

IN THE SUPREME COURT OF FLORIDA

IN THE MATTER OF USE BY
TRIAL COURTS OF THE
STANDARD JURY INSTRUCTIONS
IN CRIMINAL CASES

PROPOSED AMENDMENTS TO FLORIDA STANDARD
INSTRUCTIONS IN CRIMINAL CASES (99-1)

TO: CHIEF JUSTICE AND JUSTICES OF THE
SUPREME COURT OF FLORIDA

The Committee on Standard Jury Instructions in Criminal Cases submits the following
proposed amendments for your consideration:

Proposal 1: A Revised Instruction on Williams Rule Evidence 1
Proposal 2: A New Instruction for the Crime of Felony Battery 2
Proposal 3: A New Instruction for the Crime of Aggravated Stalking 3
Proposal 4: A New Instruction for Offenses Involving Contraband in Juvenile Facilities 4
Proposal 5: A Revised Instruction for the Crime of Driving Under the Influence 6
Proposal 6: A New Instruction for Taking Deer or Turkey with a Gun and Light 8
Proposal 7: A New Instruction for the Crime of Using a Self-Defense Weapon 9
Proposal 8: A New Instruction for Offenses Involving Contraband in Specified Locations 10
Proposal 9: A New Instruction for the Crime of Voyeurism 13
Proposal 10: A New Instruction for Eluding an Officer (Fleeing or Failure to Stop) 14
Proposal 11: A New Instruction for Eluding an Officer (Willful Fleeing/Siren & Lights) 15
Proposal 12: A New Instruction for Eluding an Officer (High Speed/Recklessness) 16
Proposal 13: A New Instruction for Crimes Motivated by Prejudice 17

Appendices:

Minutes of Committee Meetings 5/8/98 6/18/98 11/13/98

Responses to Instructions as Published

January 28, 1999

Respectfully submitted,
Philip J. Padovano
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases

**SIMILAR FACT EVIDENCE
“WILLIAMS” RULE**

To be given at the time the evidence is admitted, if requested.

The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant [or] [to corroborate the testimony of (name of child)] and you shall consider it only as it relates to those issues.

The defendant is not on trial for a crime that is not included in the [information] [indictment].

Comment

The part of the instruction that allows similar fact evidence to corroborate the testimony of the victim should only be given in some cases involving child victims of sexual abuse. See *Heuring v. State*, 513 So. 2d 122 (Fla. 1987); *Saffor v. State*, 660 So. 2d 668 (Fla. 1994); *State v. Rawls*, 649 So. 2d 1350 (Fla. 1994).

Proposal 2: A New Instruction for the Crime of Felony Battery

FELONY BATTERY

§ 784.041 Fla.Stat.

To prove the crime of felony battery, the state must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) actually and intentionally touched or struck (victim) against [his][her] will; and**
- 2. (Defendant) caused (victim) great bodily harm, permanent disability, or permanent disfigurement**

Lesser Included Offenses

Category One: Battery

Category Two: None

Comment

This instruction is based on the text of section 784.041, Florida Statutes, (1997), and generally patterned after the standard instructions on battery and aggravated battery.

Proposal 3: A New Instruction for the Crime of Aggravated Stalking

AGGRAVATED STALKING

(Victim under 16 years of age)

§ 784.048(5) Fla.Stat.

To prove the crime of aggravated stalking, the state must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) willfully, maliciously, and repeatedly followed or harassed (victim); and,**
- 2. At the time of (defendant's) actions, (victim) was under 16 years of age.**

“Harass” means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

Lesser Included Offenses

Category One: Stalking

Category Two: None

Comment

This instruction is based on the text of section 784.048, Florida Statutes, (1997), and generally patterned after the standard instructions on stalking and aggravated stalking.

CONTRABAND IN JUVENILE FACILITY

§ 985.4046 Fla.Stat.

To prove the crime of [introducing] [removing] [possession] of contraband in a juvenile detention facility, the state must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant)**
[introduced contraband into]
[knowingly possessed contraband in]
[gave contraband to a juvenile offender in]
[took contraband from]
[attempted to take or send contraband from]
[sent contraband to]
[received contraband from] [a juvenile detention facility] [juvenile commitment program].
- 2. (Defendant) did not do so through regular channels as authorized by the [facility superintendent] [program director] [manager].**

“Introduce” means to put inside or into.

Possession may be actual or constructive.

Actual possession means:

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

Give if applicable. **Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. **If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.**

For purposes of this offense, “contraband” means:

- [any unauthorized article of food or clothing]
- [any intoxicating beverage or any beverage that causes or may cause an intoxicating effect]
- [any controlled substance. (Substance alleged) is a controlled substance.] *See s. 893.02(4).*
- [any prescription or nonprescription drug that has a hypnotic, stimulating, or depressing effect]
- [any firearm or weapon of any kind or any explosive substance].

Give as applicable

A “juvenile detention facility” is a facility used pending court adjudication or disposition

or execution of a court order for the temporary care of a child alleged or found to have committed a violation of law.

A “juvenile commitment program” is a facility used for the commitment of adjudicated delinquents.

Lesser Included Offenses

Category One: None

Category Two: None

Comment

This instruction is based on the text of section 985.4046, Florida Statutes, (1997), and adapted from the standard instructions for introduction of contraband in a county detention facility and possession of a controlled substance. In *Chicone v. State*, 684 So.2d 736 (Fla. 1996), the court defined the elements of constructive possession that apply if the defendant has no control over the place where the contraband was found.

DRIVING WHILE UNDER THE INFLUENCE
F.S. 316.193

To prove the crime of driving under the influence the state must prove the following two elements beyond a reasonable doubt.

- 1. (Defendant) drove or was in actual control of a vehicle.**
- 2. While driving or in actual physical control of the vehicle (defendant)**
Give 2a or b as applicable
 - a. was under the influence of [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that [his] [her] normal faculties were impaired or**
 - b. had a blood or breath alcohol level of 0.08 or higher.**

Definitions: give as applicable

“Vehicle” is any device, in, upon or by which any person or property is, or may be, transported or drawn upon a highway, except devices used exclusively upon stationary rails or tracks.

“Normal faculties” include but are not limited to the ability to see, hear, walk, talk, judge distances, drive an automobile, make judgments, act in emergencies and, in general, to normally perform the many mental and physical acts of our daily lives.

“Actual physical control of a vehicle” means the defendant must be physically in or on the vehicle and have the capability to operate the vehicle, regardless of whether [he] [she] is actually operating the vehicle at the time.

“Alcoholic beverages” are considered to be substances of any kind and description which contain alcohol.

() is a controlled substance under Florida law. *F.S. 893.*

() is a chemical substance under Florida law. *F.S. 877.111(1).*

Give when 2b is applicable; give only if vehicle is a motor vehicle as defined by F.S. 316.003(21)

1. If you find from the evidence that the defendant had a blood or breath alcohol level of 0.05 or less, you shall presume that the defendant was not under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired.

2. If you find from the evidence that the defendant had a blood or breath alcohol level in excess of 0.05 but less than 0.08, you may consider that evidence with other competent evidence in determining whether the defendant was under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired; or

3. If you find from the evidence that the defendant had a blood or breath alcohol level of 0.08 or more, that evidence would be sufficient by itself to establish that the defendant was under the influence of alcohol to the extent that [his] [her] normal faculties were impaired. However, such evidence may be contradicted or rebutted by other evidence demonstrating that the defendant was not under the influence to the extent that [his][her] normal faculties were impaired.

These presumptions may be considered along with any other evidence presented in deciding whether the defendant was under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired.

Give only if this defense is raised.

It is a defense to the charge of driving or being in actual physical control of a vehicle while under the influence if at the time of the alleged offense the vehicle was inoperable. However, it is not a defense if, while impaired, the defendant drove or was in actual physical control of the vehicle before it became inoperable. Therefore, if you are not convinced beyond a reasonable doubt that the vehicle was operable at the time of the alleged offense, you should find the defendant not guilty. However, if you are convinced that the vehicle was operable at the time of the alleged offense, then you should find the defendant guilty if all the other elements of the charge have been proved beyond a reasonable doubt.

**TAKING DEER/WILD TURKEY WITH GUN AND LIGHT
F.S. 372.99(1)**

To prove the crime of taking [deer] [wild turkey] with gun and light, the state must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) did take any [deer] [wild turkey].**
- 2. (Defendant) used a gun and light in such taking.**

“Take” shall include taking, attempting to take, pursuing, hunting, molesting, capturing, or killing any [deer] [wild turkey, or their nests or eggs], by any means, whether or not such actions result in obtaining possession of such [deer] [wild turkey or their nests or eggs]. *F.S. 327.001(10)*

“Gun” means a shotgun, rifle, pistol, revolver, air gun, gas gun, blow gun, bow, crossbow, or any other device mechanically propelling an arrow, spear, or other projectile. *Fla. Admin. Code 39.10004(39)*

“Light” means any artificial light. *Fla. Admin. Code 39.1004(56)*

“Possession” means any one of the following:

- 1. Manual possession**
- 2. Physical possession**
- 3. Control or custody**
- 4. Possession in one’s clothing, attire, or equipment**
- 5. Possession in or about a vessel, vehicle or beast of burden under one’s custody or control, including but not limited to compartments, drawers, pockets, trunks, and similar places in and about such vessel, vehicle, or beast of burden.**

If you find from the evidence that the defendant displayed or used a light in a place where [deer] [wild turkey] might be found and in a manner capable of disclosing the presence of [deer] [wild turkey], and that the defendant possessed a firearm or other weapon customarily used for the taking of [deer] [wild turkey], between one hour after sunset and one hour before sunrise, then this would be sufficient by itself to establish that the defendant was taking or attempting to take [deer][wild turkey] by use of a gun and light. However, such evidence may be contradicted or rebutted by other evidence. *F.S. 379.99(2)*

Proposal 7: A New Instruction for the Crime of Using a Self-Defense Weapon

USE OF A SELF-DEFENSE WEAPON

§790.054 Fla. Stat.

To prove the crime of using a self-defense weapon against a law enforcement officer, the state must prove the following four elements beyond a reasonable doubt:

1. (Defendant) **intentionally used a [self-defense chemical spray] [nonlethal stun gun] [nonlethal electric weapon] [remote stun gun] against (victim).**
2. (Victim) **was at the time a law enforcement officer.**
3. (Defendant) **knew (victim) was a law enforcement officer.**
4. **At the time of the incident, (victim) was engaged in the lawful performance of [his] [her] duties.**

The court now instructs you that (name of official position of victim designated in charge) **is a law enforcement officer.** *Do not read the name of the victim in this part of the instruction.*

Lesser Included Offenses

Category One: None

Category Two: Battery, Fla.Stat. 784.03(1)(a)

Comment

This instruction is based on section 790.054, Florida Statutes, (1997). In giving this instruction, do not refer to the victim by name in the last sentence of the instruction. That sentence must state the class of officers to which the victim belongs, e.g., probation officer, correctional officer. See *Wright v. State*, 586 So. 2d 1025 (Fla. 1991).

CONTRABAND IN SPECIFIED LOCATIONS

§893.13(1)(c)(d) & (e) Fla.Stat.

To prove the crime of (crime charged), the state must prove the following four elements beyond a reasonable doubt:

1. (Defendant)
[sold]
[purchased]
[manufactured]
[delivered]
[possessed with intent to sell]
[possessed with intent to manufacture]
[possessed with intent to deliver]
a certain substance
Give a, b or c as applicable
2. a. in, on, or within 1,000 feet of the real property comprising a child care facility or a public or private elementary, middle, or secondary school between the hours of 6:00 a.m. to 12:00 a.m. s. 893.13(1)(c)
b. in, on, or within 200 feet of [the real property comprising a public housing facility] [the real property comprising a public or private college, university, or other postsecondary educational institution] [a public park]. s. 893.13(1)(d)
c. in, on, or within 1000 feet of [a physical place for worship at which a church or religious organization regularly conducts a religious services] [of a convenience business]. s. 893.13(1)(e)
3. The substance was (specific substance alleged).
4. (Defendant) had knowledge of the presence of the substance.

Definitions: give as applicable.

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

“Manufacture” means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

To “possess” means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means:

- (a) the thing is in the hand of or on the person, or

- (b) the thing is in a container in the hand of or on the person, or
- (c) the thing is so close as to be within ready reach and is under the control of the person.

Give if applicable.

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable.

If a thing is in a place over which the person does not have control, in order to establish constructive possession the state must prove the person's (1) control over the thing, (2) knowledge that the thing was within the person's presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

Definitions. Give as applicable

"Child care facility" means any child care center or arrangement which provides child care for more than five children unrelated to the operator and which receives a payment, fee, or grant for any of the children receiving care. It does not matter if the child care facility is operated for profit or as a non profit operation.

A "convenience business" means any place of business that is primarily engaged in the retail sale of groceries, or both groceries and gasoline, and that is open for business at any time between the hours of 11 p.m. and 5 a.m. The term does not include any of the following: a business that is primarily a restaurant, or one that always has at least five employees on the premises after 11 p.m. and before 5 a.m., or one that has at least 10,000 square feet of retail floor space. The term "convenience business" also does not include any business in which the owner or members of his family work between the hours of 11 p.m. and 5 a.m.

The term "real property comprising a public housing facility" is defined as the real property of a public corporation created as a housing authority by statute.

Lesser Included Offenses

Category One: Drug Abuse Possession

Category Two: None

Comment

This instruction is based on section 893.13, Florida Statutes, (1997), and adapted from the standard instruction on sale of contraband near a school. In *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), the court defined the elements of constructive possession that apply if the defendant has no control over the place where the contraband was found.

VOYEURISM
§ 810.14 Fla. Stat.

To prove the crime of voyeurism, the state must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) secretly**
[observed]
[photographed]
[filmed]
[videotaped]
[recorded] (victim)
- 2. The (act alleged) was done with a [lewd] [lascivious] [indecent] intent.**
- 3. When (victim) was [observed] [photographed] [filmed] [videotaped] [recorded] [he] [she] was in a [dwelling] [structure] [conveyance] in which [he] [she] had a reasonable expectation of privacy.**

The words lewd, lascivious, and indecent mean the same thing, a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing the act.

“Dwelling” means a building [or conveyance] of any kind, including any attached porch, whether such building [or conveyance] is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the enclosed space of ground and outbuildings immediately surrounding it.

“Structure” means any kind of building, either temporary or permanent, that has a roof over it, together with the enclosed space of ground and outbuildings immediately surrounding it.

Conveyance means any motor vehicle, ship, vessel, railroad car, trailer, aircraft or sleeping car.

Lesser Included Offenses

Category One: None

Category Two: None

Comment

This instruction is based on section 810.14, Florida Statutes (Supp. 1998). It is error to inform the jury of a prior conviction. Therefore, do not read the allegation of prior conviction or send the information or indictment into the jury room. The historical fact of a previous conviction shall be determined by the judge, and shall thereby fix the degree of the crime. *State v. Harris*, 356 So. 2d 315 (Fla. 1978).

Proposal 10: A New Instruction for Eluding an Officer (Fleeing or Failure to Stop)

FLEEING TO ELUDE A LAW ENFORCEMENT OFFICER

§ 316.1935(1) Fla. Stat.

To prove the crime of fleeing to elude a law enforcement officer, the state must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) was operating a motor vehicle upon a street or highway in Florida.**
- 2. A duly authorized law enforcement officer ordered the defendant to stop or remain stopped.**
- 3. (Defendant)**
 - a. [willfully refused or failed to stop the vehicle in compliance with the order] or**
 - b. [having stopped the vehicle, willfully fled in an attempt to elude the officer]**

“Operator” means any person who is in actual physical control of a motor vehicle upon the highway, or who is exercising control over or steering a vehicle being towed by a motor vehicle.

“Motor Vehicle” means any vehicle which is self-propelled [and] [every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails], but not including any bicycle or moped.

“Street or highway” means the entire width between boundary lines of every way or place of whatever nature when any part thereof is open to the public for purposes of vehicular traffic.

“Willfully” means intentionally, knowingly, and purposely.

Lesser Included Offenses

Category One: None

Category Two: None

Comment

This instruction is based on the text of section 316.1935(1), Florida Statutes, (Supp. 1998).

FLEEING TO ELUDE A LAW ENFORCEMENT OFFICER

§ 316.1935(2) Fla. Stat.

To prove the crime of fleeing to elude a law enforcement officer, the state must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) was operating a motor vehicle upon a street or highway in Florida.**
- 2. Defendant willfully fled from or attempted to elude a law enforcement officer.**
- 3. The law enforcement officer was in an authorized law enforcement patrol vehicle with agency insignia and other jurisdictional markings prominently displayed on the vehicle and with siren and lights activated.**

“Operator” means any person who is in actual physical control of a motor vehicle upon the highway, or who is exercising control over or steering a vehicle being towed by a motor vehicle.

“Motor Vehicle” means any vehicle which is self-propelled [and] [every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails], but not including any bicycle or moped.

“Street or highway” means the entire width between boundary lines of every way or place of whatever nature when any part thereof is open to the public for purposes of vehicular traffic.

“Willfully” means intentionally, knowingly, and purposely.

Lesser Included Offenses

Category One: Fleeing to Elude, Fla.Stat. 316.1935(1)

Category Two: None

Comment

This instruction is based on the text of section 316.1935(2), Florida Statutes, (Supp. 1998).

FLEEING TO ELUDE A LAW ENFORCEMENT OFFICER

§ 316.1935(3) Fla. Stat.

To prove the crime of fleeing to elude a law enforcement officer, the state must prove the following four elements beyond a reasonable doubt:

- 1. (Defendant) was operating a motor vehicle upon a street or highway in Florida.**
- 2. (Defendant) willfully fled from or attempted to elude a law enforcement officer.**
- 3. The law enforcement officer was in an authorized law enforcement patrol vehicle with agency insignia and other jurisdictional markings prominently displayed on the vehicle and with siren and lights activated.**
- 4. During the course of the fleeing or attempting to flee, (Defendant) drove at high speed or in any manner demonstrating a wanton disregard for the safety of persons or property.**

“Operator” means any person who is in actual physical control of a motor vehicle upon the highway, or who is exercising control over or steering a vehicle being towed by a motor vehicle.

“Motor Vehicle” means any vehicle which is self-propelled [and] [every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails], but not including any bicycle or moped.

“Street or highway” means the entire width between boundary lines of every way or place of whatever nature when any part thereof is open to the public for purposes of vehicular traffic.

“Willfully” means intentionally, knowingly, and purposely.

“Wanton” means a conscious and intentional indifference to the risks created by the manner in which the vehicle was operated.

Lesser Included Offenses

Category One: Fleeing to Elude Fla.Stat. 316.1935(2)
Fleeing to Elude Fla.Stat. 316.1935(1)

Category Two: Reckless Driving Fla. Stat. 316.192

Comment

This instruction is based on the text of section 316.1935(3), Florida Statutes, (Supp. 1998).

AGGRAVATION OF A FELONY BY EVIDENCING PREJUDICE

§ 775.085

The punishment provided by law for the crime of (crime charged) is greater if the defendant was motivated by prejudice to commit the crime. Therefore, if you find the defendant guilty of (crime charged) you must then consider the defendant’s alleged motivation in committing the crime.

If the State has proven the crime of (crime charged) and if the State has proven beyond a reasonable doubt that (defendant):

- 1. perceived, knew, or had reasonable ground to perceive or know (victim’s) [race] [color] [ancestry] [ethnicity] [religion] [sexual orientation] [national origin] [mental disability] [physical disability] [advanced age], and**
 - 2. intentionally selected (victim) because of that perception or knowledge,**
- you should find that the defendant was motivated by prejudice to commit the crime.**

If the state has proven the crime of (crime charged) beyond a reasonable doubt, but has not proven beyond a reasonable doubt that the defendant was motivated by prejudice to commit the crime, then you should find the defendant guilty of only (crime charged).

Give if applicable

“Mental or physical disability” means that the victim suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, and has one or more physical or mental limitations that restrict the victim’s ability to perform the normal activities of daily living.

“Advanced age” means that the victim is older than 65 years of age.

Comment

This instruction is based on section 775.085, Florida Statutes, (Supp. 1998). Proof that the defendant intentionally selected the victim is required by the case law. See, *State v. Stalder*, 630 So. 2d 1072 (Fla. 1994).