

In the Supreme Court of the State of Idaho

IN RE: CRIMINAL JURY
INSTRUCTIONS

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ORDER

The Idaho Supreme Court, having reviewed recommendations of the Idaho Criminal Jury Instructions Committee, and having reviewed revisions of the Idaho Criminal Jury Instructions based upon those recommendations,

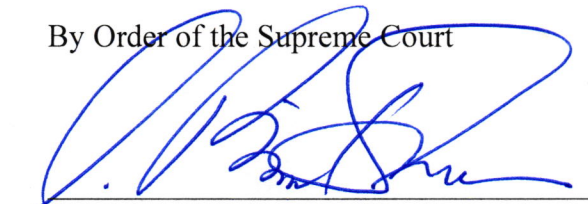
NOW, THEREFORE, IT IS ORDERED that the Court accepts revisions to Idaho Criminal Jury Instructions 405 (Manufacturing of a Controlled Substance), 406C (Trafficking in Methamphetamine and/or Amphetamine by Manufacturing), 409 (Delivery or Manufacture of Drug Paraphernalia), 413 (Creating a Counterfeit Controlled Substance), 417 (Manufacturing a Simulated Controlled Substance), 542A (Grand Theft), 542B (Petit Theft), 547 (Theft by Possession), 571 (Definition of "Owner"), 702 (Definition of "Malice"), 1030 (Reckless Driving), and 1031 (Inattentive Driving), redline copies of which are attached hereto, and approves the adoption of a new criminal jury instruction for Driving with an Open Container of Alcohol, to be designated as ICJI 1011. The Court also orders that formatting and citation corrections be made to certain Idaho Criminal Jury Instructions as reflected in the chart attached hereto as Appendix A. The revised and new Idaho Criminal Jury Instructions shall be disseminated for general use by the trial bench and bar in Idaho, to be effective immediately. It is recommended that whenever these revised Idaho Criminal Jury Instructions contain an instruction applicable to a case and the trial judge determines that the jury should be instructed on that subject, the judge should use the instruction contained in the revised Idaho Criminal Jury

Instructions, unless the judge finds that a different instruction would more adequately, accurately or clearly state the law.

IT IS FURTHER ORDERED that notice of this Order shall be published for three consecutive weeks on the Idaho State Bar's website and in its weekly e-Bulletin, and that, as soon as practicable, a summary of the amendments effected by this Order shall be published in one issue of *The Advocate*.

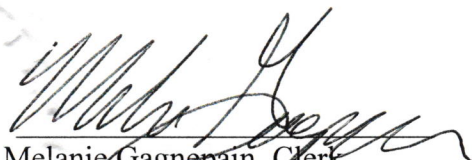
DATED this 21st day of April, 2023.

By Order of the Supreme Court



G. Richard Bevan, Chief Justice

ATTEST:



Melanie Gagnepain, Clerk

ICJI 405 (Manufacturing a Controlled Substance)

In order for the defendant to be guilty of Manufacturing a Controlled Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] manufactured [name of substance], and
4. the defendant either knew it was [name of substance] or believed it was a controlled substance.

If any of the above has not been proved beyond a reasonable doubt, must find the defendant not guilty. If each of the above has been proved beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37–2732(a). If the defendant is charged with "second offense" drug manufacturing, IC § 37–2739, that issue should be presented in a bifurcated proceeding.

[See ICJI 426 for the definition of “manufacture.”](#)

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that IC § 37–2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and IC § 18–114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

It was error for the verdict form, in combination with jury instruction for manufacturing, to fail to require a finding by the jury that the manufacturing was done knowingly. *State v. Palmer*, 138 Idaho 931, 71 P.3d 439 (Ct. App. 2003).

ICJI 406C (Trafficking in Methamphetamine and/or Amphetamine by Manufacturing)

In order for the defendant to be guilty of Trafficking in [methamphetamine] [or] [amphetamine] by manufacturing, the state must prove:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [manufactured] [or] [attempted to manufacture] [methamphetamine] [and/or] [amphetamine], and
4. the defendant knew it was [methamphetamine] [and/or] [amphetamine].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732B(a)(3).

If the defendant is charged with "second offense" drug trafficking, IC § 37-2732B(a)(7), that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

[See ICJI 426 for the definition of “manufacture.”](#)

It was error for the verdict form, in combination with jury instruction for manufacturing, to fail to require a finding by the jury that the manufacturing was done knowingly. State v. Palmer, 138 Idaho 931, 71 P.3d 439 (Ct. App. 2003).

ICJI 409 (Delivery or Manufacture of Drug Paraphernalia)

In order for the defendant to be guilty of [Delivery] [or] [Possession With Intent to Deliver] [or] [Manufacturing With Intent to Deliver] Drug Paraphernalia, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [delivered] [or] [possessed with intent to deliver] [or] [manufactured with intent to deliver] [insert description of paraphernalia]

4. with the intent that the [insert description of paraphernalia] would be used to [plant] [propagate] [cultivate] [grow] [harvest] [manufacture] [compound] [convert] [produce] [process] [prepare] [test] [analyze] [pack] [repack] [store] [contain] [conceal] [inject] [ingest] [inhale] [introduce into a human body] a controlled substance; and

5. the defendant did so knowing, or under circumstances where the defendant reasonably should know, that it would be used to [insert description of use of paraphernalia] a controlled substance.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2734(~~B~~)B. Under the statute, the paraphernalia must be intended to be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body.

The statute does not contain a specific intent element. The committee concluded, based upon *State v. Newman*, 108 Idaho 5, 15, 696 P.2d 856, 866 (1985), holding modified by *State v. Bitt*, 118 Idaho 584, 798 P.2d 43 (1990), the mental element set forth in element four should be included.

For the definition of “drug paraphernalia,” see ICJI 427.

ICJI 413 (Creating a Counterfeit Controlled Substance)

In order for the defendant to be guilty of Creating a Counterfeit Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] created a counterfeit substance

4. knowing the substance was counterfeit.

If any of the above has not been proved beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proved beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(b). See ICJI 424 for the definition of counterfeit substance. If the defendant is charged with "second offense," IC § 37-2739, that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

~~In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that IC § 37-2732(e) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and IC § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.~~

The statute does not contain a mental element. The committee concluded, based upon *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997), a mental element as set forth in element three should be included.

ICJI 417 (Distribution of a Simulated Controlled Substance)

In order for the defendant to be guilty of Manufacturing a Simulated Controlled Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] manufactured a simulated controlled substance, and
4. the defendant intended to manufacture a simulated controlled substance.

If any of the above has not been proved beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proved beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(g). If the defendant is charged with "second offense" drug manufacturing, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding as provided in ICJI 1601.

See ICJI 425 for the definition of a simulated controlled substance.

[See ICJI 426 for the definition of “manufacture.”](#)

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

ICJI 542A (Grand Theft)

In order for the defendant to be guilty of Grand Theft, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] wrongfully [took] ~~[detained]~~ [obtained] [or] [withheld] property [described as: (description of property)],
4. from an owner,
5. with the intent to deprive an owner of the property or to appropriate the property, and
6. [the property exceeded one thousand dollars (\$1000) in value]

(Numerous other alternative enhancing factual findings omitted)

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty of Grand Theft. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty of Grand Theft.

Comment

I.C. § 18-2407

Effective July 1, 1999, the value of property necessary to constitute grand theft was increased from \$300 to \$1,000.

See I.C. § 18-312~~3~~2(6) for the definition of a “financial transaction card.”

If, pursuant to I.C. § 18-2407(1)(b)(8), several thefts are charged in one count as being part of a common scheme or plan with the aggregate value of the property stolen exceeding \$1,000, use ICJI 554.

~~Using ICJI 540 and ICJI 542 is intended to eliminate the need of instructing that Petit Theft is an included offense of Grand Theft.~~

ICJI 542B (Petit Theft)

In order for the defendant to be guilty of Petit Theft, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] wrongfully [took] ~~[detained]~~ [obtained] [withheld] ~~[deliberately killed]~~ property [described as: (description of property)],
4. from an owner, ~~and~~
5. ~~the defendant [took] [detained] [withheld] the property~~ with the intent to deprive an owner of the property or to appropriate the property.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty of Petit Theft. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty of Petit Theft.

Comment

I.C. § 18-2407.

Effective July 1, 1999, the value of property necessary to constitute grand theft was increased from \$300 to \$1,000.

See I.C. § 18-312~~3~~2(6) for the definition of a “financial transaction card.”

If, pursuant to I.C. § 18-2407(1)(b)(8), several thefts are charged in one count as being part of a common scheme or plan with the aggregate value of the property stolen exceeding \$1,000, use ICJI 554.

~~Using ICJI 540 and ICJI 542 is intended to eliminate the need of instructing that Petit Theft is an included offense of Grand Theft.~~

ICJI 547 (Theft by Possession)

In order for the Defendant to be guilty of Theft by Possession of Stolen Property, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] knowingly [received] [retained] [concealed] [obtained control over] [possessed] [disposed of] [describe property],
4. either knowing the property was stolen ~~by another~~ or under such circumstances as would reasonably induce the defendant to believe the property was stolen,
5. such property was in fact stolen, and
6. any of the following occurred:
 - (a) the defendant had the intent to deprive the owner permanently of the use or benefit of the property, or
 - (b) the defendant knowingly used, concealed or abandoned the property in such manner as to deprive the owner permanently of the use or benefit of the property, or
 - (c) the defendant used, concealed, or abandoned the property knowing that such use, concealment or abandonment would have probably deprived the owner permanently of the use or benefit of the property.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Property is stolen when a person wrongfully takes, obtains, or withholds it from the owner with the intent to deprive the owner of the property or to appropriate it to any person other than the owner.

Comment

I.C. § 18-2403(4)

See State v. Weeks, 160 Idaho 195, 370 P.3d 398 (Ct. App. 2016) (recognizing statutory change eliminating “by another” from I.C. §18-2403(4)); State v. Mitchell, No. 46969, 2020 WL 5372307 (Idaho Ct. App. Sept. 9, 2020) (unpublished) (same).

Proposed Revised ICJI 571 (Definition of “Owner”)

An ‘owner’ of property is any person who has a right to possession of such property superior to that of the defendant. ["Owner" includes any person who physically delivers or transfers goods or property to a purchaser through an agreement or contract in which the purchaser has entered into fraudulently by having no intention to pay any amount for the goods or property.]

Comment

I.C. § 18-2402(6)

The bracketed language may be included in cases involving Theft by False Promise (ICJI 544). For the purposes of this chapter and regardless of any contrary provisions of chapter 2, title 28, Idaho Code, an owner retains a superior right to possession of such goods or property over the fraudulent purchaser.

ICJI 702 (Definition of “Malice”)

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of time. It only means that the malice must precede rather than follow the act.

Comment

I.C. § 18-4002.

Do not use this instruction if the only murder charge is felony murder or murder by the intentional application of torture because these crimes do not require proof of malice aforethought. Idaho Code § 18-4001; *State v. Pratt*, 125 Idaho 594, 873 P.2d 848 (1994); *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989).

There is no legal distinction between malice and malice aforethought. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

When the charge is attempted second degree murder, this instruction must be amended to delete any reference to implied malice. The intent to kill is required for attempted second degree murder. *State v. Buckley*, 131 Idaho 164, 953 P.2d 604 (1998).

[“The general malice definition found under I.C. § 18-101 does not properly describe the ‘malice’ required for murder.” See *State v. McDermott*, 169 Idaho 892, 505 P.3d 678, 684 \(2022\).](#)

ICJI 1030 (Reckless Driving)

In order for the defendant to be guilty of Reckless Driving, the state must prove each of the following:

1. On or about [date],
2. in the state of Idaho,
3. the defendant [name] drove or was in actual physical control of a vehicle
4. upon a highway, or upon public or private property open to the public, and
5. [the defendant drove the vehicle carelessly ~~or~~ and heedlessly or without due caution and circumspection and at a speed or in a manner as to endanger or be likely to endanger any person or property] [or] [the defendant passed when there was a line in [his] [her] lane indicating a sight distance restriction].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 49-1401(1).

If the defendant is charged with "second offense" reckless driving, I.C. § 49-1401(2), that issue should be presented in a bifurcated proceeding as provided in ICJI 1601 (with appropriate modifications).

ICJI 1031 (Inattentive Driving)

In order for the defendant to be guilty of Inattentive Driving, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] drove or was in actual physical control of a vehicle
4. upon a highway, or upon public or private property open to the public, and
5. the defendant drove the vehicle in an inattentive, careless or imprudent manner, in light of the circumstances then existing, ~~rather than heedless or wanton, or drove in a manner where the danger to persons or property from the defendant's conduct was slight.~~

If any of the above has not been proved beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proved beyond a reasonable doubt, then you must find the defendant guilty.

Comment

If the jury is instructed on inattentive driving as a lesser included offense of reckless driving, element 5 should read:

the defendant drove the vehicle in an inattentive, careless or imprudent manner, in light of the circumstances then existing, rather than heedless or wanton, or drove in a manner where the danger to persons or property from the defendant's conduct was slight.

New Instruction: ICJI 1011 (Driving with an Open Container of Alcohol)

In order for the defendant to be guilty of Driving with an Open Container of Alcohol the state must prove each of the following:

1. On or about [date]
2. in the State of Idaho
3. the defendant, [name]
4. was in actual physical control of a motor vehicle
5. upon a public highway or the right-of-way of a public highway
6. while in possession of an open beverage containing alcoholic liquor, beer, or wine

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 23-505

See ICJI 1003 for definition of “actual physical control”

APPENDIX A

Formatting and Citation Corrections

<u>ICJI #</u>	<u>Revision(s)</u>
403 (Possession of a Controlled Substance)	The statutory citation in the comments section shall reference I.C. § 37-2732(c), not I.C. § 37-2732(a).
416 (Distribution of a Simulated Controlled Substance)	An opening bracket is added to element four.
423 (Marijuana Defined)	Addition of a notation to the comments indicating the definition is inapplicable to felony possession of marijuana. The statutory citation in the comments section should reference I.C. § 37-2701(u), not I.C. § 37-2701(s).
425 (Simulated Controlled Substance Defined)	The statutory citation in the comments section should reference I.C. § 37-2701(ff), not I.C. § 37-2701(bb).
426 (Manufacture Defined)	The statutory citation in the comments section should reference I.C. § 37-2701(t), not I.C. § 37-2701(r).
427 (Paraphernalia Defined)	The statutory citation in the comments section should reference I.C. § 37-2701(o), not I.C. § 37-2701(n).