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MEMORANDUM (2/21/2020)

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 23rd edition of the book was published in 2019. The Administrative Office of the Courts' website includes Word "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.

1.09 – No independent research or discussion

- a) Replace the second paragraph of the instruction with the following language:

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. During your deliberations, you must not communicate with or provide any information to anyone by any means about this case outside the jury deliberation room. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website, including, but not limited to, Facebook, LinkedIn, YouTube, Snapchat, Instagram, Google, Twitter, or any other social media, to communicate to anyone any information about this case or to conduct any research about this case until you have returned your verdict and the trial has concluded.

3.01 – Criminal responsibility for conduct of another [not to be charged as a separate offense or be put on a verdict form]

- a) After the last sentence of parts/elements 2 and 3 before the closing bracket, add the following definition:

“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 conscious objective or desire to engage in the conduct or cause the result.

6.10 – [Influencing] [attempting to influence] a domestic assault witness

- a) Insert attachment one to this memorandum as a new instruction numbered 6.10.

10.23 – Soliciting sexual exploitation of a minor

- a) Change the definition of “lascivious” to read as follows:

[“Lascivious” means tending to incite lust; lewd; indecent.]

- b) Change the wording of existing footnote 4 to read as follows:

State v. Hall, ___ S.W.3d ___, 2019 WL 117580 (Tenn. 2019). See Comment 3.

- c) Add a new comment 3 to the instruction. The text of the comment should read as follows:

In deciding whether or not materials are “lascivious,” the Supreme Court in *State v. Whited*, 506 S.W.3d 416, 438 (Tenn. 2016), held that

the fact-intensive determination of whether particular materials contain sexual activity or a lascivious exhibition of private body areas is not facilitated by the adoption of a one-size-fits-all “multi-factor analysis” such as the *Dost* factors. See *Grzybowicz*, 747 F.3d at 1306. Lower courts should refrain from using the *Dost* factors as a test or an analytical framework in making such a determination.

29.13 – [Physical abuse] [only for offenses committed prior to 1/1/19: gross neglect] of impaired adult resulting in serious harm (for offenses committed on or after 7/1/07)

- a) Change the title of the instruction to the following:

[Physical abuse] [only for offenses committed prior to 1/1/19: gross neglect] of impaired adult resulting in serious harm (for offenses committed on or after 7/1/07, but prior to 1/1/2020)

29.14(a) – [Abuse] [only for offenses committed prior to 1/1/19: gross neglect] [exploitation] of adult (for offenses committed on or after 6/11/07)

- a) Change the title of the instruction to the following but keep the existing footnote after 6/11/07:

[Abuse] [only for offenses committed prior to 1/1/19: neglect] [exploitation] of adult (for offenses committed on or after 6/11/07, but prior to 1/1/2020)

29.14(b) – Financial exploitation of [an elderly] [a vulnerable] adult (for offenses committed on or after 7/1/17)

- a) Amend Part C of the definition of “financial exploitation: as follows:

(C) The act of obtaining or exercising control over an elderly or vulnerable adult’s property **[Only for offenses committed on or after 1/1/20: , without receiving the [elderly] [vulnerable] adult’s effective consent,]** by a caregiver committed with intent to benefit the caregiver or other third party.

- b) Add the following new definition in brackets after the definition of “Caregiver”:

[“Effective consent” means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

- [(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof];* or
 - [(b) given by a person the defendant knows is not authorized to act as an agent;] or
 - [(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or
 - [(d) given solely to detect the commission of an offense].]
- c) Add a footnote after the new definition of “effective consent” and renumber any subsequent footnotes accordingly. The text of the footnote should read as follow:

T.C.A. § 39-11-106.

29.15 – Aggravated neglect of [an elderly] [a vulnerable] adult

- a) Amend element 2 to read as follows:

That the defendant **[only for offenses committed prior to 1/1/2020: willfully and]** knowingly neglected the *[elderly] [vulnerable]* adult so as to adversely affect *[his] [her]* health or welfare;

- b) Amend Part C of the definition of “financial exploitation: as follows:

(C) The act of obtaining or exercising control over an elderly or vulnerable adult’s property **[Only for offenses committed on or after 1/1/20: ,** without receiving the *[elderly] [vulnerable]* adult’s effective consent,] by a caregiver committed with intent to benefit the caregiver or other third party.

- c) Add the following new definition in brackets after the definition of “Confinement”:

[“Effective consent” means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

- [(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof];* or
 - [(b) given by a person the defendant knows is not authorized to act as an agent;] or
 - [(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or
 - [(d) given solely to detect the commission of an offense].]
- d) Add a footnote after the new definition of “effective consent” and renumber any subsequent footnotes accordingly. The text of the footnote should read as follow:

T.C.A. § 39-11-106.

- e) Amend part (ii) of the definition of “neglect” as follows:

(ii) The failure of a caregiver to make a reasonable effort to protect *[an elderly] [a vulnerable]* adult from **[Only for offenses committed on or after 1/1/20: abuse, sexual exploitation,]** neglect or financial exploitation by others;

29.16 – Neglect of [an elderly] [a vulnerable] adult [other than due to abandonment or confinement alone without injury]

- a) Amend element 2 to read as follows:

That the defendant **[only for offenses committed prior to 1/1/2020: willfully and]** knowingly neglected the *[elderly] [vulnerable]* adult so as to adversely affect *[his] [her]* health or welfare;

- b) Amend Part C of the definition of “financial exploitation: as follows:

(C) The act of obtaining or exercising control over an elderly or vulnerable adult’s property **[Only for offenses committed on or after 1/1/20: ,** without receiving the *[elderly] [vulnerable]* adult’s effective consent,] by a caregiver committed with intent to benefit the caregiver or other third party.

- c) Add the following new definition in brackets after the definition of “Confinement”:

[“Effective consent” means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

- [(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof];* or
- [(b) given by a person the defendant knows is not authorized to act as an agent;] or
- [(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or
- [(d) given solely to detect the commission of an offense].]

- d) Add a footnote after the new definition of “effective consent” and renumber any subsequent footnotes accordingly. The text of the footnote should read as follow:

T.C.A. § 39-11-106.

- e) Amend part (ii) of the definition of “neglect” as follows:

(ii) The failure of a caregiver to make a reasonable effort to protect *[an elderly] [a vulnerable]* adult from **[Only for offenses committed on or after 1/1/20: abuse, sexual exploitation,]** neglect or financial exploitation by others;

29.17 – Neglect of [an elderly] [a vulnerable] adult [due to abandonment or confinement alone without injury]

- a) Amend element 2 to read as follows:

That the defendant **[only for offenses committed prior to 1/1/2020: willfully and]** knowingly neglected the *[elderly] [vulnerable]* adult so as to adversely affect *[his] [her]* health or welfare;

- b) Amend Part C of the definition of “financial exploitation: as follows:

(C) The act of obtaining or exercising control over an elderly or vulnerable adult’s property **[Only for offenses committed on or after 1/1/20: ,** without receiving the *[elderly] [vulnerable]* adult’s effective consent,] by a caregiver committed with intent to benefit the caregiver or other third party.

- c) Add the following new definition in brackets after the definition of “Confinement”:

[“Effective consent” means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

- [(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof];*] or
- [(b) given by a person the defendant knows is not authorized to act as an agent;] or
- [(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or
- [(d) given solely to detect the commission of an offense].]

- d) Add a footnote after the new definition of “effective consent” and renumber any subsequent footnotes accordingly. The text of the footnote should read as follow:

T.C.A. § 39-11-106.

- e) Amend part (ii) of the definition of “neglect” as follows:

(ii) The failure of a caregiver to make a reasonable effort to protect *[an elderly] [a vulnerable]* adult from **[Only for offenses committed on or after 1/1/20: abuse, sexual exploitation,]** neglect or financial exploitation by others;

29.18 – [Aggravated] abuse of [an elderly] [a vulnerable] adult (for offenses committed on or after 1/1/20)

- a) Insert attachment two to this memorandum as new instruction 29.18.

29.19 – Sexual exploitation of [an elderly] [a vulnerable] adult

- a) Insert attachment three to this memorandum as new instruction 29.19.

38.08 – Driving under the influence: Supplemental instruction number one

- a) Replace the existing instruction with attachment four to this memorandum.

38.11 Violation of Habitual Motor Vehicle Offender Act

- a) Delete this instruction but keep the number as “Reserved”.

38.17(a) – [Refusing] [preventing] [obstructing] the administration of a required [breath] [blood] test (for offenses committed on or after 7/1/17)

- a) Amend the title of the instruction to read as follows:

[Refusing] [preventing] [obstructing] the administration of a required *[breath] [blood]* test (for offenses committed on or after 7/1/17 but prior to 7/1/19)

T.P.I.-- CRIM. 6.10

[INFLUENCING] [ATTEMPTING TO INFLUENCE] A

DOMESTIC ASSAULT WITNESS

Any person who *[influences] [attempts to influence] a [prospective]* domestic assault witness 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 was *[a defendant] [a person acting at the direction of the defendant]* in a criminal case involving domestic assault pursuant to Tenn. Code Ann. § 39-13-111;

and

- (2) that *[he] [she]* intentionally *[influenced] [attempted to influence]* _____, a witness in an official proceeding by means of persuasion to

- (a) testify falsely
- (b) withhold any *[truthful testimony] [information] [document] [evidence]*
- (c) elude legal process summoning the witness to *[testify] [supply evidence]* or
- (d) be absent from an official proceeding to which _____ had been legally summoned;

and

(3) that the means of persuasion was not coercion.

"Coercion" means a threat, however communicated, to commit any offense, wrongfully accuse any person of any offense, expose any person to hatred, contempt or ridicule, harm the credit or business reputation of any person, take or withhold action as a public servant or cause a public servant to take or withhold action.²

"Official proceeding" means any type of administrative, executive, legislative or judicial proceeding that may be conducted before a public servant authorized by law to take statements under oath.³

"Intentional" 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.⁴

COMMENTS

1. Influencing or attempting to influence a domestic assault witness "is a Class A misdemeanor and, upon conviction, the sentence runs consecutively to the sentence for any other offense that is based in whole or in part on the factual allegations about which the person was seeking to influence a witness."

FOOTNOTES

1. T.C.A. § 39-16-507.

2. T.C.A. § 39-11-106.

3. T.C.A. § 39-11-106.

4. T.C.A. § 39-11-106.

T.P.I.-- CRIM. 29.18

[Aggravated] Abuse of [an elderly] [a vulnerable] adult

(for offenses committed on or after 1/1/20)

Any person who commits *[Aggravated] Abuse of [an elderly] [a vulnerable]* adult 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 abused *[an elderly] [a vulnerable]* adult;

and

(2) that the defendant acted knowingly.

[and

(3)(a) that the act resulted in *[serious psychological injury] [serious physical harm]*

or

(3)(b) that a deadly weapon was used to accomplish the act

or

(3)(c) that the abuse involved strangulation

or

(3)(d) that the abuse resulted in serious bodily injury].

"Abuse" means the infliction of physical harm.² "Physical harm" means physical pain or injury, regardless of gravity or duration.³

["Deadly weapon" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.]⁴

["Elderly adult" means a person seventy (70) years of age or older.]⁵

["Firearm" means *[any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive] [, or the frame or receiver of any such weapon]*⁶ *[, or any firearm muffler or firearm silencer]*⁷ *[any destructive device]*.⁸ *[The definition of "firearm" does not include an antique firearm.]*⁹¹⁰

["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.¹¹ "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.]¹²

["Serious physical harm" means physical harm of such gravity that:

- (A) Would normally require medical treatment or hospitalization;
- (B) Involves acute pain of such duration that it results in substantial suffering;
- (C) Involves any degree of prolonged pain or suffering; or
- (D) Involves any degree of prolonged incapacity.¹³

“Physical harm” means physical pain or injury, regardless of gravity or duration.]¹⁴

["Serious psychological injury" means any mental harm that would normally require extended medical treatment, including hospitalization or institutionalization, or mental harm involving any degree of prolonged incapacity.]¹⁵

["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, regardless of whether that conduct results in any visible injury or whether the person has any intent to kill or protractedly injure the victim.]¹⁶

["Vulnerable adult" means a person eighteen (18) years of age or older who, because of intellectual disability or physical dysfunction, is unable to fully manage the person's own resources, carry out all or a portion of the activities of daily living, or fully protect against neglect, exploitation, or hazardous or abusive situations without assistance from others.]¹⁷

"Knowingly" 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.¹⁸

The requirement of “knowingly” is also established if it is shown that the defendant acted intentionally.¹⁹

"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.²⁰

COMMENTS

1. Abuse of an elderly adult is a Class E felony. Abuse of a Vulnerable adult is a Class D felony. T.C.A. §39-15-510. Aggravated abuse resulting in serious psychological injury or serious physical harm is a Class C felony. Aggravated abuse by a deadly weapon or strangulation, or which results in serious bodily injury is a Class B felony. T.C.A. §39-15-511.

Footnotes

1. T.C.A. §39-15-510.

2. T.C.A. §39-15-501.

3. T.C.A. §39-15-501.

4. T.C.A. §39-11-106.

5. T.C.A. §39-15-501.

6. The trial judge should consult 27 C.F.R. § 478.11 to draft the definition of “frame or receiver” if it is fairly raised in the proof.

7. The trial judge should consult 27 C.F.R. § 478.11 to draft the definition of “firearm muffler or firearm silencer” if it is fairly raised in the proof.

8. The trial judge should consult T.C.A. § 39-11-106 to draft the definition of “destructive device” if it is fairly raised in the proof.

9. The trial judge should consult T.C.A. § 39-11-106 to draft the definition of “antique firearm” if it is fairly raised in the proof.

10. T.C.A. §39-11-106.

11. T.C.A. §39-11-106.

12. T.C.A. §39-11-106.

13. T.C.A. §39-15-501.

14. T.C.A. §39-15-501.

15. T.C.A. §39-15-501.

16. T.C.A. §39-13-102(a)(2).

17. T.C.A. §39-15-501.

18. T.C.A. §39-11-106.

19. T.C.A. §39-11-301.

20. T.C.A. §39-11-106.

T.P.I.-- CRIM. 29.19

Sexual exploitation of [an elderly] [a vulnerable] adult

Any person who commits sexual exploitation of *[an elderly] [a vulnerable]* adult 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 sexually exploited *[an elderly] [a vulnerable]* adult;

and
- (2) that the defendant acted knowingly.

["Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

- [(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof];*] or
- [(b) given by a person the defendant knows is not authorized to act as an agent;] or
- [(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or

[(d) given solely to detect the commission of an offense].]²

["Elderly adult" means a person seventy (70) years of age or older.]³

"Sexual exploitation" means an act committed upon or in the presence of *[an elderly] [a vulnerable]* adult, without that adult's effective consent, for purposes of sexual gratification. "Sexual exploitation" includes, but is not limited to, fondling; exposure of genitals to *[an elderly] [a vulnerable]* adult; exposure of sexual acts to *[an elderly] [a vulnerable]* adult; exposure of *[an elderly] [a vulnerable]* adult's sexual organs; an intentional act or statement by a person intended to shame, degrade, humiliate, or otherwise harm the personal dignity of *[an elderly] [a vulnerable]* adult; or an act or statement by a person who knew or should have known the act or statement would cause shame, degradation, humiliation, or harm to the personal dignity of *[an elderly] [a vulnerable]* adult. "Sexual exploitation" does not include any act intended for a valid medical purpose, or any act reasonably intended to be a normal caregiving act, such as bathing by appropriate persons at appropriate times.⁴

["Vulnerable adult" means a person eighteen (18) years of age or older who, because of intellectual disability or physical dysfunction, is unable to fully manage the person's own resources, carry out all or a portion of the activities of daily living, or fully protect against neglect, exploitation, or hazardous or abusive situations without assistance from others.]⁵

"Knowingly" 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.⁶

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.⁷

"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.⁸

COMMENTS

1. Sexual exploitation of an elderly or vulnerable adult is a Class A misdemeanor. T.C.A. §39-15-512(b).

Footnotes

1. T.C.A. §39-15-512.

2. T.C.A. §39-11-106.

3. T.C.A. §39-15-501.

4. T.C.A. §39-15-501.

5. T.C.A. §39-15-501.

6. T.C.A. §39-11-106.

7. T.C.A. §39-11-301(a)(2).

8. T.C.A. §39-11-106.

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]** **[only for offenses committed on or after 7/1/19: seventh 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 but prior to 7/1/19: 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.]

or

[For offenses committed on or after 7/1/19: 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, and twenty (20) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of vehicular

homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault, or adult driving while impaired 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, or the date of the person's violation of vehicular homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault, or adult driving while impaired is within twenty (20) years of the date of the present offense, 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, and every violation of vehicular homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault, or adult driving while impaired occurred within twenty (20) years of the date of the present offense shall be considered in determining the number of prior offenses. However, any 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 conviction then your verdict will be:

"We the jury, find the defendant, _____, guilty of a fourth 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 fifth conviction then your verdict will be:

"We the jury, find the defendant, _____, guilty of a fifth 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 sixth conviction then your verdict will be:

"We the jury, find the defendant, _____, guilty of a sixth 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 seventh conviction then your verdict will be:

"We the jury, find the defendant, _____, guilty of a seventh 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]* *[fifth]* *[sixth]* *[seventh]* 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 DUI occur more than ten (10) years apart shall not be considered a multiple offender. T.C.A. §55-10-403(a)(3). However, prior convictions for vehicular homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault and adult driving while impaired qualify if occurring any time within 20 years of the instant offense to qualify.
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

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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.