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SCMF-11-0000315

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Publication and Distribution
of the
Hawai'i Pattern Jury Instructions - Criminal

ORDER APPROVING PUBLICATION AND DISTRIBUTION
OF HAWAI'I PATTERN JURY INSTRUCTIONS - CRIMINAL
(By: Recktenwald, C.J., Nakayama, Acoba, and McKenna, JJ., and
Intermediate Court of Appeals Chief Judge Nakamura,
in place of Pollack, J., unavailable)

Upon consideration of the request of the Standing
Committee on Pattern Criminal Jury Instructions to publish and
distribute the (1) addition of Criminal Instructions 11.07A and
11.07B, and (2) revision of Criminal Instruction 11.07 of the
Hawai'i Pattern Jury Instructions - Criminal,

IT IS HEREBY ORDERED that the request is granted and
the attached criminal jury instructions 11.07, 11.07A, and 11.07B
are approved for publication and distribution.

IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval or judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, September 20, 2012.

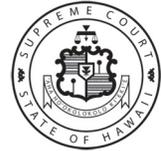
/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Craig H. Nakamura



~~**[11.07. Abuse of Family or Household Members--Third Offense
Within Two Years: H.R.S. § 709-906(7)]**~~

~~_____ [In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Abuse of Family or Household Members:~~

~~_____ A person commits the offense of Abuse of Family or Household Members if he/she intentionally, knowingly, or recklessly physically abuses a family or household member, within two years of a second or subsequent conviction:~~

~~_____ There are four material elements of the offense of Abuse of Family or Household Members, each of which the prosecution must prove beyond a reasonable doubt.~~

~~_____ These four elements are:~~

~~_____ 1. That, on or about (date) in the [City and] County of (name of county), the Defendant physically abused (name of complainant); and~~

~~_____ 2. That, at that time, the Defendant and (name of complainant) were family or household members; and~~

~~_____ 3. That the Defendant had been previously convicted of a second or subsequent offense of Abuse of Family or Household Members within two years of (date of incident); and~~

~~_____ 4. That the Defendant acted intentionally, knowingly, or recklessly as to each of the foregoing elements:~~

~~_____ "Family or household member" means spouses or reciprocal beneficiaries,* former spouses or reciprocal beneficiaries,* persons who have a child in common,** parents, children, persons related by consanguinity,** and persons jointly residing or formerly residing in the same dwelling unit.~~

Notes

~~_____ H.R.S. §§ 709-906 (1) & (7), 702-206(1), (2) and (3).~~

~~_____ For definition of states of mind, see instructions:~~

~~_____ 6.02 – "intentionally"~~

6.03 – “knowingly”

6.04 – “recklessly”

For definition of “reciprocal beneficiaries,” see H.R.S. § 572C-3.

For degrees of consanguinity within which marriage is prohibited, see H.R.S. § 572-1.

* Effective 7/1/97--Act 383, Hawai'i Session Laws 1997

** Effective 7/15/98--Act 172, Hawai'i Session Laws 1998]

11.07. Abuse of Family or Household Members – Stipulation as to Prior Conviction Element and Limiting Instruction: H.R.S. § 709-906(7)

One of the elements of the offense of Abuse of Family or Household Members requires the prosecution to prove beyond a reasonable doubt that, on (insert date of charged offense) the Defendant (defendant’s name) had two or more prior misdemeanor convictions, the last of which occurred within two years of that date. This element is referred to as the “prior conviction element” of the offense.

The defense and the prosecution have stipulated to this element, which means that both sides agree that the Defendant had two or more prior misdemeanor convictions, the last of which occurred within two years of (insert date of charged offense). Based on this stipulation, you must accept as proven beyond a reasonable doubt the “prior conviction element.” You must not consider the stipulation for any other purpose. You must not speculate as to the nature of the prior convictions.

Notes

The court should consider giving this instruction immediately after the stipulation is read to the jury. During the court’s complete instructions to the jury at the close of the case, the court should consider giving either this instruction or 4.01 (“Several times during the trial I told you that certain evidence was allowed into this trial for a particular and limited purpose. When you consider that evidence, you must limit your consideration to that purpose.”).

See *State v. Murray*, 116 Hawai'i 3, 169 P.3d 955 (2007) (“failure to allow the defendant to use the stipulation procedure would not be considered harmless error”). Under *Murray*, if the defense requests the stipulation procedure: (1) the defendant

should be allowed to stipulate to the fact of the required prior convictions; (2) the stipulation may be accepted only after engaging the defendant in an on-the-record colloquy to ensure a knowing and voluntary waiver of his/her right to have the “prior conviction element” proved beyond a reasonable doubt and decided by a jury; (3) the jury should be instructed that the defendant has stipulated to this particular element of the charged offense to make it plain that this element is considered proven beyond a reasonable doubt; (4) the instruction must be carefully crafted to omit any reference to the “name or nature” of the previous convictions; (5) the instruction should ensure that the prior convictions are not considered by the jury for any purpose other than conclusively establishing the “prior convictions element;” and (6) the court must preclude any mention of the name or nature of the prior convictions at any point during the trial, i.e., jury selection, opening statements, presentation of evidence, closing arguments, or instructions.

11.07. Abuse of Family or Household Members – Stipulation as to Prior Conviction Element and Limiting Instruction: H.R.S. § 709-906(7)

One of the elements of the offense of Abuse of Family or Household Members requires the prosecution to prove beyond a reasonable doubt that, on (insert date of charged offense) the Defendant (defendant's name) had two or more prior misdemeanor convictions, the last of which occurred within two years of that date. This element is referred to as the “prior conviction element” of the offense.

The defense and the prosecution have stipulated to this element, which means that both sides agree that the Defendant had two or more prior misdemeanor convictions, the last of which occurred within two years of (insert date of charged offense). Based on this stipulation, you must accept as proven beyond a reasonable doubt the “prior conviction element.” You must not consider the stipulation for any other purpose. You must not speculate as to the nature of the prior convictions.

Notes

The court should consider giving this instruction immediately after the stipulation is read to the jury. During the court's complete instructions to the jury at the close of the case, the court should consider giving either this instruction or 4.01 (“Several times during the trial I told you that certain evidence was allowed into this trial for a particular and limited purpose. When you consider that evidence, you must limit your consideration to that purpose.”).

See *State v. Murray*, 116 Hawai'i 3, 169 P.3d 955 (2007) (“failure to allow the defendant to use the stipulation procedure would not be considered harmless error”). Under *Murray*, if the defense requests the stipulation procedure: (1) the defendant should be allowed to stipulate to the fact of the required prior convictions; (2) the stipulation may be accepted only after engaging the defendant in an on-the-record colloquy to ensure a knowing and voluntary waiver of his/her right to have the “prior conviction element” proved beyond a reasonable doubt and decided by a jury; (3) the jury should be instructed that the defendant has stipulated to this particular element of the charged offense to make it plain that this element is considered proven beyond a reasonable doubt; (4) the instruction must be carefully crafted to omit any reference to the “name or nature” of the previous convictions; (5) the instruction should ensure that the prior convictions are not considered by the jury for any purpose other than conclusively establishing the “prior convictions element;” and (6) the court must preclude any mention of the name or nature of the prior convictions at any point during the trial, *i.e.*, jury selection, opening statements, presentation of evidence, closing arguments, or instructions.

**11.07A. Abuse of Family or Household Members – Stipulation as to Third Offense
Within Two Years: H.R.S. § 709-906(7)**

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Abuse of Family or Household Members.

A person commits the offense of Abuse of Family or Household Members if he/she intentionally, knowingly, or recklessly physically abuses a family or household member, and the Defendant had previously been convicted two or more times of misdemeanor offenses, the last of which occurred within two years of the date of the charged offense.

There are four material elements of the offense of Abuse of Family or Household Members, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant physically abused (name of complainant); and

2. That, at that time, the Defendant and (name of complainant) were family or household members; and

3. That, at that time, the Defendant had two or more misdemeanor convictions, the last of which occurred within two years of (specify date); and

4. That the Defendant acted intentionally, knowingly, or recklessly as to each of the foregoing elements.

“Family or household member” means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

“Physically abuse” means to engage in conduct that injures, hurts, or damages a person’s body.

Notes

H.R.S. §§ 709-906 (1) & (7), 702-206(1), (2) and (3).

For definition of states of mind, see instructions:

6.02 – “intentionally”

6.03 – “knowingly”

6.04 – “recklessly”

For definition of “reciprocal beneficiaries,” see H.R.S. § 572C-3.

For degrees of consanguinity within which marriage is prohibited, see H.R.S. § 572-1.

**11.07A. Abuse of Family or Household Members – Stipulation as to Third Offense
Within Two Years: H.R.S. § 709-906(7)**

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Abuse of Family or Household Members.

A person commits the offense of Abuse of Family or Household Members if he/she intentionally, knowingly, or recklessly physically abuses a family or household member, and the Defendant had previously been convicted two or more times of misdemeanor offenses, the last of which occurred within two years of the date of the charged offense.

There are four material elements of the offense of Abuse of Family or Household Members, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant physically abused (name of complainant); and

2. That, at that time, the Defendant and (name of complainant) were family or household members; and

3. That, at that time, the Defendant had two or more misdemeanor convictions, the last of which occurred within two years of (specify date); and

4. That the Defendant acted intentionally, knowingly, or recklessly as to each of the foregoing elements.

“Family or household member” means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

“Physically abuse” means to engage in conduct that injures, hurts, or damages a person’s body.

Notes

H.R.S. §§ 709-906 (1) & (7), 702-206(1), (2) and (3).

For definition of states of mind, see instructions:

6.02 – “intentionally”

6.03 – “knowingly”

6.04 – “recklessly”

For definition of “reciprocal beneficiaries,” see H.R.S. § 572C-3.

For degrees of consanguinity within which marriage is prohibited, see H.R.S. § 572-1.

11.07B. Abuse of Family or Household Members – Third Offense Within Two Years: H.R.S. § 709-906(7)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Abuse of Family or Household Members.

A person commits the offense of Abuse of Family or Household Members if he/she intentionally, knowingly, or recklessly physically abuses a family or household member, within two years of a second or subsequent conviction.

There are four material elements of the offense of Abuse of Family or Household Members, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant physically abused (name of complainant); and

2. That, at that time, the Defendant and (name of complainant) were family or household members; and

3. That the Defendant had been previously convicted of a second or subsequent offense of Abuse of Family or Household Members within two years of (date of incident); and

4. That the Defendant acted intentionally, knowingly, or recklessly as to each of the foregoing elements.

“Family or household member” means spouses or reciprocal beneficiaries, *former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

“Physically abuse” means to engage in conduct that injures, hurts, or damages a person’s body.

Notes

H.R.S. §§ 709-906 (1) & (7), 702-206(1), (2) and (3).

For definition of states of mind, see instructions:

6.02 – “intentionally”

6.03 – “knowingly”

6.04 – “recklessly”

For definition of “reciprocal beneficiaries,” see H.R.S. § 572C-3.

For degrees of consanguinity within which marriage is prohibited, see H.R.S. § 572-1.

11.07B. Abuse of Family or Household Members – Third Offense Within Two Years: H.R.S. § 709-906(7)

[In Count (count number) of the Indictment/Complaint, the] [The] Defendant, (defendant's name), is charged with the offense of Abuse of Family or Household Members.

A person commits the offense of Abuse of Family or Household Members if he/she intentionally, knowingly, or recklessly physically abuses a family or household member, within two years of a second or subsequent conviction.

There are four material elements of the offense of Abuse of Family or Household Members, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That, on or about (date) in the [City and] County of (name of county), the Defendant physically abused (name of complainant); and

2. That, at that time, the Defendant and (name of complainant) were family or household members; and

3. That the Defendant had been previously convicted of a second or subsequent offense of Abuse of Family or Household Members within two years of (date of incident); and

4. That the Defendant acted intentionally, knowingly, or recklessly as to each of the foregoing elements.

“Family or household member” means spouses or reciprocal beneficiaries, *former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

“Physically abuse” means to engage in conduct that injures, hurts, or damages a person’s body.

Notes

H.R.S. §§ 709-906 (1) & (7), 702-206(1), (2) and (3).

For definition of states of mind, see instructions:

6.02 – “intentionally”

6.03 – “knowingly”

6.04 – “recklessly”

For definition of “reciprocal beneficiaries,” see H.R.S. § 572C-3.

For degrees of consanguinity within which marriage is prohibited, see H.R.S. § 572-1.