

IN THE SUPREME COURT OF FLORIDA

Case No. SC11-2517

In Re: Standard Jury Instructions in Criminal Cases – Report No. 2011-05

COMMENT OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association (FPDA) files this comment to proposed Florida Standard Jury Instructions 3.6(m) (Affirmative Defense: Temporary Possession of Controlled Substance for Legal Disposal), 3.6(n) (Affirmative Defense: Controlled Substance was Lawfully Obtained from a Practitioner or Pursuant to a Valid Prescription), and 3.9(f) (Eyewitness Identification).

Affirmative Defense Instructions

The proposed instructions on the affirmative defenses of temporary possession and lawful prescription try to cover two bases at once. There is one proposed instruction if the trial court rules the burden of persuasion is on the defendant and another proposed instruction if it rules the burden of persuasion is on the prosecution. The comment suggests the trial court consult *Dixon v. United States*, 548 U.S. 1 (2006), for guidance.

If the law is unsettled, then this issue isn't appropriate for a standard jury instruction. The issue of who bears the burden of persuasion should be litigated by parties and settled by appellate decision before becoming part of the standard jury

instructions. In *In re Standard Jury Instructions in Criminal Cases--Report 2011-02*, 75 So. 3d 207 (Fla. 2011), this Court adopted a standard jury instruction on child abuse that included a *comment* that the law was unsettled on the burden of persuasion. But the instruction itself didn't include two options depending on the trial court's legal ruling on the burden of persuasion. The proposal here appears unprecedented.

Eyewitness Identification

The Committee has proposed a new instruction to be given if eyewitness identification is a disputed issue and if requested. FPDA applauds the effort, believing an instruction is needed given what we now know about eyewitness misidentification as the leading cause of wrongful convictions. However, FPDA believes the instruction should be more detailed and informative in order to adequately apprise jurors of the issues that years of research indicate are relevant in determining the reliability of eyewitness identification testimony.

Regarding the proposed eyewitness instruction, the FPDA believes the instruction should be substantially strengthened and amplified. As noted in numerous national studies and in the Interim Report of this Court's Florida Innocence Commission, eyewitness misidentification is the single greatest cause of wrongful convictions (Interim Report at p. 10). Testimony presented to the Commission determined that 9 of 11 wrongful Florida convictions (82%) were the

result of misidentifications (Interim Report at p. 12). Social science research has established definitively that numerous specific psychological and scientific factors affect the reliability of eyewitness evaluations (see generally Appendix, Magistrate’s Report, and Opinion in *State of New Jersey v. Henderson*, 27 A. 3d 872 (N.J. 2011); the American Bar Association Criminal Justice Section further concludes that “powerful research mandates wider use of special jury instructions and expert testimony on eyewitness identification problems to assist factfinders in fairly evaluating the evidence in appropriate cases.” Achieving Justice: Freeing The Innocence, Convicting the Guilty (Chapter 3, Report of the ABA Criminal Justice Section’s Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process.) Although there are differing opinions about the efficacy of specific jury instructions in this field, “jury instructions on the areas in which there is widespread scientific consensus can save time, much in the same way that operation of the doctrine of judicial notice does.” (ABA Report at p.44.) Thus, well-crafted jury instructions are essential in assisting juries in reaching rational decisions about the reliability of eyewitness testimony.

In August, 2011, the New Jersey Supreme Court issued an extensive opinion addressing the issue of eyewitness reliability. See, *State v. New Jersey v. Henderson*, 27 A.3d 872 (N.J. 2011). Prior to deciding the issue in *Henderson*, the Court appointed a Special Master to preside over a hearing to address the issues

presented with eyewitness identifications. A ten day hearing was held, the State and defense were represented, as well as several amici. Over 300 exhibits were introduced and psychological, scientific, and legal experts testified. The Court summarized all of the information and findings in its opinion. Rather than recite all the studies and material considered, FPDA would refer this Court to the lengthy opinion, citations, and appendix in *Henderson*, all of which support the requested instruction below. Additionally, FPDA believes there is a need for an instruction that reflects the scientific and legal principles in a meaningful and understandable way. In its proposal, FPDA has also borrowed heavily from the proposed instruction contained in the law review article written by Christian Sheehan, *Making the Jurors the “Experts”*: *The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. Rev. 651, 679-81 (2011).

The Florida Public Defenders Association proposes the following instruction in cases involving eyewitness identification:

One of the issues in this case is the identification of [defendant’s name] as the person who committed the crime. It is the Assistant State Attorney’s job to prove to you that [defendant’s name] is the one who committed the crime. If you are not convinced, beyond a reasonable doubt that [defendant’s name] committed the crime, you must find [him or her] not guilty.

You [will hear or have heard] testimony from someone who says [he or she] witnessed the event. A witness’s testimony is a reflection of [his or her] perception and memory. It is not

necessarily an expression of fact. As a result, the witness's perception may or may not be accurate.

There are a number of factors you should think about when considering eyewitness identification testimony. This is very important because some of this information may contradict your current beliefs. Keep in mind that eyewitness testimony can be extraordinarily valuable evidence and I am in no way telling you whether to believe or disbelieve the witness's testimony. I am just giving you some background information to help you in your assessment. Ultimately, you, and you alone, must decide whether the witness has convinced you that the person [he or she] saw was [defendant's name]. It is not essential that the witness [himself or herself] be one-hundred percent convinced about the accuracy of [his or her] identification, as long as you are satisfied that the Assistant State Attorney has met [his or her] burden of proof. On the other hand, even if the witness seems positive of [his or her] identification, this does not relieve you of your duty to carefully consider [his or her] testimony. An eyewitness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

There are factors at the time of the crime and factors that come into play after the crime that may affect the reliability of an identification. In deciding how much weight to give to eyewitness testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses. In addition to those factors, you should also consider factors that may have an impact on the witness's perception at the time of the crime as well as factors which may affect the identification after the crime. Some of the factors you should consider are:

Did the witness have the capacity and opportunity to observe the offender? Think about the length of time the witness had for observation, the conditions at the time of observations, including lighting, distance, whether the witness was distracted, and whether any obstacles impaired the witness's observations. These are factors that can affect the reliability of an identification. A witness is more likely to make an accurate identification if [he or she] has a good opportunity to view the events.

Was the identification the product of the eyewitness's own recollection or was it affected by any influence or suggestion? Did the eyewitness receive information after the incident or after the identification procedure from police, prosecutors, other witnesses or third parties that taints, distorts, or alters the eyewitness's memory of the incident? Did the eyewitness receive any confirming feedback that [he or she] made a correct identification prior to testifying? Was the witness exposed to opinions, descriptions, or identifications given by others or to any information or influence that may affect the independence of the witness' identification?

Did the identification procedure (out of court or in court) affect the witness's identification of the offender? Things you should consider is whether the eyewitness was given proper instructions before the identification procedure, including that the perpetrator might not be among the people in the display, that the witness should not feel compelled to make an identification and that the investigation will continue whether an identification is made or not. If there was a line-up or photo array shown to the witness, did the subjects match the pre-lineup description and do the subjects resemble the description? Were there multiple identification procedures which included the defendant or [his or her] photograph?

Has the witness made inconsistent identifications? If so, you should look closely at the circumstances surrounding each identification to determine if any of the identifications are reliable.

Has the witness been unable to make an identification at any time when given an opportunity to do so?

You may also consider whether the witness knows [defendant's name] or whether [he or she] saw [defendant's name] before. Sometimes, prior exposure helps an eyewitness to recognize a person. But sometimes, it leads to a mistaken identification when a witness confuses people seen at different times. For example, if a witness got off of a bus before witnessing the crime, [he or she] might mistakenly remember another passenger on the bus when asked to identify the perpetrator of the

crime. It is for you to decide whether prior contact between the witness and [defendant's name], if there was any, makes the identification in this case more credible, less credible, or had no effect.

You may consider the time that elapsed between the event and the identification. A lapse of time may affect identification accuracy.

You may consider whether the eyewitness and the offender are of different races or ethnic groups, and whether this may have affected the accuracy of the identification.

You should consider the totality of the circumstances surrounding the eyewitness's identification.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this comment has been furnished to the Honorable Jacqueline Hogan Scola, 1351 NW 12th Street, Suite 603, Miami, FL 33125-1628, this 2nd day of April, 2012.

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