

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY

INSTRUCTIONS CRIMINAL CASES
REPORT 2016-08

CASE NO.: SC16-

To the Chief Justice and Justices of the Supreme Court of Florida:

This report, proposing amended instructions to the Florida Standard Jury Instructions in Criminal Cases, is filed pursuant to Article V, section 2(a), Florida Constitution.

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| | <u>Instruction #</u> | <u>Topic</u> |
|-------------------|----------------------|---|
| Proposal 1 | 7.8 | DUI Manslaughter |
| Proposal 2 | 7.8(a) | BUI Manslaughter |
| Proposal 3 | 9.1 | Kidnapping |
| Proposal 4 | 9.2 | False Imprisonment |
| Proposal 5 | 18.3 | False Information to Law Enforcement |
| Proposal 6 | 20.18(a) | Unlawful Possession of the Personal Identification Information of Another Person |
| Proposal 7 | 28.18 | Failure to Obey the Lawful Order of a [Police] [Traffic] Official |

The proposals are in Appendix A. Words and punctuation to be deleted are shown with strike-through marks; words and punctuation to be added are underlined. All of the proposals were published in the August 1, 2016 issue of the *Bar News*. No comments were received.

Proposal 1 – 7.8 – DUI Manslaughter

In May 2016, the Court promulgated changes to the standard DUI jury instructions. See *In re Standard Jury Instructions in Criminal Cases – Report 2015-07*, 192 So. 3d 1190 (Fla. 2016). The Committee had not included corresponding changes for the standard DUI Manslaughter instruction in that case because a proposal for DUI Manslaughter was pending in another case at the time the report was filed. This report is designed to make the standard DUI Manslaughter instruction consistent with all the other DUI instructions.

The Committee’s first change was to put brackets around “actual physical control” everywhere that phrase is mentioned because the overwhelming majority of DUI Manslaughter trials do not involve actual physical control.

The next change is in the enhancement section for a blood/breath alcohol level of .15 or higher. The Committee added an italicized statutory cite to “§ 316.193(4), Fla. Stat.” in the heading and deleted the reference to offenses occurring prior to October 2008 because that reference is out-of-date.

The next changes were to add italicized statutory references in Chapter 316 for “Vehicle” and “Normal faculties.”

The next change was to add the definition of “impaired,” which comes from *Shaw v. State*, 783 So. 2d 1097 (Fla. 5th DCA 2001).

Next, the existing explanation of “actual physical control,” provides an option for when the defendant is physically in or on the vehicle. The Committee wanted to make it clear that the option of “on a vehicle” pertains to vehicles such as motorcycles and bicycles and does not mean that a person sitting on the hood or the trunk of a car is in actual physical control. Thus, the Committee added an italicized note above the explanation of “actual physical control.”

The next change was a statutory cite from § 322.01(2), Florida Statutes for the definition of “alcoholic beverages.”

The last change pertains to what is commonly referred to as the “presumptions of impairment.” That phrase used to be relevant when there were separate crimes of Driving While Intoxicated and Driving Under the Influence. But many years ago, the Legislature created just one crime—DUI—which can be committed in alternate ways (driving while impaired or driving with an unlawful breath/blood alcohol level). The court need not instruct jurors they may conclude a defendant is impaired with a blood/breath alcohol level of more than .08 because driving with such an alcohol level is itself the crime of DUI. The Committee unanimously agreed the third paragraph in this section is confusing and unnecessary. The Committee could think of no example where the State’s charging document contained just the impairment theory of DUI even though there was evidence that the defendant was over the legal limit. Thus the Committee added an italicized note explaining why there is no need to instruct on § 316.1934(2)(c), Florida Statutes.

No comments were received after publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 2 – 7.8(a) – BUI Manslaughter

In May 2016, the Court promulgated changes to the standard BUI jury instructions. See *In re Standard Jury Instructions in Criminal Cases – Report 2015-07*, 192 So. 3d 1190 (Fla. 2016). The Committee had not included

corresponding changes for the standard BUI Manslaughter instruction in that case because at the time the Committee submitted its report, a proposal for BUI Manslaughter was pending in another case. This filing is designed to make the standard BUI Manslaughter instruction consistent with all the other BUI instructions.

The Committee's first change is in the enhancement section which covers cases when a defendant's blood/breath alcohol level is .15 or higher. The Committee added an italicized statutory cite to § 327.35(4), Florida Statutes above that enhancement section and proposes to lower the blood/breath alcohol level from .20 to .15 so that the instruction is consistent with the statute.

The next changes were to add italicized statutory references in Chapter 327 for "Normal faculties" and "Operate."

The next change was to add the definition of "impaired," which comes from *Shaw v. State*, 783 So. 2d 1097 (Fla. 5th DCA 2001).

The next change was a statutory cite from § 322.01(2), Florida Statutes, for the definition of "alcoholic beverages."

The last change pertains to what is commonly referred to as the "presumptions of impairment." That section was amended for the same reason in proposal #1. In short, there is no need to instruct jurors they may conclude a defendant is impaired with a blood/breath alcohol level of more than .08 because operating a vessel with such an alcohol level is itself the crime of BUI.

No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposals 3 and 4 – 9.1 and 9.2 – Kidnapping and False Imprisonment

The Committee is filing proposals to amend the standard Kidnapping and False Imprisonment instructions to ensure there is a jury finding if the State is trying to score the adult-on-minor sex offense multiplier in § 921.0024(1)(b), Florida Statutes. That part of the statute calls for the subtotal sentence points on the scoresheet to be multiplied by 2.0 if the defendant was 18 years of age or older at the time of the crime and the victim was younger than 18. Additionally, the Kidnapping or False Imprisonment had to be committed after October 1, 2014. Finally, there has to be a finding that during the course of the Kidnapping or False Imprisonment, the defendant committed an enumerated sex offense against the victim.

The Committee concluded that in light of *Alleyne v. United States*, 133 S.Ct. 2151 (2013), any fact, other than a fact pertaining to recidivism, that increases a defendant's minimum sentence, must be found by the jury. Although *Alleyne* dealt with a minimum mandatory sentence, the logic of *Alleyne* would appear to apply to scoresheet points also. Thus, the Committee has proposed adding new sections to

the standard Kidnapping and False Imprisonment instructions that would enable the jury to make the necessary finding for the adult on minor sex offense multiplier to be scored.

The Committee believes most prosecutors will not charge defendants in a way that would make a) the adult on minor sex offense multiplier or b) the enhancement in § 787.01(3) or § 787.02(3), Florida Statutes, relevant. Those factors enhance the degree of a Kidnapping or a False Imprisonment if the defendant commits an enumerated crime during the course of the Kidnapping or False Imprisonment. It would seem to be make more sense for prosecutors to charge Kidnapping in one count and the enumerated crime in a separate count. But if the State does allege the facts necessary for the jury to make those findings, then the issue of lesser included offenses becomes quite complicated. In an attempt to alert everyone to these complications, the Committee added asterisks to the lesser-included boxes and notes explaining that the aggravating circumstances or the enumerated sex crimes would become lesser-included offenses, if charged.

No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 5 – 18.3 – False Information to Law Enforcement

The Committee proposes to delete instruction 18.3 in its entirety because it is duplicated in instruction 21.15. Both instructions cover the crime of False Information to Law Enforcement, which is found in § 837.055, Florida Statutes. Because Chapter 18 in the standard jury instructions is labelled Perjury but a violation of § 837.055, Florida Statutes, does not require the State to prove the defendant was under oath, the Committee believes it is better to delete instruction 18.3 and retain instruction 21.15. (Chapter 21 is labelled Obstruction of Justice.)

No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal to delete instruction 18.3 with the Court.

Proposal 6 – 20.18(a) – Unlawful Possession of the Personal Identification Information of Another Person

As the Court is aware, an explanation of the term “possession” can become complicated. As a result, the Committee thinks it best to simplify the explanation wherever possible. One place the explanation can be simplified is in Instruction 20.18(a), which covers the crime of Unlawful Possession of the Personal Identification Information of Another Person.

The Committee proposes to delete the explanations of actual and constructive possession, mere proximity, inferences and the exceptions to inferences. Instead, the Committee believes jurors are better served with a more

straightforward and simple explanation that to possess personal identification information means to be aware of the information and to exercise control over it. That explanation is based on the elements of Possession of a Controlled Substance in instruction 25.7, which are: 1) D knew of the presence of the substance; 2) D exercised control or ownership over the substance; and 3) the substance was x. The Committee recognized there may be instances where a party wants the jury to have a more complete explanation of possession. To cover that possibility, the Committee proposal includes a new note in the Comment section that reads: If a party requests a more complete instruction on the concept of possession, the trial judge can insert language from Instruction 25.7 (Possession of a Controlled Substance).

No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

**Proposal 7 – 28.18 – Failure to Obey the Lawful Order of a [Police]
[Traffic] Official**

There was a mistake in the numbering of the elements for instruction 28.18 when it was promulgated last year. See *In re Standard Jury Instructions in Criminal Cases – Report 2013-047*, 166 So. 3d 161 (Fla. 2015). To correct the error, the proposal contains the number “1.” next to the first element (instead of “2.”) and then the remaining elements are numbered appropriately. No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Respectfully submitted this 15th day of
September, 2016.

s/ Judge F. Rand Wallis _____
The Honorable F. Rand Wallis
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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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