

**MEMORANDUM OF LAW REGARDING
REQUIREMENT OF UNANIMITY**
(in Jury Instructions)

From a recent appellate brief (2020)

Takeaway:

Your jury must be unanimous as to all ELEMENTS
(including the specific actus reas in sexual offense cases)

The “principle that jury verdicts must be unanimous” is a “fundamental tenet of criminal law” and one protected by the Utah Constitution. *State v. Saunders*, 1999 UT 59, ¶59, 992 P.2d 951 (plurality); Utah Const. art. I, § 10. Not only does the Unanimous Verdict Clause require “unanimity as to each count of each distinct crime charged by the prosecution and submitted to the jury for decision,” but the jury must “be unanimous on all elements of a criminal charge for [a] conviction to stand.” *State v. Hummel*, 2017 UT 19, ¶¶26,29, 393 P.3d 314. *Also Case*, 2020 UT App 81, ¶21 (where more than one distinct act has been committed but defendant charged with only one count, jury must be unanimous as to which act or incident constitutes charged crime).

With regard to sex offenses, a defendant can be charged and convicted of separate and independent crimes based upon each “act” (or touch) or taking of indecent liberty. *E.g.*, *State v. Hattrich*, 2013 UT App 177, ¶35, 317 P.3d 433; *State v. Suarez*, 736 P.2d 1040, 1042 (Utah Ct. App. 1987). It becomes a violation of the unanimity guarantee, however, if the jury is allowed to potentially “return[] a guilty verdict with each juror deciding guilt on the basis of a different *act* by defendant.” *Saunders*, 1999 UT 59, ¶62 (emphasis added). That is what occurred here.

- *With regard to the Object Rape Counts (Counts 1-2,4-5)*

Instruction 30 set forth the elements of the Counts 1 and 2 charges of Object Rape with regard to KD, and Instruction 31 sets forth the elements of the Counts 4 and 5 charges of Object Rape with regard to CJ. R647-48. Because the jury was not instructed or otherwise advised which specific act of penetration of the genital opening (of which there were approximately 28 between the two women), and/or which specific act of penetration of the anal opening (of which there were approximately 18 between the two women), was meant to be “the act” of object rape at issue in each count, *see* nn.4,8, *supra*, and further, because the jury was never told they were required to be unanimous as to the specific act for each count, the jury was not required to be unanimous in violation of the Utah Constitution.

Specificity as to the act is necessary to the counts involving KD because she testified that although, at some point, she felt the measurements were “no longer” for research, she specifically chose to continue. TR1007-08. Thus, it is essential to know what act is at issue in order to determine whether it occurred before or after the point KD admittedly chose to continue.

Specificity is also important with regard to CJ for two reasons. First, she actually left the room at one point and chose to return. So, identification of the specific act is crucial to determine whether the jury found any of the plausible 8 acts of penetration that occurred after CJ voluntarily returned were or were not consensual. *See* n.4, *supra*. Also, the jury acquitted Mottaghan of Object Rape on the counts involving CJ, instead finding the lesser charge of misdemeanor Sexual Battery. R669. So with regard to CJ in

particular, it cannot be ascertained which 2 of a plausible 24+ touches the jury actually found to constitute the misdemeanor crime; nor can we be assured that the jury was unanimous as to which two acts those were.

- *With regard to the Forcible Sex Abuse Counts (Counts 3 and 6)*

Instruction 33 sets forth the elements of the Count 3 charge of Forcible Sex Abuse with regard to KD, and Instruction 34 does the same with regard to Count 6 involving CJ. R650-51. As before, the instructions simply recite the same statutory language but never tell jurors which specific touch to the enumerated anatomy or which specific mechanism of taking indecent liberties is at issue in each count. This lack of specificity is especially confusing since the prosecutor argued that *penetrative touches* to the named anatomy could suffice for the basis of these counts (touches and penetrations amounting to more than 25 for CJ and more than 30 for KD). *See* nn.4,8, *supra*. Again, specificity as to the act is critical with regard to CJ for the reasons detailed above, and likewise as to KD, where both made a conscious choice to continue. Consequently, the verdicts on Counts 3 and 6 are invalid because, again, the jury was not required to render a unanimous decision as to the specific act at issue.

- *With regard to Attempted Object Rape (Counts 7 and 8)*

The problem here is that there was no actual touching or penetration that occurred, and as set forth below, no substantial step to penetrate. From the documentation, and assuming the measurement procedure would have been the same, at least 16 measurements were recorded, amounting to at least 16 “acts”. StateExs37-38. Thus, it is unknown which two acts served as the basis of the “attempted” offenses, or said

differently, for which two acts did Mottaghian make a substantial step to take along with the requisite sexual intent?

In sum, when the State failed to elect which act supported each count, the jury was required to be instructed to agree on a specific act or else acquit. *E.g.*, *Alires*, 2019 UT App 206, ¶22; *Case*, 2020 UT App 81, ¶23. This did not occur in any manner. *C.f.*, *State v. Gollaher*, 2020 UT App 131, ¶34, ___ P.3d. ___ (though no proper instruction, jury received additional sufficient guidance from trial court). Because this verdict “does not differentiate among various charges”, it fails. *Hummel*, 2017 UT 19, ¶26.