

MULTNOMAH COUNTY CIRCUIT COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF OREGON,

PLAINTIFF,

vs.

JOSEPH GIBSON,

DEFENDANT.

No. 19CR53042

JOSEPH GIBSON'S
PROPOSED JURY INSTRUCTIONS

COMES NOW Joseph Gibson and moves the Court to charge the jury according to the below listed instructions on the law. These proposed instructions are derived from the Constitutions, case law, statutes, and from Oregon's pattern instructions.¹

Respectfully submitted this Tuesday, June 21, 2022.

/s/ D. Angus Lee

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¹ The phrase "the defendant" as used in pattern instructions has been replaced by "Mr. Gibson."

CERTIFICATE OF SERVICE

I, D. Angus Lee, hereby declare under penalty of perjury under the laws of the State of Oregon that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years.

On Tuesday, June 21, 2022, I caused this document to be served in the following manner on the parties listed below:

Brad Kalbaugh	()	(BY FIRST CLASS US MAIL)
Multnomah County District Attorney's Office	(X)	(BY E-MAIL)
600 Multnomah County Courthouse	()	(BY FAX)
1021 SW 4th Ave	()	(BY HAND)
Portland OR 97204		
brad.kalbaugh@mcdca.us		

/s/ D. Angus Lee

No. ____

It is for you and you alone to decide whether to believe a witness's testimony. Witnesses are not permitted to give opinions on whether another witness is, or was, being truthful in any given statement. Despite the court's efforts to prevent such testimony, a witness's testimony occasionally can be interpreted as an opinion on another witness's truthfulness in regards to a particular statement. If that occurs, you should not give any weight to the witness's opinion about the credibility of that statement. You are the sole arbiters of the facts in this case and thus must disregard any other witness's opinion about the credibility of any account of the underlying events.

UCrJI 1006A

VOUCHING

No. ____

All defendants are innocent unless and until they are proven guilty beyond a reasonable doubt. The burden is on the state, and the state alone, to prove the guilt of each individual defendant beyond a reasonable doubt.

Reasonable doubt is doubt based on common sense and reason. Reasonable doubt is not an imaginary doubt. Reasonable doubt means an honest uncertainty as to the guilt of the defendant. You must return a verdict of not guilty if, after careful and impartial consideration of all the evidence in the case, you are not convinced beyond a reasonable doubt that a defendant is guilty.

UCrJI No. 1009

INNOCENCE OF DEFENDANT—PROOF BEYOND A REASONABLE DOUBT

No. ____

Each defendant has an absolute constitutional right not to testify. Therefore, any defendant's decision not to testify cannot be considered as an indication of guilt for that defendant or any other defendant. It should not be commented on or in any way considered by you in your deliberations.

Each defendant also has an absolute constitutional right not to present any evidence. Therefore, a defendant's decision not to present any evidence cannot be considered as an indication of guilt as to any defendant. It should not be commented on or in any way considered by you in your deliberations.

Even though each defendant has the right not to testify, no defendant has the right to compel another defendant to testify even if such testimony would be helpful to the defendant who wishes to call another defendant as a witness in his or her defense.

UCrJI No. 1021 (modified)

DEFENDANT NOT TESTIFYING

No. ____ [Subject to motion in limine]

If you find that a defendant has been previously convicted of a crime, you may consider this conviction only for its bearing, if any, on the credibility of that individual defendant.

Specifically, you **may not** use this evidence for the purpose of drawing the inference that because the defendant was convicted of a previous crime the defendant may be guilty of the crime charged in this case.

UCrJI No. 1023 (emphasis added) (modified)

DEFENDANT'S PRIOR CONVICTION

COMMENT: OEC 609. If the conviction has been received for a purpose under OEC 404(3) or OEC 404(4), a special instruction may have to be drafted. See also the comment at UCrJI No. 1022.

No. ____

When a witness testifies about statements made by a defendant, you should consider such testimony with caution.

In reviewing such testimony, you should consider, among other things, the following:

- 1) Did that defendant make the statement, and, if so, did that defendant clearly express what that defendant intended to say?
- 2) Did the witness correctly hear and understand what that defendant said?
- 3) Did the witness correctly remember and relate what that defendant said?
- 4) Did the witness intentionally or mistakenly alter some of that defendant's words, thereby changing the meaning of what was actually said?

If, after weighing such factors, you conclude that that defendant said what that defendant intended to say and that the witness to the statement correctly understood, remembered, and related to you what that defendant said, then you are authorized to consider such statements for what you deem them to be worth.

UCrJI 1024 (modified)

DEFENDANT'S STATEMENTS

COMMENT: ORS 10.095(4); *State v. Bouse*, 199 Or 676, 698–700, 264 P2d 800 (1953), *overruled on other grounds*, *State v. Fischer*, 232 Or 558, 565, 376 P2d 418 (1962). This instruction is an ORS 10.095 statutorily required instruction. It must be given in appropriate cases when requested by the defense, that is, when “there is evidence to support it.” *State v. Swee*, 51 Or App 249, 253, 624 P2d 1108 (1981); *see State v. McKenna*, 67 Or App 662, 665, 679 P2d 346 (1984) (in context

1 of DUI case). In *Swee*, one of the reasons that the trial judge did not give the uniform “oral
2 admission” instruction requested by the defendant was that the judge felt that the instruction
3 labeled a questionably incriminating statement as an “admission.” The conviction was reversed on
4 appeal. The Committee believes it is preferable to refer to the defendant’s statement as a
5 “statement” and leave it to the jury to determine whether or not it is also an “admission.”

No. ____

The state has the burden to establish the guilt of each defendant beyond a reasonable doubt. When you evaluate the state's evidence, you may also consider the power of the state to gather and produce evidence.

If the evidence offered by the state was weaker and less satisfactory than other stronger or more satisfactory evidence that the state could have offered, then you should view the weaker and less satisfactory evidence with distrust.

UCrJI 1030 (modified)

LESS SATISFACTORY EVIDENCE

No. ____

A person acts “knowingly” or “with knowledge” if that person acts with an awareness the his or her conduct is of a particular nature.

When used in the phrase “did unlawfully and knowingly, while participating with 5 or more other persons engage in tumultuous and violent conduct thereby intentionally and recklessly creating a grave risk of causing public alarm,” “knowingly” means that the person acted with an awareness that his or her conduct was tumultuous and violent.

When used in the phrase “did unlawfully and knowingly, while participating with 5 or more other persons engage in tumultuous and violent conduct thereby intentionally and recklessly creating a grave risk of causing public alarm,” “knowingly” also means that the person acted with an awareness that he or she was participating with five or more other persons who were also engage in tumultuous and violent conduct.

UCrJI 1036 (modified); *State v. Owen*, 369 Or 288, 310, 505 P3d 953 (2022); *State v. Prophet*, 318 Or App 330, 350, 507 P3d 735 (2022) (“all elements other than venue, statute of limitations, and the like, “necessarily require[] a culpable mental state” under ORS 161.095(2), regardless of whether the statute provides an explicit mental state”); *In re M.A.W.-S.*, 319 OR. App. 426, 507 P3d 1291 (2022) (following *Prophet*, and finding that “participating with five or more persons” “necessarily requires a culpable mental state”).).

KNOWINGLY AND WITH KNOWLEDGE

No. ____

A person acts “intentionally” or “with intent” when that person acts with a conscious objective to cause a particular result.

When used in the phrase “intentionally and recklessly creating a grave risk of causing public alarm”, “intentionally” means that a person acts with a conscious objective to cause to create a grave risk of causing public alarm.

UCrJI 1035

INTENTIONALLY AND WITH INTENT

No. ____

A person acts recklessly if that person is aware of and consciously disregards a substantial and unjustifiable risk that a particular result will occur. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

When used in the phrase “recklessly creating a grave risk of causing public alarm”, “recklessly” means that person is aware of and consciously disregards a substantial and unjustifiable risk that public alarm will occur. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Recklessness is also established if a person acts intentionally or knowingly.

UCrJI 1037

RECKLESSLY

No. ____

Public place means a place to which the general public has access. It includes, but is not limited to, hallways, lobbies, and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence. It also includes highways, streets, schools, places of amusement, parks, playgrounds, and premises used in connection with public passenger transportation.

UCrJI 1047

PUBLIC PLACE

No. ____

If you determine that a witness was an accomplice, then you should view that witness's testimony with distrust.

UCrJI 1057

ACCOMPLICE TESTIMONY (View with Distrust)

No. ____

Although the defendants are being tried together, you must consider the case against each separately. In doing so, you must decide what the evidence shows as to each defendant, without considering any evidence that may have been received solely against some other defendant or defendants. Each defendant is entitled to have the case decided on the evidence and on the law applicable to that defendant.

UCrJI No. 1059

SEPARATE CONSIDERATION FOR EACH DEFENDANT

No. ____

The defenses of self-defense and defense of another person has been raised. A defendant is justified in using physical force on another person to defend himself or a third party from what a defendant reasonably believes to be the use or imminent use of unlawful physical force. In defending, a person may only use that degree of force which he reasonably believes to be necessary.

The burden of proof is on the state to prove beyond a reasonable doubt that the defense does not apply.

UCrJI No. 1107

DEFENSE—PHYSICAL FORCE—DEFENSE OF PERSON

No. ____

Ordinarily, a person is not justified in using physical force on others if he was the initial aggressor. However, a defendant's use of physical force may be justified even though he was the aggressor, if you find that a defendant withdrew from the encounter and effectively communicated to others an intent to withdraw from the encounter, but the others nevertheless continued or threatened to continue the use of unlawful physical force on the defendant.

UCrJI No. 1110, modified for the riot context.

DEFENSE—USE OF PHYSICAL FORCE

IN DEFENSE OF PERSON—AGGRESSION

No. ____

Violent and tumultuous conduct means physical acts of violence that are immediately likely to produce the use of physical force.

UCrJI No. 2300(6) (developed for ORS 166.025(a) charge, edited for consistency with *State v. Cantwell*, 66 Or App 848, 853, 676 P2d 353 (1984) (“We do not read the statute to encompass speech in the term "behavior," but construe it to refer only to physical acts of violence.”) The form charge’s unmodified reference to “physical conduct” does not adequately protect constitutional rights of speech in a context where a demonstration can be construed as “physical conduct”.

No. ____

The term tumultuous and violent conduct is intended to represent more than mere loud noise or disturbance. The term is designed to imply terroristic mob behavior involving ominous threats of personal injury and property damage.

State v. Goodwill, 35 Or. App. 293, 297, 581 P.2d 113, 115 (1978).

No. ____

The term tumultuous and violent conduct does not include political speech or protest.

State v. Chakerian, 325 Ore. 370 (1997).

No. ____

A person does not commit the crime of riot if he or she merely is part of a group and five *other* members of that group engage in tumultuous and violent conduct that intentionally or recklessly creates a grave risk of causing public alarm.

State v. Chakerian, 325 Ore. 370, 375 n 8 (1997).

No. ____

To prove the crime of riot, the state must prove that the person charged *personally* engaged in violent and tumultuous conduct.

State v. Chakerian, 325 Ore. 370, 375 n 8 (1997). [To be used if the UCrJI 2301 is given in unmodified form]

No. ____

Oregon law provides that a person commits the crime of riot if, while participating with five or more other persons, the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm.

In this case, to establish the crime of riot, the state must prove beyond a reasonable doubt the following elements:

- 1) The act occurred on or about May 1, 2019;
- 2) Mr. Gibson, while participating with five or more persons, personally engaged in tumultuous and violent conduct; and
- 3) Mr. Gibson, by engaging personally in such conduct, intentionally or recklessly created a grave risk of causing public alarm.

UCrJI 2301, modified to insert the constitutional limitation required under *State v. Chakerian*, 325 Ore. 370, 375 n 8 (1997).

RIOT

No. ____

To convict Mr. Gibson of any crime all members of the jury must unanimously agree on the verdict.

U.S. Const. Amend. VI; U.S. Const. Amend. XIV.

No. ____

The right to assemble and engage in advocacy in a traditional public forum such as a public sidewalk is conduct in the furtherance of constitutionally protected free speech under the First Amendment, and a defendant cannot be found guilty of riot for constitutionally-protected First Amendment conduct.

See Hill v. Colorado, 580 U.S. 703, 714-15, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2002) (noting that “the First Amendment interests of petitioners are clear and undisputed” because “their leafleting, sign displays and oral communications are protected by the First Amendment,” and that the “public sidewalks, streets and ways” where they chose to exercise their rights “are ‘quintessential’ public forums for free speech.”); *NAACP v. State of Alabama*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”).

No. ____

A claim that the exercise of free speech was intended to exercise a coercive impact on others does not remove the conduct from the protections of the First Amendment.

See also Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L. Ed. 2d. 1 (1971).

No. ____

The fact that the messages conveyed by those engaging in free speech may be offensive to their recipients does not deprive them of constitutional protection.

Hill, 580 U.S. at 715.

No. ____

Free speech cannot be restricted simply because it is upsetting or arouses contempt, because the State of Oregon may not prohibit the expression of an idea simply because a local community finds the idea itself offensive or disagreeable. Indeed, the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.

Snyder v. Phelps, 562 U.S. 443, 458 (2011)

No. ____

Free speech may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Free speech is often provocative and challenging.

Terminiello v. Chicago, 337 U.S. 1, 4, 69 S. Ct. 894, 896 (1949).

No. ____ [Subject to motion for election of facts]

In alleging that Mr. Gibson committed riot, the State of Oregon relies upon evidence regarding a single act of allegedly riotous conduct, namely _____, constituting the alleged crime.

[or, regarding the following acts of allegedly riotous conduct, namely _____]

To convict the Mr. Gibson, you must unanimously agree that this specific allegedly riotous act was proved to be riotous beyond a reasonable doubt.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.26 (4th Ed)

WPIC 4.26 Several Distinct Acts—Election to Specify a Particular Act

NOTE ON USE: This instruction may be used for a case in which the jury heard evidence of multiple acts but the prosecutor has elected to specify one act as constituting the criminal conduct.

No. ____

It is a defense to the crime charged that the case brought against a defendant has been selectively enforced. Even if you find that a defendant committed the crime alleged, you are instructed to find the defendant not guilty if you find by a preponderance of the evidence that the law in this case has been enforced in a discriminatory manner with the intent and purpose to deny equal protection of law to defendant.

Oregon Constitution, Article I, § 16 (“In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.”)

People v. Gray, 254 Cal.App.2d 256 (2d Dist. 1967).

No. ____

In considering the conduct of those present at Cider Riot on May 1, 2019, you are instructed that mere words, however insulting or opprobrious, cannot, justify an assault or violent response, and that a defendant cannot be considered guilty of riot because his words provoked violence by others.

State v. Jones, 179 Or. 636, 638, 173 P.2d 960, 961 (1946).