

To: Justices of the Florida Supreme Court
Re: Comments on Proposed Jury Instructions 13.21 (Impairing Telephone/Power to a Dwelling...) and 10.15 (Felons Possessing Weapons/Ammunition)
Date: July 22, 2005

Please consider the following two comments about instruction 13.21 (Impairing Telephone/Power to a Dwelling to Facilitate or Further a Burglary).

First, 810.061 Fla. Stat. (2004) states that the term “burglary” has the meaning ascribed in s.810.02(1)(b). The definition of burglary in proposed jury instruction 13.21 does not track the definition of burglary in 810.02(1)(b), however.

Second, the definition of “impaired” is proposed to be “diminished, damaged, or weakened.” In Shaw v. State, 783 So. 2d 1097 (Fla. 5th DCA 2001), the Fifth District held that it was error for a prosecutor to argue that “impaired” means “weakened.” According to the 5th DCA, “impaired” does not mean “weakened” - at least not in a DUI prosecution. According to the 5th DCA, “impaired” (for DUI purposes) means “diminishment in some material aspect.”

It is not clear that the 5th DCA’s Shaw decision was correct. In fact, I checked www.onelook.com for definitions of the word “impaired” and the proposed definition of “diminished, damaged, or weakened” seems entirely appropriate. For some reason, though, the 5th DCA relied upon one particular dictionary - Webster’s New Collegiate – in which the definition of “impaired” differs from the definition in the proposed 13.21 instruction. It is possible that the word “impaired” means one thing in 810.061 Fla. Stat. and another thing in 316.193 Fla. Stat. But the issue is going to arise at some point and hopefully will be addressed before a conviction has to be reversed.

Separately, please consider the following four comments about the new proposed instruction for 10.15 Felons Possessing Weapons.

The first problem is with the title which is proposed to be FELONS POSSESSING WEAPONS/AMMUNITION. The relevant statute – 790.23 – reads: It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been: . . .

The statute is ambiguous as to whether there is a difference between the word “possess” and the word “carry.” If there is no difference, there is no problem. But if there is a difference – which seems to be the case because element #2 has an “a” and a “b” - then a convicted felon who possesses a concealed weapon but does not “carry” it may not be guilty. I am not aware of any case law on the ambiguity. But the title of the proposed instruction might be better named as : CONVICTED FELONS CARRYING A CONCEALED WEAPON OR POSSESSING FIREARMS/AMMUNITION/ELECTRIC WEAPON.

A second problem with the proposed instruction is highlighted in the recent case of Moore v. State, 903 So. 2d 341 (Fla. 1st DCA 2005). Because instruction 2b states that the trial judge is supposed to fill in the (*weapon alleged*),” there may be instances (such as in Moore where the jury was told that a pellet gun was a “deadly weapon”) where the jury will not be properly instructed and a conviction will have to be reversed.

A third problem is that the language in the “defense” section (pertaining to the restoration of civil rights) does not track the statute because the statute (790.23(2)) refers to both civil rights and firearm authority. Furthermore, the jury is not told who has the burden of persuasion on the issue of whether a defendant’s civil rights had been restored.

The fourth problem is in the language on “possession.” The instruction states: “If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.” This is an incorrect statement of law under two scenarios. #1 - If two or more people are carrying one bale of marijuana, they are not in exclusive possession of the marijuana. Nevertheless, there is an inference of “knowledge of presence” because they are in actual possession. #2 – In a joint constructive possession

case, there is an inference of “knowledge of presence” when the item is in a common area, in plain view of the owner/resident, and the owner/resident is present in the place where the item is located. Cases that support this proposition include Brown v. State, 428 So. 2d 250 (Fla. 1983) and Bradshaw v. State, 509 So. 2d 1306 (Fla. 1st DCA 1987).

To fix these problems – along with a few other minor changes - I propose the following:

10.15

FELONS POSSESSING WEAPONS/AMMUNITION
CONVICTED FELONS CARRYING A CONCEALED WEAPON OR
POSSESSING FIREARM/AMMUNITION/ELECTRIC WEAPON OR
DEVICE

s. 790.23, Fla. Stat.

To prove the crime of (*crime charged*), the State must prove the following (*two*)(*three*) elements beyond a reasonable doubt:

1. (*Defendant*) had been convicted of (*prior offense/a felony*).
2. After the conviction, (*defendant*) knowingly

Give 2a or 2b as applicable

- a. [owned][had in [his][her] care, custody, possession, or control]

[a firearm]

[an electric weapon or device]

[ammunition].

- b. [carried a (~~weapon alleged~~), which was concealed from the ordinary sight of another person] concealed weapon].

Defense; give as a third element only if defendant has satisfied his burden of production..

3. (*Defendant's*) civil rights and firearm authority had not been restored at the time of the offense. If you find that the defendant's civil rights had been restored at the time of the offense, you shall find the defendant not guilty.

Definitions

“Convicted” means that a judgment has been entered in a criminal proceeding by a ~~competent~~ court pronouncing the accused guilty.

A [~~“firearm”~~][~~electric weapon or device”~~][~~“concealed weapon”~~] is legally defined as (~~adapt Section 790.001, Fla. Stat., as required by the allegations~~).

Give as appropriate

[A “firearm”][“Ammunition”][“An electric weapon or device”][“A concealed weapon”] is legally defined as (insert the definition in 790.001).

If the concealed weapon is a tear gas gun or chemical weapon or device, give the following:

A [~~“tear gas gun”~~][~~“chemical weapon or device”~~] is legally defined as (insert the definition in 790.001).

If the concealed weapon is an “other deadly weapon,” give the following:

A “deadly weapon” is legally defined as one likely to produce death or great bodily injury.

Give if 2a alleged

“Care” and “custody” mean immediate charge and control exercised by a person over the named object. The terms care, custody, and control may be used interchangeably.

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

Evidence of mere proximity to an object does not establish ownership or control of that object when the object was not in a place over which the person had control. In such cases, you can only find guilt if the facts and circumstances convince you beyond a reasonable doubt that the defendant knew of the presence of the object and exercised the right of ownership or control over the object.

Possession may be actual or constructive. If a thing is in the hand of or on the person, or in a bag or container in the hand of or on the person, or is so close as to be within ready reach and is under the control of the person, it is in the actual possession of that person.

If a thing is in a place over which the person has control or in which the person has hidden or concealed it, it is in the constructive possession of that person.

Possession may be joint, that is, two or more person 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 or assumed.~~

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

Give if appropriate

Knowledge of the presence of an object may be inferred where the defendant was in (actual possession of the object)(exclusive constructive possession of the object)(nonexclusive constructive possession, where the object was in plain view, in a common area of the place controlled by the defendant, and the defendant was present in that place).

Respectfully submitted,

Bart Schneider
Fla. Bar No. 0936065
203 Live Oak Court
Lake Mary, Florida 32746
(407) 321-1027

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by U.S. mail to Judge Deede S. Costello, Chair of the Supreme Court Committee on Standard Jury Instructions in Criminal Cases, Bay County Courthouse, P.O. Box 1089, Panama City, Florida 32402-1089, this 22nd day of July, 2005.

Bart Schneider

CERTIFICATE OF TYPE AND FONT SIZE

I CERTIFY that this letter has been typed using Times New Roman 14.

Bart Schneider