IN THE SUPREME COURT OF FLORIDA

IN RE:
STANDARD JURY INSTRUCTIONS CASE NUMBER: SC11-
CRIMINAL CASES-
REPORT 2011-03
_____/

To the Chief Justice and Justices of the Supreme Court of Florida:
This report, proposing new and amended instructions to the Florida Standard Jury Instructions in Criminal Cases, is filed pursuant to Article V, section 2(a), Florida Constitution.

	Instruction #	Topic
Proposal 1	**10.15(a)**	**Possession of a Firearm By a Person Under 24 Found Delinquent of An Offense Which Would Be a Felony if Committed By An Adult**
Proposal 2	**8.21**	**[Aggravated] [Assault] [Battery] By a Detainee Upon Another Detainee or Visitor**
Proposal 3	**6.4**	**Attempted Second Degree Murder**
Proposal 4	**28.5(a)**	**Racing on a Highway**
Proposal 5	**3.9**	**Weighing the Evidence**
Proposal 6	**3.10**	**Rules for Deliberation**
Proposal 7	**3.6(k)**	**Duress**
Proposal 8	**15.4**	**Resisting Recovery of Merchandise**
Proposal 9	**Qualifications 1.001, 1.01, 2.08**	**Jimmy Ryce**
Proposal 10	**11.17**	**Unlawful Residency for Sexual Offenders**

Appendix A contains the proposals. Words to be deleted are shown with strike-through marks; words to be added are underlined.

Proposals 1-7 were published in *The Florida Bar News* on April 30, 2011.
Proposals 8-10 were published in *The Florida Bar News* on May 15, 2011.

Comments are attached in Appendix B.
Proposal 1 - A comment was submitted by Atty. Michael Kennett (DOC).
Proposal 2 - No comments were received.

Proposal 3 - A comment was received from Atty. Michael Kennett (DOC).
Proposal 4 – No comments were received.
Proposals 5 and 6 – Initial referral letter from Judge Usan.
Proposal 7 – A comment was received from Atty. Michael Kennett (DOC).
Proposals 8 and 9 - No comments were received.
Proposal 10 – A comment was received from committee member, Mr. R. Blaise Trettis.

Explanation of Proposals

Proposal 1 - 10.15(a) - Possession of a Firearm By a Person Under 24 Who Has Been Found Delinquent of an Offense Which Would Be A Felony If Committed By An Adult

A committee member proposed this instruction because there is no existing instruction for Fla. Stat. 790.23(1)(b) or (d). The proposal tracks the language of the statute. Definitions are provided for "delinquent act," "firearm," "ammunition," "electric weapon or device," and "concealed weapon," along with statutory sources for those definitions. Case cites are provided to support the explanations of the word(s): "found," "on or about a person," "ordinary sight of another person," and "deadly weapon." The explanation of "possession" is taken from the controlled substance instructions. A note is given in the comment section to explain why a 3-year minimum mandatory is not applicable.

After publication, one comment was received from Atty. Michael Kennett. He pointed out that the crimes of both (a) Attempted Possession of a Firearm by Delinquent . . . and (b) Attempted Carrying a Concealed Weapon by Delinquent . . .. exist, so that the Category 2 box should simply say "Attempt." The committee agreed. He also proposed that there be two separate boxes of lesser-included offenses – one for Carrying a Concealed Weapon and one for Possession of a Firearm. The committee did not agree and used one box for lesser-included offenses with the words "Carrying a Concealed Weapon if Carrying a Concealed Weapon is charged" as the sole Category 1 offense. The committee did not believe that these minor changes were substantive enough to warrant republication. The proposal passed unanimously.

Proposal 2 – 8.21 - [Aggravated] Assault, Battery By a Detainee Upon Another Detainee or Visitor

A committee member proposed this instruction because there is no existing instruction for Fla. Stat. 784.082. The proposal tracks the language of the statute. The reader is referred to the applicable portions of the instructions for assault, battery, aggravated assault, and aggravated battery because those crimes can be committed in multiple ways (e.g., battery can be committed by an intentional

touching or by intentionally causing bodily harm). The comment section notes the conflict in the district courts of appeal about whether the statute applies to juveniles held in juvenile facilities. That conflict is being addressed in SC10-2483. Thus, the committee respectfully requests this court to reword the comment section in this proposal to reflect the decision in SC10-2483. No comments were received after publication; the proposal passed unanimously.

Proposal 3 – 6.4 - Attempted Second Degree Murder

A committee member proposed putting Attempted Voluntary Manslaughter in the Category One box based on case law such as *Firsher v.State*, 834 So. 2d 921 (Fla. 3d DCA 2003).

After publication, one comment was received from Atty. Michael Kennett. Mr. Kennett repeats the argument that he - and others - have made to the Court in numerous other cases: Florida's manslaughter statute codifies the common law. According to this view, "manslaughter by act" includes (a) voluntary manslaughter (an intentional act, done with an intent to kill, but also done in a heat of passion based on adequate provocation) and (b) one form of involuntary manslaughter (misdemeanor manslaughter). Based on this analysis, Mr. Kennett argues Attempted Voluntary Manslaughter is not a Category One lesser of Attempted Second Degree Murder.

The committee could not adopt Mr. Kennett's reasoning because it is inconsistent with *Montgomery v. State*, 39 So. 3d 252 (Fla. 2010). The issue of whether the crime of Attempted Voluntary Manslaughter exists in the wake of *Montgomery* is before the Court in SC10-1458. Despite the uncertainty, the committee thought it best to put this proposal in the pipeline. The proposal passed unanimously.

Note: This Court has created a jury instruction case, SC11-1010, which deals with an instruction for Attempted Voluntary Manslaughter (instruction 6.6). The Court may want to sever this proposal from this case and add it toSC11-1010.

Proposal 4 – 28.5(a) - Racing on a Highway

A committee member proposed updating this instruction because the 2010 legislature changed the definition of "race." No other changes were made to the existing instruction. No comments were received after publication; the proposal passed unanimously.

Proposal 5 – 3.9 -Weighing the Evidence

The committee proposes changes to this instruction in response to a letter from Circuit Judge Michael Usan. Judge Usan wrote that it made more sense to put the "witness talking to a lawyer should not be discredited" part of Instruction 3.10

in the "Weighing the Evidence" instruction (3.9). Also, paragraph #9 was updated to reflect that impeachment is proper via evidence that the witness was convicted of either a felony or a misdemeanor involving dishonesty or false statement. Paragraph #10 was updated because reputation evidence of either dishonesty or truthfulness is admissible. No comments were received after publication; the proposal passed by a vote of 6-2.

Proposal 6 – 3.10 - Rules for Deliberation

The only change to 3.10 was the deletion of the section about "a witness talking to a lawyer should not be discredited." As noted above, the committee adopted the recommendation from Judge Usan and put that section in the "Weighing the Evidence" instruction. No comments were received after publication; the proposal passed unanimously.

Proposal 7 – 3.6(k) - Duress

A committee member proposed adding in the burden of persuasion for this affirmative defense because of case law such as *Smith v. State*, 826 So. 2d 1098 (Fla. 5th DCA 2002). One comment was received from Mr. Michael Kennett who pointed out that duress is not a defense for an attempted homicide that has an intent to kill and that it is unclear whether duress is a defense to an unintentional criminal homicide. The committee agreed and revised the comment section accordingly, but did not think the change was substantive enough to warrant republication. The proposal passed unanimously.

Proposal 8 – 15.4 – Resisting Recovery of Merchandise

A committee member proposed this new instruction because this crime is a necessary lesser-included offense in certain robbery trials. The proposal tracks the language of Fla. Stat. 812.015(6). The committee debated the part of the statute that states: ". . . unless the individual did not know, or did not have reason to know, that the person seeking to recover the property was a law enforcement officer, merchant, etc." Despite language from *Lane v. State*, 867 So.2d 539 (Fla. 1st DCA 2004), the consensus of the committee was that this part of the statute created an affirmative defense. The committee did not think it could ignore *Lane*, however. The committee decided to create an element #6 about the defendant's knowledge, with a reference to the comment section in which the issues about whether "knowledge" was an element or an affirmative defense and if an affirmative defense, who has the burden of persuasion, were brought to the reader's attention. Because the "unless" language in the Resisting Recovery statute is also used in the Burglary statute, the note for the judge contains a reference to the burglary instruction. Some committee members did not think the note should reference the

burglary instruction because to do so was an indirect way of putting the committee's stamp of approval on the committee allocating the burden of the persuasion of the affirmative defense to the state. (For burglary, case law holds that "consent to enter" and "premises open to the public" are affirmative defenses, which the state must disprove beyond a reasonable doubt if there is evidence to support the defense. There is no case law regarding this statute.) However, the proposal did not generate any comments after publication and it passed unanimously.

Proposal 9 – Qualifications, 1.001, 1.01, 2.08 – Jimmy Ryce

In *In re STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES-REPORT NO. 2010-01 AND STANDARD JURY INSTRUCTIONS IN CIVIL CASES-REPORT NO. 2010-10*, 52 So.3d 595 (Fla. 2010), this Court promulgated a series of instructions regarding juror use of the internet. The committee recognized that these instructions applied to Jimmy Ryce trials. The committee agreed to track the language of the instructions that have been approved already. Four instructions are necessary: qualifications (before jurors are sent to the courtroom); an introduction (when jurors are first in courtroom); a preliminary instruction (when jury is sworn); and a final instruction (when jurors are about to deliberate). No comments were received after publication and the proposal passed unanimously.

Proposal 10 – 11.17 – Unlawful Residency by Sexual Offenders

A former committee member (Judge Brad Thomas) proposed an instruction because there was no existing instruction for Fla. Stat. 775.215(2) and (3). His proposal tracked the language of the statute and was published on January 1, 2011. The committee received one comment from member, Mr. R. Blaise Trettis. Mr. Trettis argued that the provisions in Fla. Stat. 775.215(2)(c) and 775.215(3)(c) should be elements of the crimes. Those provisions state (for (2)(c)) that the crime of Unlawful Residency applies to any person convicted of certain sexual offenses in Florida that occurred on or after October 1, 2004, (and for (3)(c)) that the crime of Unlawful Residency applies to any person convicted of certain sexual offenses outside of Florida that occurred on or after May 26, 2010.

The committee debated whether the date of offense of the predicate sexual crime was an element or was something for the judge to determine, perhaps as part of a 3.190(c)(4) motion. The committee decided to publish the proposal from Mr. Trettis. The committee also decided to publish the definitions of "life felony," "felony of the first degree," "felony of the second degree," and "felony of the third degree." The committee did not, however, accept his suggestion that if the jurors did not find that the predicate sexual crime was a first degree felony or higher, the

jurors should be instructed to acquit. The committee believed that if the jurors did not find the predicate sexual offense was a first degree felony or higher, they should be able to find that the predicate offense was a second or third degree felony, thus making the crime of Unlawful Residency a misdemeanor.

The committee is uncertain whether "residence after establishment" is an element or whether "residence before establishment" is an affirmative defense. If an affirmative defense, the committee did not think it appropriate for the committee to allocate and determine the burden of persuasion. Thus, the decision is left to the trial judge and an explanation of the issue is given in italics.

The revised proposal was published in the *Bar News* on May 15, 2011. No comments were received. After publication, the committee made some minor changes that did not warrant republication. The proposal passed by a vote of 7-1.

Respectfully submitted this _____day of June, 2011.

_____

The Honorable Samantha L. Ward
Thirteenth Judicial Circuit
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
800 East Twiggs Street
Tampa, Florida 33602
Florida Bar Number 862207

CERTIFICATE OF FONT SIZE

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).

_____

HONORABLE SAMANTHA L. WARD
Chair, Committee on Standard Jury
Instructions in Criminal Cases
Florida Bar Number 862207