IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES — REPORT 2015-04 **CASE NO.: SC15-**

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 #	Title
Proposal 1	**10.6**	**Discharging a Firearm [in Public] [on Residential Property]**
Proposal 2	**14.1**	**Theft**
Proposal 3	**14.2**	**Dealing in Stolen Property (Fencing)**
Proposal 4	**14.3**	**Dealing in Stolen Property (Organizing)**
Proposal 5	**16.1**	**Aggravated Child Abuse**
Proposal 6	**16.3**	**Child Abuse**
Proposal 7	**20.18(a)**	**Possession of Personal Identification Information**

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

The proposals were published in The Florida Bar *News* and two comments were received. One was from the Florida Association of Defense Lawyers (FACDL) for the Discharging a Firearm proposal. The other was from Mr. Jeffrey Swartz and pertained to the Theft proposal. Both comments are in Appendix B.

PROPOSAL #1: INSTRUCTION 10.6

It was brought to the Committee's attention from a prosecutor that there is a mistake in the "*If burden of persuasion is on the State*" section. The existing instruction states: "However, if you are not convinced (*insert appropriate burden of persuasion*) that the defendant was [lawfully defending life or property]…., you should find him/her not guilty." The prosecutor argued, and the Committee agreed, that the word "not" should be added right before the "[lawfully defending life or property]." However, the Committee thought the instruction would be too confusing if the word "not" was used three times in one sentence. Accordingly, the

Committee changed the sentence to: "However, if the State failed to prove (*insert appropriate burden of persuasion*) that the defendant was not [lawfully defending life or property]…., you should find [him] [her] not guilty.

The other changes were to 1) delete the brackets in the elements listed in a, b, c, and d because the brackets are unnecessary given the italicized instruction immediately above the element labelled "a;" 2) update the Comment section; and 3) put "*Fla. Stat.*" after the statute number instead of before the statute number.

The Committee's proposal was published in the Bar *News* on March 15, 2015. One comment was received from FACDL (see Appendix B). FACDL argued that the burden of persuasion for the affirmative defense should be on the State to disprove the defense beyond a reasonable doubt because there is case law regarding self-defense.

Upon post-publication review, the Committee agreed with FACDL that the case law allocates the burden of persuasion on the State to disprove a claim of self-defense, defense of others, and defense of property. But the Committee did not think there was case law that allocated the burden of persuasion for the other affirmative defenses such as 1) performing official duties requiring the discharge of a firearm and 2) discharging a firearm on public roads or property expressly approved for hunting by the Fish and Wildlife Conservation Commission or Division of Forestry.

To fix the problem, the Committee voted unanimously to amend the first sentence in the italicized note as follows: "*The statute and case law (with the exception of self-defense, defense of others, and defense of property case law) are silent as to 1) which party bears the burden of persuasion of the affirmative defense and 2) the standard for the burden of persuasion.*" The Committee then deleted the bracketed option of "[lawfully defending life or property]" in two places in the section labelled "*If burden of persuasion is on the defendant."* However, the Committee retained the bracketed option of "[lawfully defending life or property]" in the section labelled "*If burden of persuasion is on the State.*" The Committee thought these changes would make it clear that the burden of persuasion for the affirmative defense of "lawfully defending life or property" is on the State.

The Committee then voted unanimously to send the proposal to the Court.

PROPOSAL #2: INSTRUCTION 14.1

The Committee proposed three changes to the existing Theft instruction. First, because a conviction was reversed when the trial judge instructed on the fair market value inference without any evidence of the fair market value of the stolen property, the Committee thought it would be helpful to add to the italicized note above that inference stating: "*Do not give unless there is evidence of the fair*

market value of the stolen property. Barfield v. State, 613 So. 2d 507 (Fla. 1st DCA 1993)." (The latest case to be reversed for this mistake was *Hadley v. State*, 152 So. 3d 848 (Fla. 1st DCA 2014).) Note: Many members did not agree with the case law from the First District. The members thought there could be a case where a defendant sold or purchased a car for $10 when it was obvious that the fair market value of the car was worth a lot more. In that instance, the members thought the jury could just use common knowledge to determine that the purchase or sales price of the car was substantially below the fair market value, without there being any opinion offered by a witness about the fair market value. Nonetheless, these members voted along with all the other Committee members to add the italicized note.

The second change is that the Committee thought it would be helpful for the standard Theft instruction to explain the defense of good faith. For this new section, the Committee originally published a proposal that treated the good faith defense as an affirmative defense. The Committee then realized, however, that *Cliff Berry, Inc. v. State,* 116 So. 3d 394 (Fla. 3d DCA 2012) stated that the good faith defense negated the element of an intent to steal. Accordingly, the Committee published a revised good faith defense section in the April 15, 2015 issue of The Florida Bar *News*.

The third change is simply to add the word "and" before the word "claims" in the definition of "Property" in order to make the definition in the standard instruction consistent with the definition in s. 812.012(4)(b), Fla. Stat.

Post-publication, the Committee received one comment from Jeffrey Swartz (see Appendix B) who suggested that different wording be used to instruct on the new good faith defense section. Mr. Swartz argued that the jury should be told the defendant is entitled to this defense even if his or her belief was unreasonable or mistaken. Mr. Swartz also argued that the burden of persuasion would be better understood by jurors with "If you find that the defendant honestly had a good faith belief" instead of "If you have a reasonable doubt about whether defendant had an honest, good faith belief…."

The Committee partially agreed and partially disagreed with Mr. Swartz. The Committee agreed that by a vote of 7-2 to add in language that allowed the defendant's belief to be unreasonable or mistaken. But the Committee voted unanimously to leave the wording of an "honest, good faith belief" instead of "honestly had a good faith belief" because the Committee thought the burden of persuasion and instruction as a whole would be clear to jurors. The Committee's final proposal is as follows:

Good faith defense. Give if applicable. Cliff Berry, Inc. v. State, 116 So. 3d 394 (Fla. 3d DCA 2012).

It is a defense to the charge of Theft if (defendant) **had an honest, good faith belief that [he] [she] had the right to possess the** (property alleged) **of** (victim)**.**

If you have a reasonable doubt about whether (defendant) **had an honest, good faith belief, even though unreasonable or mistaken, that [he] [she] had the right to possess the** (property alleged) **of** (victim)**, you should find [him] [her] not guilty of Theft.**

If you find the State proved beyond a reasonable doubt the defendant did not have a honest, good faith belief that [he] [she] had the right to possess the (property alleged) **of** (victim)**, you should find [him] [her] guilty, if all of the elements of Theft have been proven beyond a reasonable doubt.**

PROPOSAL #3 and #4: INSTRUCTIONS 14.2 and 14.3

For the two Dealing in Stolen Property instructions, the only changes made by the Committee are: 1) to add an italicized note that the judge should not instruct on the fair market value inference if there is no evidence of the fair market value of the stolen property (see explanation above); and 2) to update the Comment sections. Both proposals were published in The Florida Bar *News* on March 15, 2015 and no comments were received. Upon post-publication review, the Committee voted unanimously to send the proposals to the Court.

PROPOSAL #5: INSTRUCTION 16.1

The idea to amend the Aggravated Child Abuse instruction came from Judge Joseph Bulone. Judge Bulone pointed out that element #1e has a *mens rea* of either knowingly or willfully committing child abuse… However, in the definitions section, the instruction informs jurors that "willfully" means "knowingly, intentionally, and purposely." Judge Bulone argued, and the Committee agreed, that the legislature would not have used "knowingly or willfully" if "willfully" already meant "knowingly." Accordingly, the Committee voted unanimously to delete the word "knowingly" from the definition of "willfully." There are no other changes other than updating the Comment section. The proposal passed unanimously and was published in The Florida Bar *News* on March 15, 2015. No comments were received. Upon post-publication review, the Committee voted unanimously to send the proposal to the Court.

PROPOSAL #6: INSTRUCTION 16.3

The idea to amend the Child Abuse instruction also came from Judge Bulone, who pointed out that element #1 reads awkwardly with the existing

language of: "Defendant knowingly or willfully intentionally inflicted…" or "Defendant knowingly or willfully actively encouraged…."

Judge Bulone proposed as a fix, and the Committee agreed, to make element #1a read as follows: "(Defendant) knowingly or wilfully abused (victim) by intentionally inflicting [physical] [or] [mental] injury upon (victim)." Element #1b would read as follows: "(Defendant) knowingly or wilfully abused (victim) by committing an intentional act that could reasonably be expected to result in [physical] [or] [mental] injury to (victim). Element #1c would read as follows: ""(Defendant) knowingly or wilfully abused (victim) by actively encouraging another person to commit an act that resulted in or could reasonably have been expected to result in [physical] [or] [mental] injury to (victim)."

The only other changes are to add a definition of "willfully" consistent with the definition being proposed in the Aggravated Child Abuse instruction ("Willfully" means intentionally and purposefully) and to update the Comment section. All votes were unanimous and the proposal was published in The Florida Bar *News* on March 15, 2015. No comments were received. Upon post-publication review, the Committee voted unanimously to send the proposal to the Court.

PROPOSAL #7: INSTRUCTION 20.18(a)

The idea for this new instruction came from member Judge Rand Wallis, who thought it would be helpful to have a standard instruction for the crime created in 2013 of Unlawful Possession of the Personal Identification of Another Person. The Committee did not find it difficult to track the elements of the crime that are set forth in s. 817.5685(2), Fla. Stat. The Committee's proposal includes an explanation of the concept of possession consistent with the Committee latest explanation of possession used in the controlled substance proposals (see Report 2015-03).

The Committee's proposal then instructs on the enhancement to a third degree felony if the defendant possessed the personal identification information of five or more persons. The definition of "personal identification information" is copied from s. 817.5685(1), Fla. Stat. The Committee then captured the idea in s. 817.5685(2), Fla. Stat. that the personal identification information can be in any form. Next, the Committee tracked the inference in s. 817.5685(3)(b)1, Fla. Stat., that proof that a person used or was in possession of the personal identification information of five or more people, unless satisfactorily explained, gives rise to the inference that the person possessed the information knowingly and intentionally without authorization. Finally, the Committee treated s. 817.5685(4), Fla. Stat. and s. 817.5685(5), Fla. Stat. as affirmative defenses. The decision to treat s. 817.5685(5), Fla. Stat. as an affirmative defense was not controversial because the plain language of the statute states that it is an affirmative defense. The Committee

was less sure how to treat s. 817.5685(4), Fla. Stat. but ultimately decided that the section should also be treated as an affirmative defense because it is in a separate section from the elements of the crime and because it would be somewhat impractical for the State to have to prove in its case-in-chief that the defendant was not the victim's parent, legal guardian, or other type of guardian, etc. The Committee found no case law on the allocation of the burden of persuasion of the affirmative defense or what that burden should be, so the Committee copied in usual affirmative defense format which informs the trial judge and attorneys of the issue and lets the trial judges decide. Finally, the Committee identified no necessary lesser-included offenses. The proposal passed unanimously and was published in The Florida Bar *News* on March 15, 2015. No comments were received. Upon post-publication review, the Committee voted unanimously to send the proposal to the Court.

CONCLUSION

The Standard Jury Instructions in Criminal Cases Committee respectfully requests the Court authorize for use the proposals in Appendix A.

Respectfully submitted this 23rd day of June, 2015.

s/ Jerri L. Collins
The Honorable Jerri L. Collins
Chair, Supreme Court Committee on
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CERTIFICATE OF SERVICE AND FONT 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) and that a copy of the report and the appendices were emailed to Mr. Jeffrey Swartz, at swartzj@cooley.edu; to Mr. Luke Newman, at luke@lukenewmanlaw.com; and to Mr. William Ponall, at ponallb@criminaldefenselaw.com; this 23rd day of June, 2015.

s/ Jerri L. Collins
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