

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES CASE NO.: SC19-REPORT 2019-07

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.

Table with 3 columns: Proposal #, Instruction #, and Topic. Row 1: Proposal 1, 3.3(a), Aggravation of (Name of Felony) by [Carrying] [Displaying] [Using] [Threatening to Use] [Attempting to Use] a [Firearm] [Weapon]. Row 2: Proposal 2, 3.3(b), Aggravation of a Felony by Carrying a Weapon Other than a Firearm.

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.

The proposals were published in the April 1, 2019 issue of the Bar News. One comment was received from the Florida Public Defenders Association ("FPDA"). The FPDA's comment is in Appendix B.

Referral

In a letter dated November 5, 2018, the Court sent a referral to the Committee asking for amendments to the applicable criminal jury instructions as a result of Shepard v. State, 259 So. 3d 701 (Fla. 2018). The Court also asked the Committee to review the definitions for "deadly weapon" and "dangerous weapon." The referral is in Appendix C. (The Committee response to the referral was due in May 2019 but was later extended to the end of July 2019.)

The Committee agreed there were problems with the existing definitions of "weapon," "deadly weapon," and "dangerous weapon" in the standard criminal jury instructions. These problems are discussed in footnote one.<sup>1</sup> The Committee

RECEIVED, 07/22/2019 11:34:33 AM, Clerk, Supreme Court

concluded the best solution would be for the Legislature to define the terms

<sup>1</sup> *Browne v. State*, 239 So. 3d 171 (Fla. 5th DCA 2018) is instructive in this regard. Browne pointed the barrels of a double-barreled shotgun at a victim during a robbery. It turned out the barrels were detached from the rest of the shotgun at the time of the robbery. The State charged Browne with Robbery with a Weapon. The Fifth District Court of Appeal held that because the robbery statute does not define a weapon, the courts should look to the Chapter 790 definition of a weapon. The Chapter 790 definition states: “Weapon means any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife.” The Fifth District Court of Appeal concluded the detached barrels of a shotgun were not a dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, or chemical weapon or device, so the only possible option within the Chapter 790 definition was “other deadly weapon.” The Fifth District Court of Appeal wrote that considering how the detached barrels were used by Browne, there was no likelihood of death or great bodily harm to the victim. The Fifth District Court of Appeal therefore concluded the detached barrels of a shotgun could not be considered as an “other deadly weapon,” and therefore could not be considered a weapon.

There is a problem, though, with applying the Chapter 790 definition of “weapon” to the robbery statute. The Chapter 790 definition of weapon includes “other deadly weapon,” but the robbery statute has a separate penalty for a robber who carries a deadly weapon than for a robber who carries a weapon. Thus, a weapon and a deadly weapon cannot mean the same thing for purposes of the robbery statute. The Fifth District Court of Appeal is not the only district court that has applied the Chapter 790 definition of “weapon” to the robbery statute. The Fourth District Court did so in *Stanley v. State*, 757 So. 2d 1275 (Fla. 4th DCA 2000), and the Second District Court did so in *Williams v. State*, 651 So. 2d 1242 (Fla. 2d DCA 1995).

In addition, the standard robbery instruction does not rely on the Chapter 790 definition of weapon. Instead, it defines a weapon as “any object that could be used to cause death or inflict serious bodily harm,” which is based on *Dale v. State*, 703 So. 2d 1045 (Fla. 1997). However, the *Dale*-based definition may be problematic. If a defendant robs a bank teller with car keys in his pocket, he or she could theoretically be charged with robbery while carrying a weapon because he or she could have used the car keys to poke out the teller’s eye.

Moreover, in some statutes, the Legislature uses the term “deadly weapon.” In other statutes, the term “dangerous weapon” is used, which raises two questions: 1) what is the difference between a dangerous weapon and a deadly weapon? 2) assuming those terms are synonymous, what is the difference between a weapon

“weapon, “deadly weapon,” and “dangerous weapon” where appropriate. The Committee, therefore, unanimously recommends that the Court put this issue on the judicial branch agenda for the next legislative session.

In the absence of legislative direction, the Committee agreed that the Court must fill the void. Recently, the Court issued *Shepard v. State*, 259 So. 3d 701 (Fla. 2018), in which the defendant drove a car into a victim. The issue on appeal was whether a car could be a weapon for purposes of § 775.087(1), Fla. Stat., which is the statute reclassifying a felony because of the use of a weapon during the commission of the felony. There is no definition of “weapon” in § 775.087(1), Fla. Stat. The Court found that the appropriate definition of “weapon” for purposes of § 775.087(1), Fla. Stat., is “any object used or intended to be used to inflict harm on another.”

However, in *Shepard*, the defendant actually used the weapon (car) to kill the victim. There could be a circumstance when a defendant does not use and does not intend to use the weapon, but nevertheless has the weapon available by virtue of carrying it during the commission of the felony. In fact, § 775.087(1), Fla. Stat., reclassifies felonies for people who merely *carry* a weapon during the commission of the felony. If a defendant carries a weapon while committing a felony (that does not include a weapon as an element), the plain language of the statute would require that defendant to be subject to the reclassification. For example, if a defendant had an injunction to stay away from a victim and then the defendant stalked the victim while carrying a stiletto, the defendant should be guilty of Aggravated Stalking-Reclassified, regardless of whether the defendant used or intended to use the stiletto during the stalking.

The idea that one should be subject to a more severe punishment for the mere carrying of a weapon during the commission of a felony was recognized in *State v. Baker*, 452 So. 2d 927 (Fla. 1984). In *Baker*, this Court wrote: “However, the statutory element which enhances punishment for armed robbery is not the *use* of the deadly weapon, but the mere fact that a deadly weapon was *carried* by the

---

and a dangerous/deadly weapon? In sum, there is no definition of “deadly weapon” or “dangerous weapon” anywhere in the statutes. Chapter 790 contains a definition of “weapon,” but that term is not defined in non-Chapter 790 crimes and, as the Court realized in *Shepard v. State*, 259 So. 3d 701 (Fla. 2018), the Chapter 790 definition of “weapon” does not fit for all criminal statutes that are not within Chapter 790.

perpetrator. The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon in his possession during the offense.”

The same idea is present in burglary case law because the burglary statute criminalizes one who “is or becomes armed...with a dangerous weapon” in the course of committing the burglary. Thus, if a burglar steals a gun after breaking into a house when no one is home, the burglar is guilty of Armed Burglary, even if he never used the gun and never intended to use the gun during the burglary. In *State v. Rodriguez*, 402 So. 2d 86 (Fla. 3d DCA 1981), the Third District wrote about the burglary statute as follows: “We agree with *State v. Dopson*, 323 So. 2d 644 (Fla. 4th DCA 1975) where Judge Downey stated: There is nothing ambiguous about the language of either section of the statute nor do we find any support for the alleged requirement that the state must show the person charged intended or was willing to use such weapon in the furtherance of the crime being committed. A loaded pistol is a dangerous weapon and to take possession thereof is to arm oneself.”

For instruction 3.3(a), the Committee was unsure whether the Court intended to limit § 775.087(1), Fla. Stat., to require the State to prove the defendant not only *carried* the weapon during the commission of the felony, but also *intended to use* the weapon. Because the *Shepard* facts did not require the Court to consider that circumstance, the Committee decided to base its proposal on *Shepard*, but also wanted to cover the circumstance where the statute criminalizes the mere carrying of a weapon. The Committee also wanted to capture two other ideas to define weapons: 1) objects that were designed to inflict bodily harm on another; and 2) objects that were not designed to inflict bodily harm but were used, intended to be used, threatened to be used, or attempted to be used to inflict harm. For purposes of instruction 3.3(a), the Committee combined *Shepard* with *State v. Fleming*, 606 So. 2d 1229 (Fla. 1st DCA 1992). The Committee is recommending the definition for “weapon” for instruction 3.3(a) read as follows:

**A “weapon” is defined as: 1) any object readily capable of inflicting bodily harm if used in the ordinary manner contemplated by its design and construction; or 2) any other object that was [used] [or] [threatened to be used] [or] [attempted to be used] [or] [intended to be used] to inflict bodily harm.**

The Committee also worked on a variety of instructions that contained the term “deadly weapon” or “dangerous weapon.” Proposals were published in the *Bar News*. But upon final review, the proposals needed more work because they

could arguably be found to be inconsistent with existing case law. Therefore, the Committee will begin that project again. For now, the Committee is: 1) requesting the Court to ask the Legislature to define “weapon,” “deadly weapon” and “dangerous weapon” where needed; and 2) filing proposals for instructions 3.3(a) and 3.3(b).

The proposals for 3.3(a) and 3.3(b) were published in the April 1, 2019 edition of the *Bar News*. The Committee received one comment from the FPDA, which will be discussed next.

### FPDA Comment

The FPDA's comments (Appendix B) pertain to some proposals that are not included in this report. The Committee's response to the pertinent parts of the FPDA's comment is as follows:

The FPDA's first point is that the proposals should not create substantive changes. The Committee concluded that substantive changes were necessary and desirable. For example, the existing definition of “weapon” for purposes of § 775.087(1), Fla. Stat., is in instruction 3.3(b), which defines a weapon as “any object that could be used to cause death or inflict serious bodily harm.” As noted in footnote one, almost any object, including car keys, *could* be used to cause death or inflict serious bodily harm. Thus, the existing definition of “weapon” for § 775.087(1), Fla. Stat., appears to be too broad. However, if the definition of “weapon” from *Shepard v. State*, 259 So. 3d 701 (Fla. 2018), is inserted into the instruction for § 775.087(1), Fla. Stat., then the instruction would limit the Legislature's reclassification scheme in cases where the State's only proof is that the defendant was carrying the object during the commission of the felony. If this is what the Court intended, the Court should insert: **A “weapon” is defined as any object that was used or intended to be used to inflict harm.** Finally, the Committee notes that the existing definition of “weapon” for purposes of § 775.087(1), Fla. Stat., (instruction 3.3(b)) references “death or serious bodily harm.” However, in *Shepard v. State*, 259 So. 3d 701 (Fla. 2018), the Court defined a “weapon” as any object used or intended to be used to inflict harm. Because the Court did not mention *serious* bodily harm and because § 775.087(1), Fla. Stat. does not refer to a “dangerous weapon” or a “deadly weapon,” the Committee thought the instruction for § 775.087(1), Fla. Stat., should refer only to “bodily harm” and not “serious bodily harm,” even though such a change in the standard instruction would be a substantive change.

The FPDA also commented that greater juror confusion should be avoided. The Committee agreed but did not think that its final proposal was confusing.

The FPDA next commented that the proposal should include “bodily harm” and not just “harm” because there could be psychological harm in a given case. The Committee agreed and added the word “bodily” to its final proposal.

The FPDA also suggested the proposal include “tangible object” instead of just “object.” The Committee disagreed because no one thought the State would argue—or a jury would conclude—that an intangible object was a weapon.

The FPDA pointed out that confusion arises when the same term is defined differently in different instructions. The Committee agrees that confusion is possible but cannot be avoided—without a legislative fix—because the definition of “weapon” for a Chapter 790 crime often does not fit for a crime (or a criminal statute) not within Chapter 790. For example, even if the Court inserts the *Shepard* definition of “weapon” into the instruction covering § 775.087(1), Fla. Stat., that instruction would still differ from a standard jury instruction that covers a Chapter 790 crime.

### **Proposal 1 – Instruction 3.3(a)**

Existing instruction 3.3(a) covers the § 775.087(1), Fla. Stat., reclassification for a firearm while existing instruction 3.3(b) covers the § 775.087(1), Fla. Stat., reclassification for a weapon. The Committee thought it best to streamline the instructions so that instruction 3.3(a) covers both the firearm and the weapon reclassifications. The Committee also deleted the word “felony” from the title and added an unbolded “(name of felony),” which means the judge is to insert the appropriate name of the felony alleged. The Committee added the options within § 775.087(1), Fla. Stat. of: 1) displaying; 2) using; 3) threatening to use; and 4) attempting to use by putting brackets around each of those terms, along with brackets around “carrying” because § 775.087(1), Fla. Stat. contains all of these options.

As explained above, the existing definition of “weapon” for purposes of § 775.087(1), Fla. Stat., is in instruction 3.3(b), and states: **A “weapon” is legally defined to mean any object that could be used to cause death or inflict serious bodily harm.** Since *any* object, such as a car key or a pencil, *could* be used to inflict serious bodily harm, the Committee thought a change in the definition of “weapon” is necessary. To repeat, the Committee proposal is: **A “weapon” is defined as: 1) any object readily capable of inflicting bodily harm if used in the ordinary manner contemplated by its design and construction; or 2) any other object that was [used] [or] [threatened to be used] [or] [attempted to be used] [or] [intended to be used] to inflict bodily harm.**

As the Court can see, in the section that covers objects that were not designed to be weapons, the Committee included all four alternatives of: 1) used;

2) threatened to use; 3) attempted to be used; and 4) intended to be used, because that is what the underlying statute requires.

The Committee also added some new ideas into the comment section. First, the Committee recommends that the verdict form contain a special finding for the reclassification. The Committee directed lawyers and judges to example 6 in instruction 3.12 for a template that could be used on the verdict form.

The Committee also noted that a special instruction would be needed if the case involved a weapon that was not commonly thought of as an object, such as an animal or a substance.

Finally, the Committee expanded the existing comment that informs lawyers and judges that § 775.087(1), Fla. Stat., cannot be used to reclassify a crime that already includes a firearm or a weapon as an element. For instance, Robbery with a Firearm, Robbery with a Deadly Weapon, and Robbery with a Weapon cannot be reclassified under § 775.087(1), Fla. Stat. Similarly, Aggravated Battery-Deadly Weapon cannot be reclassified. But an Aggravated Battery that is based on intentionally causing great bodily harm can be reclassified by § 775.087(1), Fla. Stat. *Hurry v. State*, 978 So. 2d 854 (Fla. 1st DCA 2008).

The Committee's response to the FPDA was discussed above. Upon final review, the vote was unanimous to file the proposal with the Court.

### **Proposal 2 – Instruction 3.3(b)**

If the Court agrees to include the option of a “weapon” reclassification into instruction 3.3(a), then instruction 3.3(b) is no longer necessary, which is why the Committee proposes deleting it. The proposal was published. No one commented on the streamlining idea. The final vote was unanimous to recommend that the “weapon” option, which is currently in instruction 3.3(b), be incorporated into instruction 3.3(a) and that instruction 3.3(b) be deleted.

### **Conclusion**

The Committee requests the Court ask the Legislature to define “weapon,” “deadly weapon,” and “dangerous weapon,” wherever appropriate. In the meantime, the Committee will continue to work on definitions for “deadly weapon” and “dangerous weapon.” The Committee also requests the Court to authorize for use the proposal for instruction 3.3(a) as set forth in Appendix A, *unless* the Court intended in *Shepard* to limit the scope of § 775.087(1), Fla. Stat.

Respectfully submitted this 22nd day of  
July, 2019.

s/ Judge F. Rand Wallis  
The Honorable F. Rand Wallis  
Chair, Supreme Court Committee on  
Standard Jury Instructions in Criminal Cases  
Fifth District Court of Appeal  
300 South Beach Street  
Daytona Beach, Florida 32114  
Florida Bar Number: 980821  
[WallisR@flcourts.org](mailto:WallisR@flcourts.org)

**CERTIFICATE OF SERVICE AND 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) and that a copy of the report and appendices has been sent through the portal to the Vice President of the FPDA, the Honorable Rex Dimmig, at [rdimmig@pd10.org](mailto:rdimmig@pd10.org); this 22nd day of July, 2019.

s/ Judge F. Rand Wallis  
The Honorable F. Rand Wallis  
Chair, Supreme Court Committee on  
Standard Jury Instructions in Criminal  
Cases  
Fifth District Court of Appeal  
300 South Beach Street  
Daytona Beach, Florida 32114  
Florida Bar Number: 980821  
[WallisR@flcourts.org](mailto:WallisR@flcourts.org)