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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES REPORT 2013-06 **CASE NO.: SC13-**

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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	**6.1**	**Introduction to Attempted Homicide**
Proposal 2	**10.20**	**Possession Firearm by a Person Subject to DV/Stalking Injunction**
Proposal 3	**10.21**	**Improper Exhibition (School)**
Proposal 4	**11.14-11.15s**	**Failure to Registers**
Proposal 5	**11.19**	**Sexual Misconduct**
Proposal 6	**20.20**	**Mortgage Fraud**
Proposal 7	**22.15**	**Slot Machines**

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

All of the proposals were published in *The Florida Bar News.* The committee received one comment on the Failure to Register proposals. The committee received comments from three people on the Slot Machine proposal. All of the comments are in Appendix B.

Explanation of Proposals

Proposal #1 - Introduction to Attempted Homicide

In *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010) and *Williams v. State*, -- So. 3d --, 38 Fla. L. Weekly S99 (Fla. Feb. 14, 2013), the Court found that it was error to read the then-existing manslaughter and attempted manslaughter standard instructions because they both suggested the state had to prove the defendant intended to kill.

The committee was concerned that someone would argue that the use of the phrase "attempted killing" in Instruction 6.1 would similarly suggest the defendant had to intend to kill. As a possible way around this potential problem, the committee voted unanimously to substitute the phrase "attempted homicide" for "attempted killing." The committee recognized that this was not an ideal solution, but nevertheless thought the phrase "attempted homicide" could be viewed more as a generic category of crimes than as a description of the elements of a crime.

The committee also voted unanimously to delete any reference to attempted murder in the third degree because no such crime exists. Note: Third degree murder is a form of felony murder. According to *State v. Gray*, 654 So. 2d 552 (Fla. 1995), there can be no attempt to commit felony murder. In response to *Gray*, the legislature did create a crime called Attempted Felony Murder in s. 782.051. However, the Attempted Felony Murder in s. 782.051 is not the equivalent of what is referred to in Instruction 6.1 as "attempted murder in the third degree."

The committee then voted unanimously to change the name of the crime from "Attempted Voluntary Manslaughter" to "Attempted Manslaughter by Act." This name change is consistent with other pending proposals.

The proposal was published in *The Florida Bar News* on July 15, 2013. No comments were received and the committee voted unanimously to send the proposal to the Court.

Proposal #2 - Instruction 10.20 – Possession of a Firearm by a Person Subject to a Domestic Violence or Stalking Injunction

In 2012, the legislature amended Fla. Stat. 790.233 - Possession of a Firearm by a Person Subject to a Domestic Violence or Stalking Injunction. That legislative amendment spurred the committee to create a standard instruction for this crime.

The committee did not find it difficult to capture the elements of the crime. The definitions of "firearm," "destructive device," and "ammunition" are taken from s. 790.001. The explanation for "care" and "custody" are essentially copied from the standard instruction for Possession of a Firearm by a Convicted Felon. The explanation of the concept of "possession" is copied from the committee's recently-filed proposal for Possession of a Controlled Substance (see Report 2013-05).

The proposal passed the committee unanimously. It was published in *The Florida Bar News* on July 15, 2013. No comments were received. The committee again voted unanimously to forward the proposal to the Court.

Proposal #3 - Instruction 10.21 – Improper Exhibition of a Weapon/Firearm at a School

The statute for the crime of Improper Exhibition of a Weapon or Firearm at a School (s. 790.115(1)) is not new, but a committee member thought it would be helpful for there to be a standard instruction for this crime.

The drafter used the committee's proposed instruction for Improper Exhibition of a Weapon/Firearm as a template. (See proposed Instruction 10.5 in SC12-1601.) The first element is that the defendant carried some kind of weapon. The second element is that he did so in rude, careless, angry, or threatening manner. The third element is that he did so in someone's presence. And the fourth element captures all of the school-related locations or times that the crime can be committed.

Self-defense is a defense to this offense and thus the proposal informs the judge to read the self-defense instruction(s) if applicable.

The definitions of "weapon," "deadly weapon," "firearm," and "electric weapon" are taken from s. 790.001 or case law. There is one important change, however. The definition of "weapon" in s. 790.0001 exempts a common pocketknife. The case law suggests that this exemption pertains only to a closed common pocketknife. *Porter v. State,* 798 So. 2d 855 (Fla. 5th DCA 2001)(holding that the question of whether a pocketknife was a weapon was for the jury where the pocketknife was carried in its open position). However, this statute (s. 790.115(1)) explicitly includes a common pocketknife as a weapon that can be used to commit this crime. Therefore, Improper Exhibition is listed as a Category One offense, except if the weapon is a closed common pocketknife. If the weapon is a closed common pocketknife, then Improper Exhibition is not a lesser-included offense. Finally, the Comment section addresses the exceptions in the statute.

The proposal passed the committee unanimously. It was published in *The Florida Bar News* on July 15, 2013. No comments were received and the committee again voted unanimously to forward the proposal to the Court.

Proposal #4 - Instructions 11.14-11.15s – Failure to Registers

In *Barnes v. State*, 108 So. 3d 700 (Fla. 1st DCA 2013), the First District held that misinformation from a state agent to the defendant about registration requirements was an affirmative defense to failure of a sexual offender to register. The committee members believed that this was a common defense for sexual offenders and predators and therefore the standard instructions should cover the topic. Because the logic of *Barnes* applies to all of the Failure to Register instructions, the committee unanimously recommends changes to 11.14-11.14(g) and 11.15-11.15(k).

The First District did not decide which party has the burden of persuasion for the affirmative defense or what that burden should be. The committee did not want to decide a disputed issue of law although the committee did conclude that if the burden was on the state, it was highly likely that the judiciary would require the state to disprove the affirmative defense beyond a reasonable doubt. Accordingly, the committee explained in the italicized notes that there is an unresolved issue regarding the burden of persuasion and that trial judges will have to allocate that burden.

The only other changes were to the names of the crimes, which were made clearer.

The proposal was published in *The Florida Bar News* on September 1, 2013. One comment was received from Assistant State Attorney Julia Lynch. (See Appendix B.) Ms. Lynch argued that these proposals should be rejected because trial judges would give the affirmative defense instruction even when the defendant was not entitled to it. In response, the committee added an italicized note to each instruction that reads: *Give if the defendant meets his or her burden of production.*

Ms. Lynch also argued that the terms "misinformed" and "otherwise prevented" were vague and overbroad. The committee disagreed.

Ms. Lynch then commented that there would be procedural problems with the State introducing registration instructions that had been given to the defendant by a state agent when the defendant had previously registered. The committee thought any possible procedural problems should be handled by the trial judge via evidentiary rulings and that the issue should not be addressed in a standardized jury instruction.

Finally, Ms. Lynch argued that the proposal conflicted with a sex offender statute and a sex predator statute which say that lack of a notice of the duty to register is not a defense. The committee did not think its proposals conflicted with those statutes because the affirmative defense pertains to misadvice and not lack of notice.

The committee then voted 9-1to forward these proposals to the Court, as amended with the above-mentioned italicized note to the judge. The dissenter agreed with Ms. Lynch that the affirmative defense section would be abused by defendants.

Proposal #5 - Instruction 11.19 – Sexual Misconduct Between Detention Facility Employees and Inmates

A committee member drafted this proposal because there is no existing standard instruction for this crime. The committee did not have difficulty tracking the statute for the elements section of the proposal. The only part of the statute that is not in the proposal pertains to the sexual misconduct not being a sexual battery. The committee did not think that idea needed to be addressed in the instruction because this crime is intended to cover consensual sex between an inmate and a detention facility employee. If the sex were non-consensual, then sexual battery would be charged.

The definitions of "sexual misconduct," "county detention facility," "county residential probation center," and "municipal detention facility," were taken from the statutes and cites to the relevant statutes are provided in italics. The definition of "union" is taken from the standard sexual battery instruction.

The committee did not think there were any necessarily-lesser included offenses, but the committee did add Attempt, Battery, and Assault as possible Category 2 offenses.

The proposal passed the committee unanimously and was published in *The Florida Bar News* on July 15, 2013. No comments were received. The committee then again voted unanimously to forward the proposal to the Court.

Proposal #6 - Instruction 20.20 – Mortgage Fraud

Former committee chair Judge Jacqueline Scola proposed that there be a standard instruction for Mortgage Fraud. There was no controversy tracking the

statute for the elements section of the crime. The enhancement in Fla. Stat. 817.545(5)(b) was added as a section to cover "omissions on a loan application" in Fla. Stat. 817.545(2)(a) & (b). The committee copied the Fla. Stat. 817.545(1) section regarding "documents involved in the mortgage lending process" and the definition of "mortgage lending process."

The committee did, however, have extended discussions regarding the apprpriate definitions of "knowingly" and "material." The definition for "material" was copied from federal jury instructions. The definition for "knowingly" was modified from the optional definition that is used in the standard instructions for welfare fraud. The thinking of the committee was that in a typical welfare fraud case, the individual who applies for benefits is the person who submits information directly to the government. However, when applying for a mortgage, there may a mortgage broker or a realtor or a loan processor who is also submitting information to a financial institution. Thus, a definition of "knowingly" that encompasses the possibility of mistake or accident seemed to fit better than the committee's usual definition of "knowingly," which is "with actual knowledge and understanding of the facts or the truth."

The proposal was published in the July 15, 2013 *Florida Bar News* and no comments were received. After publication, the committee voted unanimously to forward the proposal to the Court.

Proposal #7 - Instruction 22.15 – Possession or Permitting the Operation of a Slot Machine

In 2013, the legislature amended the definition of slot machine or device in Fla. Stat. 849.16, which required the committee to amend this instruction. At first, the committee tracked the statute for the elements section. (This was later changed due to comments, see below.) The committee then added the new Fla. Stat. 849.16 definition of "slot machine or device," which includes a definition for devices regulated as slot machines in Fla. Stat. 551.102(8). The committee added 1) that compliance with Department of Agriculture and Consumer Services rules is not a defense pursuant to Fla. Stat. 849.094(8)(a) and 2) the inference about a prohibited slot machine in Fla. Stat. 849.16(3).

The proposal was published in *The Florida Bar News* on July 15, 2013. Comments were received from 1) Lawrence Shearer, a defense lawyer; 2) Joseph Cocchiarella, a prosecutor in Orange County; and 3) Brent Riggle, a lawyer for the Seminole County Sheriff's Office. (See Appendix B.)

Mr. Shearer recommended that there be a reference to Fla. Stat. 849.235, which contains a defense if the slot machine is an antique slot machine not used for gambling. The committee unanimously agreed with Mr. Shearer and added a reference in the comment section to antique slot machines not used for gambling.

Mr. Riggle and Mr. Cocchiarella commented on ways to simplify element (e). As mentioned above, when the proposal was first published, the committee had tracked the statute. But after reviewing the suggestions from Mr. Riggle and Mr. Cocchiarella, the committee voted unanimously to adopt the suggestion from Mr. Cocchiarella for element (e). Specifically, the committee agreed to delete the reference to "as a result of any element of chance or other outcome unpredictable to him or her," because that concept is already covered in the definition of slot machine.

Mr. Cocchiarella also suggested that the committee expand the tile of the crime to include Manufacturing, Owning, Storing, Keeping, Selling, Leasing, and Transporting a Slot Machine. The committee unanimously agreed.

The committee did not think that the three changes outlined above warranted re-publication.

Finally, Mr. Cocchiarella recommended that the committee not track the statute that defines slot machines because statute book editors in 1984 split up a run-on sentence into separate provisions. By doing so, the editors changed the meaning of the statute without legislative action. The committee agreed with Mr. Cocchiarella's analysis – there was a change in the statute without legislative action. However, as noted by Mr. Cocchiarella, the legislature has since amended the slot machine statute and did not correct the mistake. Thus the committee voted unanimously to track the statute as it currently appears.

Conclusion

The Standard Jury Instructions in Criminal Cases Committee respectfully requests that the Court amend or create standard jury instructions as outlined in this report.

Respectfully submitted this 8th day of October, 2013.

s/ Judge Joseph A. Bulone
The Honorable Joseph A. Bulone
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
Sixth Judicial Circuit
315 Court Street, Room 417
Clearwater, Florida 33756
Florida Bar Number #371130

CERTIFICATE OF COMPLIANCE

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).

s/ Judge Joseph A. Bulone
HONORABLE JOSEPH A. BULONE
Chair, Committee on Standard Jury
Instructions in Criminal Cases
Florida Bar Number #371130