IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES – REPORT NO. 2007-05

CASE NO.: SC07-1420

The following comments are submitted in response to Proposal 2 (Voyeurism, the Video Voyeurisms, the Video Voyeurism Disseminations, and the Commercial Video Voyeurisms); and Proposals 4 and 5 (Robbery and Carjacking); which were published in the Florida Bar News on September 15th.

Proposal 2 - The Committee on Standard Jury Instructions has proposed a comment for the voyeurism instructions that says the historical fact of a previous conviction must be determined by the jury in a bifurcated proceeding. I do not think it is appropriate to publish these comments because there is no case law that holds that a prior conviction is an element of the voyeurism crimes.

The Committee obviously copied the format used in the standard jury instructions for theft and DUI. However, prior convictions for theft (or DUI) are elements of felony petit theft (or felony DUI) under existing case law. See State v. Rodriguez, 575 So. 2d 1262 (1991) for DUIs and State v. Harris, 356 So. 2d 315 (Fla. 1978) for thefts.

There is no case law that holds that a prior conviction is an element of felony voyeurism. Moreover, it is debatable whether this Court will mimic its DUI/theft case law or alter its reasoning in light of Apprendi v. New Jersey, 530 U.S. 466 (2000)(recidivist statutes are considered sentencing factors and may be proven to a judge under the preponderance standard).

In order to invoke Circuit Court jurisdiction, the State will have to allege prior convictions in the charging document. But the filing of an information - which has the benefit of giving notice to the defendant of a potential enhanced sentence - should not transform a sentencing factor into an element of a crime.

Finally, if the instruction is published as proposed, no prosecutor or trial judge is going to stick his or her neck out and bypass a jury finding on prior convictions. Accordingly, the Committee on Standard Jury Instructions will have determined the law, when this disputed issue should be allowed to percolate in the district courts of appeal before this Court issues an opinion.

Proposals 4 and 5 (Robbery and Carjacking) – It is not uncommon for defendants to rob people who know them. In these cases, the victim frequently refuses to admit - in court - that he or she was afraid. That presents a problem

because the standard instruction requires that "Force, violence, assault, or putting in fear was used in the course of a taking."

On the other hand, cases such as Cliett v. State, 951 So. 2d 3 (Fla. 1st DCA 2007) highlight that defendants may be wrongly convicted when they rob overly sensitive victims. As Judge Benton pointed out in his dissent in Cliett, the standard jury instruction for robbery is inadequate because it does not inform the jury that "putting in fear" has to be objectively reasonable.

To cure this defect, I propose the following which should be inserted in both the Robbery and Carjacking instructions after *"Force. Give if applicable."* and before "*Victim unconscious. Give if applicable.*"

Fear. Give if applicable.

A victim's subjective state of mind is not the controlling factor in determining whether the State has proven that "putting in fear" was used in the course of the taking. Actual fear on the part of an actual victim need not be proved. Rather, the issue is whether the State has proven that a reasonable person, under the same circumstances, would have felt sufficiently threatened to give in to the robber's demands.

Respectfully submitted,

_____
Bart Schneider
203 Live Oak Court
Lake Mary, Florida 32746
Florida Bar No.: 0936065
407-463-1333

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by U.S. mail to Judge Terry D. Terrell, committee chair, c/o Less Garringer, Office of the General Counsel, 500 South Duval Street, Tallahassee, Florida, 32399-1925, this _____ day of October, 2007.

_____
Bart Schneider

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this comment has been typed using Courier New 12.

_____
Bart Schneider