties.]

- b) Replace the first sentence of Comment One with the following language. The remainder of the existing comment one language stays the same.

Evading arrest while operating a motor vehicle is a Class E felony, and if committed on or after 7/1/16 shall be punished by confinement for not less than 30 days. If the flight creates a risk of death or injury to innocent bystanders, pursuing law enforcement officers or other third parties, it is a D felony and if committed on or after 7/1/16 shall be punished by confinement for not less than 60 days.

30.07- Harassment

- a) Renumber this instruction to 30.07(a).
- b) Add the following to the title of this instruction:

(for offenses committed prior to 7/1/16)

30.07(b) – Harassment (for offenses committed on or after 7/1/16)

- a) Insert the language in attachment two to this memorandum as new instruction 30.07(b).

30.12(a) – Stalking (for offenses committed prior to July 1, 2005)

- a) Replace the language of the definition of “course of conduct” with the following:

“Course of conduct” means a pattern of conduct composed of a series of two (2) or more separate, noncontinuous acts evidencing a continuity of purpose [**only for offenses committed on or after 7/1/16: including, but not limited to, acts in which the defendant directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to a person, or interferes with a person’s property]**].

- b) The language of Section F under “Uncontested contact” should be replaced with the following:

[Only for offenses committed prior to 7/1/16: Sending mail or electronic communications to that person] [only for offenses committed on or after 7/1/16: Sending to that person mail or any electronic communications, including, but not limited to, electronic mail, text messages, or any other type of electronic message sent using the Internet, web sites, or a social media platform]; or

30.12(b) – Aggravated stalking (for offenses committed on or after 7/1/05)

- a) Replace the language of the definition of “course of conduct” with the following:

“Course of conduct” means a pattern of conduct composed of a series of two (2) or more separate, noncontinuous acts evidencing a continuity of purpose **[only for offenses committed on or after 7/1/16:** including, but not limited to, acts in which the defendant directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to a person, or interferes with a person’s property].

- b) The language of Section F under “Uncontested contact” should be replaced with the following:

[Only for offenses committed prior to 7/1/16: Sending mail or electronic communications to that person] [only for offenses committed on or after 7/1/16: Sending to that person mail or any electronic communications, including, but not limited to, electronic mail, text messages, or any other type of electronic message sent using the Internet, web sites, or a social media platform]; or

30.12(c)- Especially aggravated stalking (for offenses committed on or after 7/1/05)

- a) Replace the language of the definition of “course of conduct” with the following:

“Course of conduct” means a pattern of conduct composed of a series of two (2) or more separate, noncontinuous acts evidencing a continuity of purpose **[only for offenses committed on or after 7/1/16:** including, but not limited to, acts in which the defendant directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to a person, or interferes with a person’s property].

- b) The language of Section F under “Uncontested contact” should be replaced with the following:

[Only for offenses committed prior to 7/1/16: Sending mail or electronic communications to that person] [only for offenses committed on or after 7/1/16: Sending to that person mail or any electronic communications, including, but not

limited to, electronic mail, text messages, or any other type of electronic message sent using the Internet, web sites, or a social media platform]; or

31.01 – Controlled substances: Manufacture, deliver or sale

- a) Add the following sentence to the end of Comment One:
Even though the minimum sentence must be served at 100%, which precludes full probation, a defendant eligible for and granted diversion would not have to serve that minimum sentence, as “judicial diversion does not constitute a sentence, but rather a decision to defer sentencing.” *State v. Dycus*, 456 S.W. 3d 918, at 928 (Tenn. 2015).
- b) Add the following new paragraph to the end of Comment One (after the new language from above):

For Class A, B or C felony offenses committed on or after 1/1/17 for the manufacture, delivery, or sale of a controlled substance pursuant to § 39-17-417 in which the defendant has two (2) or more prior convictions for the manufacture, delivery, or sale of a controlled substance classified as a Class A, B, or C felony, prior to or at the time of committing the instant offense, there shall be no release eligibility until the person has served eighty-five percent (85%) of the sentence imposed by the court, less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236, or any other law, shall operate to reduce below seventy percent (70%) the percentage of sentence imposed by the court such person must serve before becoming release eligible. T.C.A. § 40-35-501(u).

31.03 – Unlawful drug paraphernalia uses and activities

- a) The language of Section (C) under “Drug paraphernalia” should be replaced with the following:

(C) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, [only for offenses committed on or after 7/1/16: marijuana concentrates, marijuana oil,] cocaine, hashish, or hashish oil into the human body, such as:

31.04 – Controlled substances: Possession with intent to sell or deliver

- a) Add the following sentence to the end of Comment One:
Even though the minimum sentence must be served at 100%, which precludes full probation, a defendant eligible for and granted diversion would not have to serve that minimum sentence, as “judicial diversion does not constitute a sentence, but rather a decision to defer sentencing.” *State v. Dycus*, 456 S.W. 3d 918, at 928 (Tenn. 2015).

31.05 – Simple possession or casual exchange

- a) Add the following language after the first sentence of Comment One:

For third offenses committed on or after 7/1/16, only the simple possession or casual exchange of heroin is a Class E felony with a minimum \$1,000 fine. T.C.A. § 39-17-418(e) and T.C.A. § 39-17-428(b)(6). All others remain Class A misdemeanors.

- b) Delete Comment Two and renumber the remaining comments accordingly.

31.05(a)- Simple possession or casual exchange supplemental instruction number one

- a) Add the following language to the title:

[Only for heroin if committed on or after 7/1/16]

31.10 – [Keeping] [Maintaining] a [Location] for Drug Use

- a) Insert the language in attachment three to this memorandum as new instruction 31.10.

38.01 – Driving under the influence [accompanied by a child] [resulting in serious bodily injury to a child [resulting in the killing of a child] (for offenses committed on or after 7/1/13)

- a) Replace the language of the first sentence of Comment One with the following. The remainder of the comment stays the same:

Driving under the influence (first offense) is punishable by a fine of not less than three hundred fifty dollars (\$350) nor more than one thousand five hundred dollars (\$1,500) and confinement in the county jail or workhouse for not less than forty-eight (48) hours nor more than eleven (11) months and twenty-nine (29) days, and, prior to 7/1/16, twenty-four (24) hours of litter pickup were required to be performed.

- b) Add the following language as a new Comment Two and renumber the existing Comment Two and subsequent comments accordingly:

In sentencing convictions for DUI committed on or after 7/1/16, the court may order an offender to be subject to monitoring using a transdermal, GPS or alcohol or drug monitoring device, electronic monitoring with random alcohol or drug testing, or any other monitoring device the court believes necessary to ensure the person complies with the conditions of probation and, if applicable, the results of a clinical substance abuse assessment. If the court orders a person to be subject to monitoring, the court, the department of correction, or any other supervising agency that is responsible for the supervision of such person shall require periodic reporting by the offender for verification of the proper operation of the monitoring device; require the offender to have the device monitored for proper use and accuracy at least every thirty (30) days, or more frequently if required, and immediately notify the court of any violations, which shall be considered a violation of the conditions of probation.

38.08 – Driving under the influence: Supplemental instruction number one

- a) Insert the language in attachment four to this memorandum as revised instruction 38.08.

38.09 – Underage driving while impaired – Under 21

- a) Add the following language to the title of the instruction:

[For offenses committed prior to 7/1/16]

39.03 – Unlawful photographing in violation of privacy

- a) Add the following to the end of the existing language of Comment One:

A defendant who commits this offense as an E or D felony must register as a sex offender. T.C.A. §40-39-202(20)(A)(xxii). For misdemeanor offenses committed on or after 7/1/16, the trial judge may also order, after taking into account the facts and circumstances surrounding the offense, including the offense for which the person was originally charged and whether the conviction was the result of a plea bargain agreement, that the person be required to register as a sexual offender. T.C.A. §39-13-605(f) and T.C.A. §40-39-202(20)(A)(xxiv).

39.05 Criminal gang offense- Enhanced punishment (procedure)

- a) Delete this instruction.

39.05(a)- Criminal Gang Offense- Supplemental Instruction (Criminal Gang Member)

- a) Insert the language in attachment five to this memorandum as new instruction 39.05(a).

39.05(b)- Criminal Gang Offense- Supplemental Instruction (Criminal Gang Initiation)

- a) Insert the language in attachment six to this memorandum as new instruction 39.05(b).

39.09- Unlawful exposure

- a) Insert the language in attachment seven to this memorandum as new instruction 39.09.

40.06(b) – Defense: Self-Defense

- a) Insert the language in attachment eight to this memorandum as revised instruction 40.06(b).

40.07- Defense: Defense of third person

- a) Replace the fourth paragraph which currently begins “If evidence is introduced...” with the following language:

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of a third person.

40.08- Defense: Protection of property

- a) Replace the third paragraph from the end which currently begins “If evidence is introduced...” with the following language:

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in protection of *[his]/[her]* property.

40.09- Defense: Protection of a third person's property

- a) Replace the third paragraph from the end which currently begins "If evidence is introduced..." with the following language:

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in protection of a third person's property.

42.05 – Identity

- a) Remove the word "and" from the end of factor number three.
- b) At the end of factor number four, change the period to a semicolon and add the word "and" so that it reads as follows:
... such identifications; and
- c) Add the following to the list of factors as the next numbered paragraph:

(5) Any other factors fairly raised by the evidence.
- d) Add a footnote to the above new factor and renumber remaining footnotes accordingly. The new footnote should read as follows:

The committee added factor five to cover any additional proof not covered by the first four factors, such as expert witness identification testimony. *See State v. Christopher M. Epps*, No. M2014-01955-CCA-R3-CD, 2015 WL 5968339 (Tenn. Crim. App. Oct. 14, 2015) *perm. app. denied* (Tenn. Feb. 19, 2016).

42.13 – Alibi

- a) Replace the language in footnotes two and three with the following:

State v. Leath, 461 S.W.3d 73, 105-06 (Tenn. Crim. App. 2013), citing *Christian v. State*, 555 S.W.2d 863 (Tenn. 1977).

42.23 – Duty to preserve evidence

- a) At the end of footnote one, add the following:

See Comment One.

- b) Add the following language as new Comment One, keeping the citation underneath the quote centered and in parentheses:

The loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial. *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *State v. Ferguson*, 2 S.W.3d 912, 915-16 (1999)). The court rejected a "bad faith" analysis in favor of "a balancing approach in which bad faith is but one of the factors to be considered in determining whether the lost or destroyed evidence will deprive a defendant of a fundamentally fair trial." *Merriman*, 410 S.W.3d at 785.

Fundamental fairness, as an element of due process, requires a review of the entire record to evaluate the effect of the State's failure to preserve evidence. The trial court must first "determine whether the State had a duty to preserve the evidence," which is "limited to constitutionally material evidence." To be "constitutionally material," the evidence "must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." "If the trial court determines that the State had a duty to preserve the evidence, the court must determine if the State failed in its duty." *Id.* at 784-85. If the trial court concludes that the State lost or destroyed evidence that it had a duty to preserve, the trial court must then consider three factors to determine the appropriate remedy for the State's failure:

- (1) the degree of negligence involved;
- (2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
- (3) the sufficiency of the other evidence used at trial to support the conviction.

Id. "If the trial court concludes that a trial would be fundamentally unfair without the missing evidence, the trial court may then impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction [such as TPI - Crim. 42.23]." *Id.* at 785-86.

(Taken from *State v. Theodore Lebron Johnson*, No. M2014-02046-CCA-R3-CD, 2015 WL 5968257 (Tenn. Crim. App. Oct. 14, 2015) *perm. app. denied* (Tenn. Feb. 18, 2016))

42.25(a) – Election of Offenses

- a) Insert the language in attachment nine to this memorandum as new instruction 42.25(a).

42.28 – Use of a facility dog

- a) Insert the language in attachment ten to this memorandum as new instruction 42.28.

T.P.I. – CRIM. 6.08(b)

DOMESTIC ASSAULT (causing bodily injury to the victim):

SUPPLEMENTAL INSTRUCTION NUMBER ONE

Members of the Jury, you have determined that the defendant is guilty of domestic assault as charged in Count _____ of the indictment.

It will now be your duty to determine whether or not the defendant has previously been convicted of domestic assault in which the defendant caused bodily injury to the victim and, if you so find, to fix the amount of the fine.

The statutory law of this state provides that when a person is convicted of a *[second] [third or subsequent]* offense of domestic assault causing bodily injury to the victim, then the punishment is enhanced or increased.

For conviction on the second offense there shall be imposed a fine of not less than three hundred fifty dollars (\$350) nor more than three thousand five hundred dollars (\$3,500) [For a third or subsequent conviction there shall be imposed a fine of not less than one thousand one hundred dollars (\$1,100) nor more than five thousand dollars (\$5,000)] **[Only for offenses committed on or after 1/1/17:** For a third or subsequent conviction in which the victim *[was a current or former spouse of] [was dating] [had dated] [was having or had in the past a sexual relationship with] [was the minor child of]* the defendant, there shall be imposed a fine not exceeding three thousand dollars (\$3,000)].¹ You will first determine whether or not the defendant has been previously convicted of domestic assault causing bodily injury to the victim beyond a reasonable doubt.

If you so find, then you will fix a fine within the instructed limits. Your verdict on each of these matters must be unanimous; each juror must agree to any verdict.

Any record of prior conviction[s] of the defendant is evidence which you may consider. A judgment of conviction of any person under the same name as that of the defendant may create an inference that the identity of such person is the same as the defendant. However, the jury is not required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by all the evidence in the case warrant the inference which the law permits the jury to draw.²

If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a second conviction then your verdict will be:

We, the jury, find the defendant, _____, guilty of a second offense of domestic assault causing bodily injury to the victim." You will then report the amount of the fine.

[If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a third or subsequent conviction then your verdict will be:

"We, the jury, find the defendant, _____, guilty of a third or subsequent offense of domestic assault causing bodily injury to the victim." You will then report the amount of the fine.]

[Only for offenses committed on or after 1/1/17: If you find beyond a reasonable doubt that the defendant is a third or subsequent offender, then you must go further and decide whether or not at the time of the offense the victim *[was a current or former spouse of] [was dating] [had dated] [was having or had*

in the past a sexual relationship with] [was the minor child of] the defendant. If you so find, then your verdict will be

"We, the jury, find the defendant, _____, guilty of a third or subsequent offense of domestic assault causing bodily injury to the victim, and find the defendant's relationship with the victim to be as follows:

_____." You will then report the amount of the fine.]

If, however, you find that the defendant has not been previously convicted of domestic assault causing bodily injury to the victim as charged in Count _____ of the indictment, or if you have a reasonable doubt thereof, then your verdict will be:

"We, the jury, find the defendant, _____, not guilty of Count _____."

In the event your verdict is that the defendant has committed a *[second]* *[third or subsequent]* offense, then the fine you fix would replace the fine you reported to the Court by your verdict for Count _____. On the other hand, if you find that the defendant is not guilty of Count _____, then the fine which you set in the trial on Count _____ would be the fine for the case. As previously stated, the Court would fix other punishment.

You will take with you the indictment and the Court's previous written instructions. You should follow such previous instructions as to the law of consideration of evidence, deliberations, reasonable doubt, witnesses and any other relevant matters.

You may now retire to consider your verdict.

FOOTNOTES

-
1. T.C.A. §39-13-111(c).
 2. T.P.I.– Crim. 42.19, Inferences.

T.P.I. -- CRIM. 30.07(b)

HARASSMENT

(for offenses committed on or after 7/1/16)

Any person who commits the offense of harassment is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

[Part A:

- (1) that the defendant communicated a threat to another person;
and
- (2) that the defendant intended the communication to be a threat of harm to the alleged victim;
and
- (3) that a reasonable person would perceive the communication to be a threat of harm.]

or

[Part B:

- (1) that the defendant communicated with another person without lawful purpose, anonymously or otherwise;
and
- (2) that the defendant intended that the frequency or means of the communication [*annoy*] [*offend*] [*alarm*] [*frighten*] the recipient;
and

- (3) that the defendant by this action [*annoyed*] [*offended*] [*alarmed*] [*frightened*] the recipient.]

or

[Part C:

- (1) that the defendant communicated to another person that [*a relative*] [*some other person*] had been [*injured*] [*killed*];

and

- (2) that such communication was known by the defendant to be false;

and

- (3) that the defendant by this action intended to harass that person.

"Communicate" means contacting a person in writing or print or by telephone, wire, radio, electromagnetic, photoelectronic, photooptical, or electronic means, and includes text messages, facsimile transmissions, electronic mail, instant messages, and messages, images, video, sound recordings, or intelligence of any nature sent through or posted on social networks, social media, or web sites.²

"Intended" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.³

"Knowingly" and "known" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.⁴

COMMENTS

1. Harassment is a Class A misdemeanor. T.C.A. §39-17-308(b).

FOOTNOTES

1. T.C.A. §39-17-308(a).
2. T.C.A. §39-17-308(e).
3. T.C.A. §39-11-106(a)(18).
4. T.C.A. §39-11-106(a)(20).

T.P.I. – Crim. 31.10

[KEEPING] [MAINTAINING] A [LOCATION] FOR DRUG USE

Any person who commits the offense of *[keeping] [maintaining] a [location]* for drug use is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

(1) that the defendant *[kept] [maintained] a [store] [shop] [warehouse] [dwelling] [building] [vehicle] [boat] [aircraft] [structure] [place];*

and

(2) that the defendant knew at the time of *[keeping] [maintaining]* that it was *[resorted to by persons unlawfully using controlled substances for the purpose of using these substances] [used for [keeping] [selling] controlled substances].*²

"Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 — 39-17-416. *[_____]* is a *[drug] [substance] [immediate precursor]* in Schedules I through VII of §§ 39-17-403 — 39-17-416.³

"Knew" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.⁴

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.⁵

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.⁶

COMMENTS

1. This offense is a Class D felony. T.C.A. § 53-11-401(b)(1).
2. Fines for this offense differ with different schedules of controlled substances:
For a violation involving a Schedule I or II controlled substance, \$100,000.
For a violation involving a Schedule III or IV controlled substance, \$50,000.
For a violation involving a Schedule V or VI controlled substance, \$5,000.
For a violation involving a Schedule VII controlled substance, \$1,000.
T.C.A. § 53-11-401(b)(2). [See how this looks in Comment 2 of 31.11].

FOOTNOTES

-
1. T.C.A. § 53-11-401(a)(5).
 2. If the use of more than one controlled substance is alleged in the indictment or raised in the proof, the trial judge should make the State elect upon which controlled substance it is relying, to ensure a unanimous verdict, and insert the name of that controlled substance into element two.
 3. T.C.A. § 39-17-402(4).
 4. T.C.A. § 39-11-106(a)(20).
 5. T.C.A. § 39-11-301(a)(2).
 6. T.C.A. § 39-11-106(a)(18).

T.P.I. – CRIM. 38.08

DRIVING UNDER THE INFLUENCE:

SUPPLEMENTAL INSTRUCTION NUMBER ONE

Members of the Jury, you have determined that the defendant is guilty of driving under the influence of an intoxicant as charged in Count _____ of the indictment.

It will now be your duty to determine whether or not the defendant has previously been convicted of *[such offense] [vehicular homicide as a result of intoxication] [aggravated vehicular homicide] [vehicular assault] [adult driving while impaired]* and, if you so find, to fix the amount of the fine.

The statutory law of this state provides that when a person is convicted of a *[second] [third] [fourth or subsequent] [only for offenses committed on or after 7/1/16: sixth or subsequent]* offense of *[driving under the influence of an intoxicant] [vehicular homicide as a result of intoxication] [aggravated vehicular homicide] [vehicular assault] [adult driving while impaired] [any combination of the above]* then the punishment is enhanced or increased.

[The law of this state provides that a prior conviction for vehicular homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault, or adult driving while impaired, for the purpose of enhancing the punishment for the offense of driving under the influence of an intoxicant, shall be treated the same as a prior conviction for driving under the influence of an intoxicant.]¹

[For offenses committed on or after 7/1/10: A person who is convicted of driving under the influence of an intoxicant shall not be considered a repeat or multiple offender if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of driving under the influence of an intoxicant that resulted in a conviction for such offense. If, however, the date of a person's violation of driving under the influence of an intoxicant is within ten (10) years of the date of the present violation, then the person shall be considered a multiple offender. If a person is considered a multiple offender under this part, then every violation of driving under the influence of an intoxicant that resulted in a conviction for such offense occurring within ten (10) years of the date of the immediately preceding violation shall be considered in determining the number of prior offenses. However, a violation occurring more than twenty (20) years from the date of the instant violation shall never be considered a prior offense for that purpose.]²

[For purposes of determining if the defendant is a multiple offender, you may use a conviction for an offense committed in another state that would constitute the offense of *[driving under the influence of an intoxicant]* *[vehicular assault]* *[aggravated vehicular assault]* *[vehicular homicide as a result of intoxication]* *[aggravated vehicular homicide]* if it had been committed in this state. That offense shall be considered a prior conviction of an offense in this state if the elements of that offense are the same as the elements of the offense in this state.]³

For conviction on the second offense there shall be imposed a fine of not less than six hundred dollars (\$600) nor more than three thousand five hundred dollars (\$3,500) [For the third conviction there shall be imposed a fine of not less than one thousand one hundred dollars (\$1,100) nor more than ten thousand dollars (\$10,000).] [For the fourth or subsequent conviction there shall be imposed a fine of not less than three thousand dollars (\$3,000) nor more than fifteen thousand dollars (\$15,000).]⁴ **Only for offenses committed on or after 7/1/16:** For the sixth or subsequent offense you may in your discretion fix a fine in any amount not to exceed \$10,000.⁵

You will first determine whether or not the defendant has been previously convicted of *[driving under the influence of an intoxicant]* *[vehicular homicide as a result of intoxication]* *[aggravated vehicular homicide]* *[vehicular assault]* *[adult driving while impaired]* beyond a reasonable doubt. If you so find, then you will fix a fine within the instructed limits. Your verdict on each of these matters must be unanimous; each juror must agree to any verdict.

Any record of prior conviction[s] of the defendant is evidence which you may consider. A judgment of conviction of any person under the same name as that of the defendant may create an inference that the identity of such person is the same as the defendant. However, the jury is not required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by all the evidence in the case warrant the inference which the law permits the jury to draw.⁶

If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a second conviction then your verdict will be:

We, the jury, find the defendant, _____, guilty of a second offense of driving under the influence of an intoxicant." You will then report the amount of the fine.

[If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a third conviction then your verdict will be:

"We, the jury, find the defendant, _____, guilty of a third offense of driving under the influence of an intoxicant." You will then report the amount of the fine.]

[If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a fourth or subsequent conviction then your verdict will be:

"We the jury, find the defendant, _____, guilty of a fourth or subsequent offense of driving under the influence of an intoxicant." You will then report the amount of the fine.]

[Only for offenses committed on or after 7/1/16: If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a sixth or subsequent conviction then your verdict will be:

"We the jury, find the defendant, _____, guilty of a sixth or subsequent offense of driving under the influence of an intoxicant." You will then report the amount of the fine.]

If, however, you find that the defendant has not been previously convicted of driving under the influence of an intoxicant as charged in Count _____ of the indictment, or if you have a reasonable doubt thereof, then your verdict will be:

"We, the jury, find the defendant, _____, not guilty of Count _____."

In the event your verdict is that the defendant has committed a *[second]* *[third]* *[fourth or subsequent]* **[only for offenses committed on or after 7/1/16: sixth or subsequent]** offense, then the fine you fix would replace the fine you reported to the Court by your verdict for Count _____. On the other hand, if you find that the defendant is not guilty of Count _____, then the fine which you set in the trial on Count _____ would be the fine for the case. As previously stated, the Court would fix other punishment.

You will take with you the indictment and the Court's previous written instructions. You should follow such previous instructions as to the law of consideration of evidence, deliberations, reasonable doubt, witnesses and any other relevant matters.

You may now retire to consider your verdict.

COMMENTS

1. A person whose convictions for violating the provisions of T.C.A. §55-10-401 occur more than ten (10) years apart shall not be considered a multiple offender. T.C.A. §55-10-403(a)(3).
2. In addition to other punishment, a first offender's driver's license shall be revoked for one year; for a second offense, 2 years; for a third offense, 3 to 10 years for offenses committed prior to 7/1/11, 6 to 10 years for offenses committed on or after 7/1/11 but prior to 7/1/13, and 6 years for offenses committed on or after 7/1/13; for a fourth or subsequent offense, 5 years if committed prior to 7/1/11, and 8 years if committed on or after 7/1/11. T.C.A. §55-10-404(a)(1).

FOOTNOTES

-
1. T.C.A. §55-10-405(c), T.C.A. §55-10-418(b).

-
2. T.C.A. §55-10-405(a).
 3. T.C.A. §55-10-405(b).
 4. T.C.A. §55-10-403(a)(1).
 5. T.C.A. §40-35-111(b)(3).
 6. T.P.I.– Crim. 42.19, Inferences.

T.P.I. CRIM. 39.05(a)

CRIMINAL GANG OFFENSE

SUPPLEMENTAL INSTRUCTION (CRIMINAL GANG MEMBER)

(Only for offenses committed on or after 4/28/16)¹

Members of the jury, you have found the defendant, [_____], guilty of the offense of [_____]. It is now your duty to determine certain facts which may affect the sentence the defendant will receive for this offense.² In making these determinations, you will take with you the indictment and the Court's previous written instructions. You should follow such previous instructions as to the law of consideration of evidence, deliberations, reasonable doubt, witnesses and any other relevant matters. Each verdict you reach must be unanimous.

You will first determine if the defendant, at the time of committing that offense, committed a "criminal gang offense."

"Criminal gang offense" means the *[commission of] [attempted commission of] [facilitation of] [solicitation of] [conspiracy to commit] any [here name an offense listed in TCA § 40-35-121(a)(3)(B)]*.³

You are to take with you the court's previous instructions along with this supplemental instruction, the indictment and all exhibits entered into evidence and complete the verdict form or forms as directed below. Your verdict must be unanimous as to all findings on the verdict forms.

VERDICT FORM "A"

Was the offense of [_____] a "criminal gang offense"?

Count _____

Yes _____

No _____

Count _____

Yes _____

No _____

Count _____

Yes _____

No _____

FOREPERSON

If your verdict is “No,” you will go no further and you will report your verdict. However, if your verdict is “Yes,” you will proceed to determine whether or not the defendant was a “criminal gang member.”

A “criminal gang member” is a person who is a member of a criminal gang, who meets two (2) or more of the following criteria:

- (A) Admits to criminal gang involvement;
- (B) Is identified as a criminal gang member by a parent or guardian;
- (C) Is identified as a criminal gang member by a documented reliable informant;
- (D) Resides in or frequents a particular criminal gang's area, adopts their style or dress, their use of hand signs or their tattoos and associates with known criminal gang members;
- (E) Is identified as a criminal gang member by an informant of previously untested reliability and the identification is corroborated by independent information;
- (F) Has been arrested more than once in the company of identified criminal gang members for offenses that are consistent with usual criminal gang activity;

or

- (G) Is identified as a criminal gang member by physical evidence such as photographs or other documentation.⁴

A “criminal gang” is a formal or informal ongoing organization, association or group consisting of three (3) or more persons that has:

- (A) As one (1) of its activities the commission of criminal gang offenses;

and

(B) Two (2) or more members who, individually or collectively, engage in or have engaged in a pattern of criminal gang activity.⁵

“Pattern of criminal gang activity” means prior convictions for the commission or attempted commission of, facilitation of, solicitation of, or conspiracy to commit:

(i) two (2) or more criminal gang offenses that are classified as felonies;

or

(ii) three (3) or more criminal gang offenses that are classified as misdemeanors;

or

(iii) one (1) or more criminal gang offenses that are classified as felonies and two (2) or more criminal gang offenses that are classified as misdemeanors;

and

(iv) the criminal gang offenses are committed on “separate occasions;”

and

(v) the criminal gang offenses are committed within a five-year period.⁶

“Prior conviction” means a criminal gang offense for which a criminal gang member was convicted prior to the commission of the instant criminal gang offense by the defendant. “Prior conviction” includes convictions under the laws of any other state, government or country that, if committed in this state, would have constituted a criminal gang offense. *[[_____] is a criminal gang offense.]*⁷ Convictions for multiple criminal gang offenses committed as part of a single course of conduct within twenty-four (24) hours are not committed on “separate occasions.”⁸ [However, acts that constitute criminal gang offenses committed prior to 7/1/13 during the perpetration of which the defendant knowingly caused, or threatened to cause, death or bodily injury to

another person or persons, specifically including rape of a child, aggravated rape or rape; or resulted, or was intended to result, in the defendant's receiving income, benefit, property, money or anything of value from the commission of any aggravated burglary, or from the illegal sale, delivery, or manufacture of a controlled substance, controlled substance analogue, or firearm, shall not be construed to be a single course of conduct.]⁹

VERDICT FORM "B"

Was the defendant a "criminal gang member" at the time of committing the underlying "criminal gang offense"? In order to find the defendant guilty of being a "criminal gang member," you must unanimously find that, at the time of the "criminal gang offense" at least two (2) of the criteria listed below were true beyond a reasonable doubt. Please indicate each of your findings by marking with an "X" either "Yes" or "No." That the defendant, at the time of the offense:

- (A) had admitted to criminal gang involvements; Yes ____ No ____
- (B) had been identified as a criminal gang member by a parent or guardian;
Yes ____ No ____
- (C) had been identified as a criminal gang member by a documented reliable informant; Yes ____ No ____
- (D) resided in or frequented a particular criminal gang's area, adopted their style or dress, their use of hand signs or their tattoos, and associated with known criminal gang members; Yes ____ No ____

(E) had been identified as a criminal gang member by an informant of previously untested reliability and such identification has been corroborated by independent information; Yes ____ No ____

(F) had been arrested more than once in the company of identified criminal gang members for offenses which are consistent with usual criminal gang activity; Yes ____ No ____

(G) had been identified as a criminal gang member by physical evidence such as photographs or other documentation. Yes ____ No ____

Does the jury find the defendant was a "criminal gang member" by unanimously finding that, at the time of the "criminal gang offense," at least two (2) of the above criteria were true beyond a reasonable doubt?

Yes _____

No _____

FOREPERSON

If your verdict is "No," you will go no further and you will report your verdict. However, if your verdict is "Yes," you will proceed to determine whether or not the "criminal gang offense" was committed *[at the direction of] [in association with] [for the benefit of] [the defendant's criminal gang] [a member of the defendant's criminal gang]*.¹⁰

VERDICT FORM "C"

Does the jury find the "criminal gang offense" was committed *[at the direction of] [in association with] [for the benefit of] [the defendant's criminal gang] [a member of the defendant's criminal gang]* beyond a reasonable doubt?

Yes _____

No _____

FOREPERSON

[THE TRIAL JUDGE SHOULD ONLY GIVE THE FOLLOWING INSTRUCTION IF IT IS ALLEGED IN THE INDICTMENT THAT THE DEFENDANT WAS ALSO A LEADER OR ORGANIZER OF THE CRIMINAL GANG AT THE TIME THE OFFENSE WAS COMMITTED]:

If your verdict is "No," you will go no further and you will report your verdict.

However, if your verdict is "Yes," you will proceed to determine whether or not the defendant was also a leader or organizer of the criminal gang at the time the offense was committed. Your verdict must be unanimous.

VERDICT FORM "D"

Was the defendant a leader or organizer of the "criminal gang" at the time the "criminal gang offense" was committed?

Yes _____

No _____

Foreperson

COMMENTS

1. In *State v. Devonte Bonds*, No. E2014-00495-CCA-R3-CD, 2016 WL 1403286 (Tenn. Crim. App. April 7, 2016), T.C.A. §40-35-121 was found to be unconstitutional in that it did not require the underlying offense to possess a “nexus to a defendant’s gang affiliation, and therefore, a defendant’s own criminal conduct.” *Id.* at *47. As a consequence, 2016 Tenn. Pub. Acts, ch. 1034, eff. 4/28/16, was enacted as an attempt to remedy this shortcoming by amending the definition of “criminal gang” to add that it has as one of its “primary activities the commission of criminal gang offenses,” and adding as an element of enhancement that the criminal gang offense must have been committed “at the direction of, in association with, or for the benefit of, the defendant’s criminal gang or a member of the defendant’s criminal gang.” T.C.A. §40-35-121.

2. A criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished one (1) classification higher than the classification of the offense committed. T.C.A. § 40-35-121(b). If the criminal gang offense subject to enhancement one classification higher is a Class A felony, the presumptive sentence for the offense shall be the maximum sentence within the range from which the defendant is to be sentenced. T.C.A. § 40-35-121(d). A criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished two (2) classifications higher than the classification established by the specific statute creating the offense committed if the criminal gang member was also a leader or organizer of the criminal gang at the time the offense was committed. T.C.A. §40-35-121(e). If the offense is a Class A or B felony, the defendant shall be sentenced as a Class A felon and the presumptive sentence for the offense shall be the maximum sentence within the range from which the defendant is to be sentenced. T.C.A. 40-35-121(f).

3. If the defendant is charged with a criminal gang offense and the district attorney general intends to seek enhancement of the punishment, the indictment, in a separate count, shall specify, charge and give notice of the subsection under which enhancement is alleged applicable and of the required prior convictions constituting the gang's pattern of criminal gang activity. T.C.A. § 40-35-121(g).

4. Voir Dire - Judges may be concerned about the issue of “gang activity” as an issue for inquiry in voir dire and the opening statements of the attorneys before the jury which will first try the underlying felony. In *United States v. Jobson*, 102 F. 3d 214 (6th Cir., Kennedy 1996), the District Court was reversed for failure to treat “gang membership” as being limited to Fed. R. Evid. 404 (b) admissibility. The relevance of “gang activity” under Tenn. R. Evid. 401 and Tenn. R. Evid 403 (balancing of the probative value of the evidence against potential prejudice to defendant) should be considered before the admission of the evidence of “gang activity” in trying the underlying crime. If admissible, the trial judge should instruct the jury as to the limited use of Tenn. R. Evid. Rule 404(b) evidence.

5. Hearsay evidence - Members of the committee expressed concern that the legislature in creating this enhancement provision of the law dealing with “criminal gang offenses” invited hearsay evidence and therefore may constitute constitutional

confrontation violations. On occasion hearsay is legislatively allowed such as under the provisions of T.C.A. § 40-35-209 (b) (Sentencing Hearing) in that during a sentencing hearing hearsay evidence is addressed by allowing "reliable hearsay".... "if the opposing party is accorded a fair opportunity to be heard." Also, in T.C.A. §39-13-204 (c) (Sentencing for First Degree Murder), hearsay may be entertained by the jury "provided the defendant is accorded a fair opportunity to rebut any hearsay statement so admitted." However, the legislature did not address hearsay under this legislation found in T.C.A. §40-35-121 " Criminal Gang Offenses - Enhanced Punishment - Procedure."

FOOTNOTES

1. See Comment One.
2. T.C.A. §40-35-121.
3. T.C.A. §40-35-121(a)(3).
4. T.C.A. §40-35-121(a)(2).
5. T.C.A. §40-35-121(a)(1).
6. T.C.A. §40-35-121 (a)(4)(A).
7. "In the event that a conviction from a jurisdiction other than Tennessee is not specifically named the same as a criminal gang offense, the elements of the offense in the other jurisdiction shall be used by the Tennessee court to determine if the offense is a criminal gang offense." T.C.A. §40-35-121(a)(4)(B)(ii).
8. T.C.A. §40-35-121(a)(4)(B).
9. T.C.A. §40-35-121(a)(4)(B)(iii) and (a)(3)(A).
10. T.C.A. §40-35-121(b)(2).

T.P.I. CRIM. 39.05(b)

CRIMINAL GANG OFFENSE

SUPPLEMENTAL INSTRUCTION (CRIMINAL GANG INITIATION)

(Only for offenses committed on or after 4/28/16)¹

Members of the jury, you have found the defendant, [_____], guilty of the offense of [_____]. It is now your duty to determine certain facts which may affect the sentence the defendant will receive for this offense.² In making these determinations, you will take with you the indictment and the Court's previous written instructions. You should follow such previous instructions as to the law of consideration of evidence, deliberations, reasonable doubt, witnesses and any other relevant matters. Each verdict you reach must be unanimous.

You will first determine if the defendant, at the time of committing that offense, committed a "criminal gang offense."

"Criminal gang offense" means the *[commission of] [attempted commission of] [facilitation of] [solicitation of] [conspiracy to commit] any [here name an offense listed in TCA § 40-35-121(a)(3)(B)]*.³

You are to take with you the court's previous instructions along with this supplemental instruction, the indictment and all exhibits entered into evidence and complete the verdict form or forms as directed below. Your verdict must be unanimous as to all findings on the verdict forms.

VERDICT FORM "A"

Was the offense of [_____] a "criminal gang offense"?

Count _____

Yes _____

No _____

Count _____

Yes _____

No _____

Count _____

Yes _____

No _____

FOREPERSON

If your verdict is “No,” you will go no further and you will report your verdict. However, if your verdict is “Yes,” you will proceed to determine whether or not the defendant committed the offense for the purpose of and with the intent to fulfill an initiation or other requirement for joining a “criminal gang.”

A “criminal gang” is a formal or informal ongoing organization, association or group consisting of three (3) or more persons that has:

(A) As one (1) of its activities the commission of criminal gang offenses;

and

(B) Two (2) or more members who, individually or collectively, engage in or have engaged in a pattern of criminal gang activity.⁴

“Pattern of criminal gang activity” means prior convictions for the commission or attempted commission of, facilitation of, solicitation of, or conspiracy to commit:

(i) two (2) or more criminal gang offenses that are classified as felonies;

or

(ii) three (3) or more criminal gang offenses that are classified as misdemeanors;

or

(iii) one (1) or more criminal gang offenses that are classified as felonies and two (2) or more criminal gang offenses that are classified as misdemeanors;

and

(iv) the criminal gang offenses are committed on “separate occasions;”

and

(v) the criminal gang offenses are committed within a five-year period.⁵

“Prior conviction” means a criminal gang offense for which a criminal gang member was convicted prior to the commission of the instant criminal gang offense by the defendant. “Prior conviction” includes convictions under the laws of any other state, government or country that, if committed in this state, would have constituted a criminal gang offense. *[[_____] is a criminal gang offense.]⁶* Convictions for multiple criminal gang offenses committed as part of a single course of conduct within twenty-four (24) hours are not committed on “separate occasions.”⁷ [However, acts that constitute criminal gang offenses committed prior to 7/1/13 during the perpetration of which the defendant knowingly caused, or threatened to cause, death or bodily injury to another person or persons, specifically including rape of a child, aggravated rape or rape; or resulted, or was intended to result, in the defendant's receiving income, benefit, property, money or anything of value from the commission of any aggravated burglary, or from the illegal sale, delivery, or manufacture of a controlled substance, controlled substance analogue, or firearm, shall not be construed to be a single course of conduct.]⁸

VERDICT FORM “B”

Do you unanimously find that the defendant committed the offense for the purpose of and with the intent to fulfill an initiation or other requirement for joining a “criminal gang”?

Yes

No

FOREPERSON

If your verdict is "No," you will go no further and you will report your verdict. However, if your verdict is "Yes," you will proceed to determine whether or not the "criminal gang offense" was committed *[at the direction of] [in association with] [for the benefit of] [the defendant's criminal gang] [a member of the defendant's criminal gang]*⁹.

VERDICT FORM "C"

Does the jury find the "criminal gang offense" was committed *[at the direction of] [in association with] [for the benefit of] [the defendant's criminal gang] [a member of the defendant's criminal gang]* beyond a reasonable doubt?

Yes _____

No _____

FOREPERSON

COMMENTS

1. In *State v. Devonte Bonds*, No. E2014-00495-CCA-R3-CD, 2016 WL 1403286 (Tenn. Crim. App. April 7, 2016), the court found T.C.A. §40-35-121 to be unconstitutional in that it did not require the underlying offense to possess a "nexus to a defendant's gang affiliation, and therefore, a defendant's own criminal conduct." *Id.* at *47. As a consequence, 2016 Tenn. Pub. Acts, ch. 1034, eff. 4/28/16, was enacted as an attempt to remedy this shortcoming by amending the definition of "criminal gang" to add that it has as one of its "primary activities the commission of criminal gang offenses," and adding as an element of enhancement that the criminal gang offense must have been committed "at the direction of, in association with, or for the benefit of, the defendant's criminal gang or a member of the defendant's criminal gang." T.C.A. §40-35-121.

2. A criminal gang offense committed by a defendant who committed the offense for the purpose of and with the intent to fulfill an initiation or other requirement for joining a criminal gang shall be punished one (1) classification higher than the classification of the offense committed. T.C.A. § 40-35-121(c). If the criminal gang offense subject to enhancement one classification higher is a Class A felony, the presumptive sentence for

the offense shall be the maximum sentence within the range from which the defendant is to be sentenced. T.C.A. § 40-35-121(d).

3. If the defendant is charged with a criminal gang offense and the district attorney general intends to seek enhancement of the punishment, the indictment, in a separate count, shall specify, charge and give notice of the subsection under which enhancement is alleged applicable and of the required prior convictions constituting the gang's pattern of criminal gang activity. T.C.A. § 40-35-121(g).

4. Voir Dire - Judges may be concerned about the issue of "gang activity" as an issue for inquiry in voir dire and the opening statements of the attorneys before the jury which will first try the underlying felony. In *United States v. Jobson*, 102 F. 3d 214 (6th Cir., Kennedy 1996), the District Court was reversed for failure to treat "gang membership" as being limited to Fed. R. Evid. 404 (b) admissibility. The relevance of "gang activity" under Tenn. R. Evid. 401 and Tenn. R. Evid. 403 (balancing of the probative value of the evidence against potential prejudice to defendant) should be considered before the admission of the evidence of "gang activity" in trying the underlying crime. If admissible, the trial judge should instruct the jury as to the limited use of Tenn. R. Evid. Rule 404(b) evidence.

5. Hearsay evidence - Members of the committee expressed concern that the legislature in creating this enhancement provision of the law dealing with "criminal gang offenses" invited hearsay evidence and therefore may constitute constitutional confrontation violations. On occasion hearsay is legislatively allowed such as under the provisions of T.C.A. § 40-35-209 (b) (Sentencing Hearing) in that during a sentencing hearing hearsay evidence is addressed by allowing "reliable hearsay" "if the opposing party is accorded a fair opportunity to be heard." Also, in T.C.A. § 39-13-204 (c) (Sentencing for First Degree Murder), hearsay may be entertained by the jury "provided the defendant is accorded a fair opportunity to rebut any hearsay statement so admitted." However, the legislature did not address hearsay under this legislation found in T.C.A. § 40-35-121 "Criminal Gang Offenses - Enhanced Punishment - Procedure."

FOOTNOTES

1. See Comment One.
2. T.C.A. § 40-35-121.
3. T.C.A. § 40-35-121(a)(3).
4. T.C.A. § 40-35-121(a)(1).
5. T.C.A. § 40-35-121(a)(4)(A).
6. "In the event that a conviction from a jurisdiction other than Tennessee is not specifically names the same as a criminal gang offense, the elements of the offense in the other jurisdiction shall be used by the Tennessee court to determine if the offense is a criminal gang offense." T.C.A. § 40-35-121(a)(4)(B)(ii).
7. T.C.A. § 40-35-121(a)(4)(B).
8. T.C.A. § 40-35-121(a)(4)(B)(iii) and (a)(3)(A).
9. T.C.A. § 40-35-121(b)(2).

T.P.I. – CRIM. 39.09

UNLAWFUL EXPOSURE

Any person who commits the offense of unlawful exposure is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

(1) that the defendant, with intent to cause emotional distress, distributed an image of the intimate part or parts of another identifiable person;

and

(2) the image was [*photographed*] [*recorded*] under circumstances where the parties agreed or understood that the image would remain private;

and

(3) the person depicted in the image suffered emotional distress.

“Emotional distress” means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.²

“Intimate part” means any portion of the primary genital area, buttock, or any portion of the female breast below the top of the areola that is either uncovered or visible through less than fully opaque clothing.³

“Intent” means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscience objective or desire to engage in the conduct or cause the result.⁴

COMMENTS

1. Observation without consent is a Class A misdemeanor. T.C.A. §39-17-318(d). The existence of this offense does not preclude prosecution under any other law providing for greater punishment. T.C.A. §39-17-318(c).

FOOTNOTES

-
1. T.C.A. §39-17-318(a).
 2. T.C.A. §39-17-318(b)(1) and 39-17-315(a)(2).
 3. T.C.A. §39-17-318(b)(2).
 4. T.C.A. §39-11-106(a)(18).

T.P.I. -- CRIM. 40.06(b)

DEFENSE: SELF-DEFENSE

[Enacted May 22, 2007]¹

Included in the defendant's plea of not guilty is *[his] [her]* plea of self-defense.

If a defendant was not engaged in unlawful activity and was in a place where he or she had a right to be, he or she would have a right to *[threaten] [use]* force against the *[deceased] [alleged victim]* when and to the degree the defendant reasonably believed the force was immediately necessary to protect against the alleged victim's *[use] [attempted use]* of unlawful force. The defendant would also have no duty to retreat before *[threatening] [using]* force.²

[If a defendant was not engaged in unlawful activity and was in a place where he or she had a right to be, he or she would also have a right to *[threaten] [use]* force intended or likely to cause *[death] [serious bodily injury]* if the defendant had a reasonable belief that there was an imminent danger of death or serious bodily injury, the danger creating the belief of imminent death or serious bodily injury was real, or honestly believed to be real at the time, and the belief of danger was founded upon reasonable grounds. The defendant would also have no duty to retreat before *[threatening] [using]* force likely to cause *[death] [serious bodily injury]*.]³

In determining whether the defendant's *[threat] [use]* of force in defending *[himself] [herself]* was reasonable, you may consider not only *[his] [her] [threat] [use]* of force but also all the facts and circumstances surrounding and leading up to it. Factors to consider in deciding whether there were reasonable grounds for

the defendant to fear *[death] [serious bodily injury]* from the *[deceased] [alleged victim]* include but are not limited to any previous threats of the *[deceased] [alleged victim]* made known to the defendant; the character of the *[deceased] [alleged victim]* for violence, when known to the defendant; the animosity of the *[deceased] [alleged victim]* for the defendant, as revealed to the defendant by previous acts and words of the *[deceased] [alleged victim]*; and the manner in which the parties were armed and their relative strengths and sizes.

[If proof was offered by the defendant of a trait of character of the *[deceased] [alleged victim]* to show that the *[deceased] [alleged victim]* was the first aggressor, and proof was then offered by the State of a trait of character of the defendant to show that the defendant was the first aggressor, such proof offered by the State for that purpose can only be considered by you for the purpose of its effect, if any, in rebutting the defense proof that the *[deceased] [alleged victim]* was the first aggressor and that therefore the defendant acting in *[self-defense] [defense of a third person]*. It cannot be considered by you as evidence of *[his] [her]* predisposition to commit the offense for which *[he] [she]* is now on trial.]

[The *[threat] [use]* of force against the *[deceased] [alleged victim]* would not have been justified if the defendant provoked the *[deceased's] [alleged victim's] [use] [attempted use]* of unlawful force, unless the defendant abandoned the encounter or clearly communicated to the *[deceased] [alleged victim]* the intent to do so, and the *[deceased] [alleged victim]* nevertheless *[continued] [attempted]* to use unlawful force against the defendant.]⁴

[The *[threat]* *[use]* of force against another is not justified if the defendant consented to the exact force *[used]* *[attempted]* by the other individual.]⁵

[The *[threat]* *[use]* of force against another is not justified to resist a(n) *[arrest]* *[search]* *[stop and frisk]* *[halt at a roadblock]* that the defendant knows is being made by a law enforcement officer unless the law enforcement officer *[uses]* *[attempts to use]* greater force than necessary to make the *[arrest]* *[search]* *[stop and frisk]* *[halt]* and the defendant reasonably believes that the force is immediately necessary to protect against the law enforcement officer's *[use]* *[attempted use]* of greater force than necessary.]⁶

[A defendant⁷ using force intended or likely to cause death or serious bodily injury within a *[residence]* *[business]* *[dwelling]* *[vehicle]* is presumed to have held a reasonable belief of imminent death or serious bodily injury to self, family, a member of the household or a person visiting as an invited guest when that force is used against another person who unlawfully and forcibly enters or has unlawfully and forcibly entered the *[residence]* *[business]* *[dwelling]* *[vehicle]*, and the defendant using defensive force knew or had reason to believe that an unlawful and forcible entry occurred.]⁸ [This presumption shall not apply if:

- (1) the *[deceased]* *[alleged victim]* against whom the force was used *[had the right to be in]* *[was a lawful resident of]* the *[residence]* *[business]* *[dwelling]* *[vehicle]*, such as an owner, lessee or titleholder [provided that the *[deceased]* *[alleged victim]* was not prohibited from entering the *[residence]* ***[for offenses committed on or after 7/1/09: business]*** *[dwelling]* *[occupied vehicle]* by *[an*

order of protection from domestic abuse [a court order of no contact against the [deceased] [alleged victim]]; or

- (2) the [deceased] [alleged victim] was attempting to remove a [child] [grandchild] [person] in the [deceased's] [alleged victim's] lawful custody or guardianship; or
- (3) the defendant was engaged in an unlawful activity, or was using the [residence] [business] [dwelling] [occupied vehicle] to further an unlawful activity; or
- (4) the [deceased] [alleged victim] was a law enforcement officer who entered the [residence] [business] [dwelling] [vehicle] in the performance of his or her official duties, and identified himself or herself in accordance with any applicable law, or the defendant knew or reasonably should have known that the [deceased] [alleged victim] entering or attempting to enter was a law enforcement officer.]⁹ **[The word “business” was added by the legislature to become law 7/1/08]**

“Business” means a commercial enterprise or establishment owned by a person as all or part of such person’s livelihood, or is under the owner’s control or who is an employee or agent of the owner with responsibility for protecting persons and property and shall include the interior and exterior premises of such business.¹⁰

“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 for or capable of use by people.]¹¹

["Enter" means an intrusion of any part of the body; or an intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.]¹²

"Force" means compulsion by the use of physical power or violence.¹³

"Violence" means evidence of physical force unlawfully exercised so as to damage, injure or abuse.¹⁴ Physical contact is not required to prove violence.¹⁵

[Unlawfully pointing a deadly weapon at an alleged victim is physical force directed toward the body of the victim.]¹⁶

"Imminent" means near at hand; on the point of happening.¹⁷

["Law enforcement officer" means an officer, employee or agent of government who has a duty imposed by law to:

- (A) Maintain public order; or
- (B) Make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses; and
- (C) Investigate the commission or suspected commission of offenses.]¹⁸

["Residence" means a dwelling in which a person resides either temporarily or permanently, or is visiting as an invited guest, or any dwelling, building or other appurtenance within the curtilage of such residence.¹⁹

"Curtilage" means the area surrounding a dwelling that is necessary, convenient and habitually used for the family purposes and for those activities associated with the sanctity of a person's home.²⁰]

["Serious bodily injury" means bodily injury that involves a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty **[only for offenses committed on or after 7/1/09: or a broken bone of a child who is eight (8) [only for offenses committed on or after 7/1/14: twelve (12)] years of age or less].**²¹ ["Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.]²²

"Vehicle" means any motorized vehicle that is self-propelled and designed for use on public highways to transport people or property.²³

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense. ²⁴

[This defense is not available to the defendant if the victim was an innocent third person who was recklessly injured or recklessly killed by the defendant's use of force. "Recklessly" has been previously defined in these instructions.]²⁵

To convict the defendant, the state must prove beyond a reasonable doubt that the defendant did not act in self-defense. If from all the facts and circumstances you find the defendant acted in self-defense, or if you have a reasonable doubt as to whether the defendant acted in self-defense, you must find *[him] [her]* not guilty.²⁶

COMMENTS

1. There may be a question as to the availability of the new self-defense statute for offenses committed prior to the date of its enactment. Tennessee courts have not addressed the question of whether or not an amendment to a statutory defense should be treated as substantive or procedural. Our Supreme Court has determined that

[a]n ex post facto violation under article I, section 11 of the Tennessee Constitution occurs whenever a law (1) provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent, (2) aggravates a crime or makes it greater than when it was committed, (3) changes punishment or inflicts a greater punishment than the law annexed to the crime when it was committed, (4) changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the offense in order to convict the offender, and (5) in relation to the offense or its consequences, alters the situation of a person to his disadvantage.

State v. Odom, 137 S.W.3d 572, 582 (Tenn. 2004) (quotation marks and citations omitted). As the new self-defense statute does none of these things, is therefore not an *ex post facto* violation, and would benefit the defendant in many scenarios, a defendant may request that this defense be charged for offenses committed prior to its enactment. However, in *State v. Brimmer*, 876 S.W.2d 75 (Tenn. 1994), our Supreme Court held that even though a substantive change in the law was of substantial benefit to the defendant (increasing the burden upon the state to prove aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt), the law in effect at the time of the offense should be charged. The court relied on T.C.A. § 39-11-112, which states that

[w]hen a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense [unless providing for a lesser penalty].

It is therefore the opinion of the Committee that unless the new self-defense statute is found to be procedural rather than substantive by the appellate courts, it should not be charged in trials for offenses committed prior to May 22, 2007. Self-defense of a business should not be charged in trials for offenses committed prior to July 1, 2008.

FOOTNOTES

1. See Comment One to this instruction.
2. T.C.A. § 39-11-611(b)(1).
3. T.C.A. § 39-11-611(b)(2).
4. T.C.A. § 39-11-611(e)(2).
5. T.C.A. § 39-11-611(e)(1).
6. T.C.A. § 39-11-611(e)(3).
7. This bracketed paragraph should only be used by the trial judge to show a defendant's right of defense to unlawful forcible entry of a residence, and never that of a victim or other person. See *State v. Belser*, 945 S.W.2d 776, 781-82 (Tenn. Crim. App. 1996).
8. T.C.A. § 39-11-611(c).
9. T.C.A. § 39-11-611(d).
10. T.C.A. § 39-11-611(a)(1).
11. T.C.A. § 39-11-611(a)(3).
12. T.C.A. § 39-14-402(b).
13. T.C.A. § 39-11-106(a)(12).
14. *State v. Fitz*, 19 S.W.3d 213, 215 (Tenn. 2000).
15. *State v. Allen*, 69 S.W.3d 181, 186 (Tenn. 2002).
16. *State v. Allen*, 69 S.W.3d 181, 186 (Tenn. 2002).
17. *Black's Law Dictionary* 676 (5th ed. 1979).
18. T.C.A. § 39-11-106(21).
19. T.C.A. § 39-11-611(a)(4).
20. T.C.A. § 39-11-611(a)(2).
21. T.C.A. § 39-11-106. The trial judge may wish to omit the language regarding a broken bone of a child if not fairly raised in the proof.
22. T.C.A. § 39-11-106(a)(2).
23. T.C.A. § 39-11-611(a)(5).
24. T.C.A. § 39-11-201(a)(3).
25. T.C.A. § 39-11-604
26. T.C.A. § 39-11-203(d).

T.P.I. – CRIM. 42.25(a)

ELECTION OF OFFENSES

(ONLY USE IN GENERIC EVIDENCE CASES)¹

The state has offered proof in its case in chief of more than one act allegedly committed *[by the defendant] [by one for whom the state alleges the defendant is criminally responsible]* which the state alleges constitutes an element of the offense of _____ as charged in Count _____ of the indictment. To ensure a unanimous verdict, the State must prove beyond a reasonable doubt the commission of all of the acts described by the alleged victim *[in that particular count]* as occurring within the time period charged in *[that count of]* the indictment.

Before you can find the defendant guilty, you must unanimously agree that the State has proven beyond a reasonable doubt the commission of all of the acts described by the alleged victim as occurring within the time period charged in *[that count of]* the indictment.²

COMMENTS

1. The evidence in *State v. Jimmy Dale Qualls*, 482 S.W.3d 1 (Tenn. 2016) was termed “generic” in that it was non-specific as to time, specific details, dates or distinguishing characteristics as to individual incidents of sexual battery. In *Qualls*, “the victims described with clarity the type of sexual battery perpetrated on them but failed to identify specifically when each alleged act occurred. Instead, the victims here described a pattern of abuse that occurred over an extended period of time. One of the victims testified that the act of sexual battery occurred once a week. Both victims testified that the abuse occurred regularly and happened at least once during the time periods charged in each count of the indictment.” *Id* at 11-12.

FOOTNOTES

1. See Comment One.

2. This instruction was developed from the language in *State v. Jimmy Dale Qualls*, 482 S.W.3d 1, 16 (Tenn. 2016).

T.P.I. – CRIM. 42.28

USE OF A FACILITY DOG

The law allows either the prosecution or the defense to use a facility dog during the testimony of witnesses. This dog is not a pet, does not belong to any witness, and is a highly trained professional animal, available for use by either side. The presence of a facility dog is in no way to be interpreted as reflecting upon the credibility of any witness. You may not draw any inference, either favorably or negatively, for or against either the prosecution or the defense because of the dog's presence, and should attach no significance to the use of a facility dog by any side or witness. You also may not allow any sympathy or prejudice to enter into your consideration of the evidence during deliberations merely because of the use of a facility dog.

COMMENTS

1. In *State v. Jose Reyes*, No. M2015-00504-CCA-R3-CD, 2016 WL 3090904 (Tenn. Crim. App. May 24, 2016), the trial court approved the use of a professionally trained facility dog after taking testimony about the need for the dog by that victim. The dog laid still at the child victim's feet while he was on the witness stand throughout his testimony, including prior to the jury's being brought in and until after they left the courtroom. In *Reyes*, the Court held that while "the cases involving the use of a facility dog during a trial are not plentiful, it is clear that the evolving law permits their use." *Id.* at *6. They also observed that "the trial court also determined that the presence of [the facility dog] during the young victim's testimony would ease his being able to testify and that [the dog] would be handled in such a way as to make his presence as unobtrusive as possible and, further, the trial court instructed the jury that no inferences should be made, nor sympathy result from the presence of the facility dog. Accordingly, we cannot conclude that the trial court abused its discretion in permitting the use of the [dog] during the trial." *Id.* at *7. The above suggested instruction was drawn from language used in *Reyes* and from cases from other states cited in that opinion.