Mental Elements

The following instructions explain the various mental elements that may be included in the explanation of a particular crime.

CR06-001. Circumstantial evidence of intent or mental state (06/23/08). This instruction guides the jury regarding the use of circumstantial evidence to determine the defendant's mental state. The committee recently shortened it from three sentences to two. The change was made in the interest of brevity, and not because of any perceived error.

Nevertheless, the change eliminated a sentence that the Supreme Court has criticized in State v. Brunelle, 2008 VT 87, 184 Vt. 589 (mem.). The sentence in question states: "A person ordinarily intends the natural and probable consequences of his or her voluntary acts, knowingly done." Although this is a permissible inference that the jury may draw, the Court suggested that it "may have been plain error" for the judge to give the instruction. Id. at ¶ 18. In the past, the Court has held that it is error to instruct this inference as a presumption, as in: "A person is presumed to intend the natural and probable consequences of his acts." State v. Martell, 143 Vt. 275, 278 (1983) (citing Sandstrom v. Montana, 442 U.S. 510, 518-19 (1979)); accord State v. Myers, 2011 VT 43. The Brunelle decision indicates that the court should be wary of suggesting the inference. In light of Brunelle and Myers, the committee has eliminated the questionable sentence from all of its instructions.

For a recent example of an instruction explaining circumstantial evidence in the context of determining the defendant's intent or mental state, *see* State v. Dow, 2016 VT 91, ¶ 11, 202 Vt. 616.

CR06-011. Specific Intent (12/08/03). In most cases, the jury instruction will state the specific intent that must be proven, but it is not necessary to refer to the mental state as a "specific intent." *See, e.g.*, State v. Dow, 2016 VT 91, ¶¶ 11–14, 202 Vt. 616. When this project began, the committee used modules to refer to instructions within this chapter, but as the project has evolved, the trend is to spell out the intent to be proven within each separate instruction. See also the bottom of this page for additional notes on the concept known as "general intent."

CR06-111. "Intentionally" (02/12/07). The Supreme Court has clarified that acting "intentionally" means to act "purposely" or with a specific "conscious object." State v. Jackowski, 2006 VT 119, 181 Vt. 73. A charge that the defendant acted "intentionally" is not shown by "knowing" conduct, i.e. where the defendant was "practically certain" to cause a specific result. The committee has reviewed its instructions on "intentional" conduct, to ensure consistency with the holding of Jackowski.

The model instruction for "intentionally," CR06-111, includes a space for stating the specific harm that is alleged to have been caused. At some point the instruction must identify the intent that must have been proven. The committee notes that not every case

includes an allegation of harm to a victim. For some crimes, the allegation is that the defendant has harmed society.

CR06-121. "Purposely" (12/08/03). The model instruction for "purposely," CR06-121, is very similar to the instruction for "intentionally," CR06-111. As suggested by State v. Jackowski, 2006 VT 119, 181 Vt. 73, the two words have essentially the same meaning.

CR06-131. "Knowingly" (12/08/03). To act "knowingly" means to engage in conduct that will cause, or that will be practically certain to cause, a specific harmful result. As the Supreme Court explained State v. Jackowski, 2006 VT 119, 181 Vt. 73, this is somewhat different from acting "intentionally" or "purposely."

CR06-141. "Recklessly" (08/28/20). The instruction on recklessness derives from the Model Penal Code, § 2.02(c), as recognized by the Supreme Court in State v. Amsden, 2013 VT 51, ¶ 23, 194 Vt. 128. *See also* State v. Brooks, 163 Vt. 245, 251 (1995); State v. O'Connell, 149 Vt. 114, 115 n. 1 (1987); State v. Hoadley, 147 Vt. 49, 55 (1986). Note that a prior version of CR06-141 included an additional sentence that is not part of the MPC definition: "You may find that (Def)_____ acted recklessly if [he] [she] acted without regard to the possible consequences of [his] [her] actions." In 2020, the Committee considered whether that language had any continuing viability given the Supreme Court's express adoption of the MPC definition.

While some trial courts have used that additional language in non-homicide cases, it has not been directly addressed or approved by the Supreme Court outside of the homicide context. *See, e.g.*, State v. Carter, 2017 VT 32, ¶ 11, 204 Vt. 383 (quoting trial court's definition of recklessly in context of aggravated domestic assault charge—"[a] person acts recklessly if he acts without regard to the possible consequences of his actions"—but not addressing that precise issue); State v. Rollins, No. 2009-482, 2010 WL 7799810, at *3–4 (Vt. Oct. 21, 2010) (unpub. mem.) (describing trial court's domestic assault instruction, which defined recklessly using the "possible consequences" language, as "full, fair, and correct" in rejecting defendant's "theory of the case" argument, but not addressing propriety of "possible consequences" language). Thus, the Committee's current approach to CR06-141 follows Amsden, which expressly endorsed the MPC definition without the additional "possible consequences" language in the context of a disorderly conduct charge. Amsden, 2013 VT 51, ¶ 23. This does not necessarily mean that the prior version of the instruction (using "possible consequences") cannot be given in certain cases, as the Court has never expressly found error with that instruction.

Note that the Court has used the "possible consequences" terminology to describe recklessness in the homicide context. *See, e.g.*, State v. Shabazz, 169 Vt. 448, 455 (1999) ("Whereas the recklessness pertaining to involuntary manslaughter is conduct that disregards the *possible* consequence of death resulting, the wantonness pertaining to voluntary manslaughter is extremely reckless conduct that disregards the *probable* consequence of taking human life.") (emphasis in original).

The Committee's current approach to CR06-141 also eliminates the word "known," which had appeared in a prior version of the instruction ("consciously ignored a *known*, substantial and unjustifiable risk") but which does not appear in the MPC definition. The Committee concluded that the word "known" was superfluous, because the language "consciously ignored" already implies that the risk must be known.

CR06-151. "Wilfully" (06/14/12). Although the mental state of "willfulness" has been given different definitions under different circumstances over time, 1 LaFave, Substantive Criminal Law § 5.1 n.9 (2d ed.), the Vermont Supreme Court has taken the view that willfulness "cannot well mean less than intentionally and by design." In re Appeal of Chase, 2009 VT 94, ¶ 26, 186 Vt. 355; *see also* State v. Bean, 2016 VT 73, ¶¶ 11–12, 202 Vt. 361; State v. Coyle, 2005 VT 58, ¶ 15, 178 Vt. 580 (mem.); State v. Penn, 2003 VT 110, ¶ 9, 176 Vt. 565 (mem.); State v. Parentau, 153 Vt. 123, 125 (1989); State v. Audette, 128 Vt. 374, 379 (1970); Wendell v. Union Mut. Fire Ins. Co., 123 Vt. 294, 297 (1963); State v. Sylvester, 112 Vt. 202, 206 (1941); State v. Williams, 94 Vt. 423, 430 (1920); State v. Burlington Drug Co., 84 Vt. 243 (1911). In 2012, the committee revised all of the definitions of "willfulness" throughout the model instructions to equate willfulness with an intentional act, and to clarify that the mental element of acting "willfully" cannot be met by evidence that the defendant acted "knowingly." *See also* State v. Jackowski, 2006 VT 119, ¶ 7, 181 Vt. 73.

CR06-161. "Criminal Negligence" (12/08/03). For discussions of criminal negligence, see State v. Free, 170 Vt. 605 (2000); State v. Beayon, 158 Vt. 133, 136 (1992); and State v. Stanislaw, 153 Vt. 517, 525 (1990).

Additional Notes Concerning General Intent:

The concept known as "general intent" means that the defendant generally knew what he or she was doing. *See* LaFave and Scott, Substantive Criminal Law (1986), § 3.5(e) ("Criminal," "Constructive," "General," and "Specific" Intent). "[W]here the definition of a crime requires some forbidden act by the defendant, his [or her] bodily movement, to qualify as an act, must be voluntary. To some extent, then, all crimes of affirmative action require something in the way of a mental element – at least an intention to make the bodily movement which constitutes the act which the crime requires." Id. at 314. The most common distinction between "general intent" and "specific intent" is that "specific intent" designates a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. Id. at 315. In short, it is fair to say that all crimes require some sort of "general intent." However, it does not follow that an instruction on general intent will be helpful to the jury.

The committee believes that "general intent" is rarely an essential element of a crime, and that giving the instruction rarely adds to the jury's understanding of the case. In the unusual case where the defendant had no idea what was going on, then the defendant might have a valid defense that the charged act was involuntary. However, in most cases charging "general intent" crimes, there is no issue over the defendant's intent in doing the act that

the law has declared to be a crime. If a case does present such an issue, the court should consider instructions proposed by the attorneys.

For further discussion of this issue, see the notes regarding CR22-301 (Violation of Abuse Prevention Order). Also see the notes regarding CR27-031, where the committee has included a general intent instruction in the instructions for lewd and lascivious conduct under 13 V.S.A. § 2601. The Supreme Court has held that there is no essential element of specific intent for lewd or lascivious conduct, but it may be appropriate to include an instruction on general intent.

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