Supreme Court of Florida

IN RE:
STANDARD JURY INSTRUCTIONS
IN CRIMINAL CASES-
REPORT 2007-05
_____/

CASE NO.: SC07-1420

COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES

RESPONSE TO THE COMMENTS OF THE HONORABLE LARRY SCHACK, MR. BART SCHNEIDER, AND MR. R. BLAISE TRETTIS

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

Comes now the Supreme Court Committee on Standard Jury Instructions in Criminal Cases, by and through the Chair, the Honorable Terry D. Terrell, Circuit Court Judge, and files this response to the comments received by The Honorable Larry Schack, Mr. Bart Schneider, and Mr. R. Blaise Trettis.

The committee filed a report with the Court on July 31, 2007, proposing fourteen new and amended jury instructions.

The Court published all of the proposed instructions in *The Florida Bar News* on September 15, 2007. Comments were required to be filed with the Court no later than October 15, 2007. Comments were received from The Honorable Larry Schack, Circuit Court Judge, Mr. Bart Schneider, and Mr. R. Blaise Trettis. The comments from Judge Schack were not filed with the Court, but were sent directly to committee staff.

Judge Schack commented on proposed instructions 15.1, 15.2, 15.3, and 15.4 (proposals 4 through 7 in the report filed with the Court). Mr. Bart Schneider commented on proposed instructions 11.13, 11.13(a) through 11.13(g), 15.1, and 15.2 (proposals 2, 4, and 5 in the report filed with the Court). Mr. Trettis

commented on proposed instructions 15.1 and 15.4 (proposals 4 and 7 in the report filed with the Court).

No comments were received by the Court on proposal 1 (instruction 10.19 - Use of a Self Defense Weapon) and proposal 3 (instruction 14.7 - False Verification of Ownership or False Identification to a Pawnbroker).

The committee met on November 16, 2007, to address the comments received by the committee. The committee agreed to amend proposed instructions 11.13(b), 11.13(d), 11.13(f), 15.1, 15.2, 15.3, and 15.4. The substituted proposals are attached at Appendix A. The comments of Judge Schack, Mr. Schneider, and Mr. Trettis are attached at Appendix B.

Proposal 2 **11.13(b) Video Voyeurism**
11.13(d) Video Voyeurism Dissemination
11.13(f) Commercial Video Voyeurism

Mr. Schneider advised the committee that the comment located at the end of each of the proposed instructions should be deleted from the proposals. The comment states:

> It is error to inform the jury of a prior conviction before a determination of guilt of the charged offense. Therefore, do not read the allegation of prior conviction or send the information or indictment into the jury room. If the defendant is convicted of the current charge, the historical fact of a previous conviction shall be determined beyond a reasonable doubt by a jury in a bifurcated proceeding. *State v. Harbough*, 754 So. 2d 691 (Fla. 2000).

Mr. Schneider argued that there is no case law to support the proposition that a prior conviction under either the voyeurism or video voyeurism statutes is an element of the offense. The state will allege the existence of a prior conviction in the Information or Indictment in order to invoke the jurisdiction of the circuit court. However, a bifurcated proceeding should not be necessary. The evidence of a prior conviction can be determined outside the presence of a jury by a preponderance of the evidence and the court can then sentence accordingly. As a matter of law, there is no requirement that the state prove the existence of a prior conviction beyond a reasonable doubt in these types of cases. The committee should not be placing a comment in an instruction that reaches a legal conclusion. The issue of whether the prior conviction is an element of the offense charged, or

is solely a sentencing matter before the trial court, should be determined by the case law.

The committee did not agree with the conclusions reached by Mr. Schneider. It was felt that the prior conviction must be charged in the Information or Indictment in order to vest the circuit court with jurisdiction. Once the prior conviction is alleged, the state is obligated to prove this fact to a jury in a separate proceeding, beyond a reasonable doubt. The reason that no cases have addressed this issue is because the trial courts, in an abundance of caution, have bifurcated proceedings in cases where a prior offense is alleged in the Information or Indictment. Judge Terrell noted that the trial court never advises the jury regarding a prior conviction unless the offense charged is possession of a firearm by a convicted felon. The court always bifurcates the proceeding in order to ensure the trial jury is unaware of the offender's prior conviction.

Although not raised by any comments filed with the Court, the committee reviewed the proposed instructions and voted unanimously to include the term "intentionally" in element one of proposed instructions 11.13(b), 11.13(d), and 11.13(f). The term "intentionally" has been included by the legislature in section 810.145(2)(a), section 810.145(2)(b), section 810.145(2)(c), and section 810.145(3), Florida Statutes.

Proposal 4 **15.1 Robbery**

Mr. Schneider argued that the committee should amend the proposed robbery instruction to include an additional instruction to the jury regarding the question of whether a victim was in fear at the time the robbery was committed. Mr. Schneider noted that certain victims refuse to admit at trial that they are afraid when the robbery occurs. Element two of the current robbery instruction requires that "force, violence, assault, or putting in fear was used in the course of the taking" be proven beyond a reasonable doubt. Mr. Schneider asked the committee to consider the dissenting opinion of Judge Benton in Cliett v. State, 951 So. 2d 3 (Fla. 1st DCA 2007). In Cliett, Judge Benton pointed out the standard instruction for robbery was inadequate because it did not inform the jury that "putting in fear" has to be objectively reasonable. Mr. Schneider proposed the following addition to the standard instruction.

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.

The committee extensively debated this issue. A majority of the committee felt that the holding in Cliett was correct. The current instruction does not use the term "subjective" nor does it ask the jury to view the circumstances from the victim's point of view. The instruction simply asks whether, from a jury's external viewpoint, the victim was put in fear. This is an objective rather than a subjective analysis. The committee voted 8 to 5 to not amend the instruction by adding the requested language.

Judge Schack filed comments regarding the proposed robbery instruction. His Honor suggested a rewrite of the enhanced penalty language found in the instruction. None of the recommendations for change were substantive. The committee appreciated the plain English text offered by Judge Schack, but felt that the language used in the proposed committee instruction matched the phrasing used in several other jury instructions. The committee opted to not change the wording of the proposal. Judge Schack also recommended a modification of the definitions for the terms "firearm" and "weapon." The committee, by a vote of 14 to 3, agreed to delete the term "legally" from both of these definitions.

Mr. Trettis filed comments with the Court regarding this proposal. At the committee meeting, Mr. Trettis expressed his opinion that both first degree and second degree grand theft should not be included as permissive lesser included offenses of robbery under section 812.13(2)(c), Florida Statutes. First degree felony grand theft is both greater in degree and penalty than second degree felony robbery. Second degree felony grand theft should not be included because this offense is a crime of the same degree and penalty as second degree felony robbery. In addition, second degree felony grand theft can be a level 7 offense under the Criminal Punishment Code. Second degree robbery is a level 6 offense. Therefore, the legislature has assessed more scoresheet points for a second degree theft than for robbery.

Based on the argument of Mr. Trettis, the committee voted unanimously to delete the first degree felony grand theft from the lesser included offense table for

robbery under section 812.13(2)(c), Florida Statutes. By a vote of 11 to 1, the committee also agreed to delete second degree felony grand theft from the lesser included offense table for robbery under section 812.13(2)(c), Florida Statutes.

The committee also authorized staff to make minor grammatical changes by adding a comma in the *Force. Give if applicable* section of the instruction.

Proposal 5 **15.2 Carjacking**

Mr. Schneider requested that the committee consider adding the same "fear" instruction to this proposal as was suggested in proposal 4. For the same reasons articulated above, the committee rejected the argument based on the holding in Cliett.

The committee also voted unanimously to not adopt the suggested language offered by Judge Schack regarding the enhancement provisions found in the proposed instruction. The committee appreciated the plain English text, but felt that the language used in the proposed committee instruction matched the phrasing used in several other jury instructions. The committee, by a vote of 11 to 2, did agree to delete the term "legally" in both the firearm and weapon definition sections of the proposal.

The committee also authorized staff to make minor grammatical changes by adding a comma in the *Force. Give if applicable* section of the instruction.

Proposal 6 **15.3 Home Invasion Robbery**

The committee voted unanimously to not adopt the suggested language offered by Judge Schack regarding the enhancement provisions found in the proposed instruction.

Proposal 7 **15.4 Robbery by Sudden Snatching**

Mr. Trettis filed comments with the Court regarding this instruction. However, at the meeting, Mr. Trettis advised the committee he did not wish for the Court to consider his comments regarding this proposal. He explained that the comments filed with the Court did not provide a complete legal analysis. Mr. Trettis advised the committee that he would address his concerns in a forthcoming committee report to be filed with the Court.

The committee also voted unanimously to not adopt the suggested language offered by Judge Schack regarding the enhancement provisions found in the proposed instruction. The committee felt the language, as proposed by the committee, was a correct statement of law and the terms used were identical to other proposals submitted by the committee.

The committee authorized staff to lower case the letter "s" in the word “sudden” located in the *Enhanced Penalty. Give if applicable* section of the instruction.

Respectfully submitted this _____ day of December, 2007.

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THE HONORABLE TERRY D. TERRELL
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CERTIFICATE OF FONT SIZE

I hereby certify that this brief 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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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing instrument has been furnished to:

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The Honorable Larry Schack
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by U.S. mail this _____day of December, 2007.

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THE HONORABLE TERRY D. TERRELL
Chair, Committee on Standard Jury Instructions
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