

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES — CASE NO.: SC15-REPORT 2015-07

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.

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Table with 3 columns: Proposal #, Instruction #, Title. Lists proposals 1 through 14 with their corresponding instruction numbers and titles such as 'Driving Under the Influence' and 'Boating Under the Influence'.

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*. The Florida Association of Criminal Defense Lawyers (FACDL) sent a comment pertaining to Instruction 28.4(b). Mr. Blaise Trettis and the Florida Public Defender Association (FPDA) sent comments pertaining to the DUI and BUI instructions. All three comments are in Appendix B.

### **PROPOSALS #1 – #4: INSTRUCTIONS 28.1, 28.1(a), 28.2, and 28.3**

The idea to amend the DUI-related instructions came from a committee member who thought the DUI instructions were deficient because jurors do not have a good understanding of the meaning of “impaired.” The Committee agreed to correct that deficiency and also took the opportunity to make other minor improvements. (The changes discussed below pertain to Instructions 28.1, 28.1(a), 28.2, and 28.3. The Committee will make the DUI Manslaughter instruction consistent with these proposals at a later date because a DUI Manslaughter proposal is pending in SC15-470 and it contains changes that are not pertinent to these proposals.)

The Committee’s first change was to put brackets around “or was in actual physical control of” in elements #1 and #2 and in the enhancement in “a.” because the overwhelming majority of DUI trials do not involve actual physical control.

The next change was to delete an out-of-date italicized note in the enhancement section that informs the judge the enhancement required a blood or breath alcohol level of .20 or higher before October 1, 2008.

The next changes were to add italicized statutory references in Chapter 316 for “Vehicle” and “Normal faculties.”

The next change was to add the definition of “impaired,” which comes from *Shaw v. State*, 783 So. 2d 1097 (Fla. 5th DCA 2001).

In the existing explanation of “actual physical control,” there is an option that the defendant is physically in or on the vehicle. The Committee wanted to make it clear that the option of “on a vehicle” pertains to vehicles such as motorcycles and bicycles and does not mean that a person sitting on the hood or on the trunk of a car is in actual physical control. Thus, the Committee added an italicized note above the explanation of “actual physical control.”

The next change was a statutory cite from s. 322.01(2), Fla. Stat., for the definition of “alcoholic beverages.”

The last change pertained to what is commonly referred to as the “presumptions of impairment.” That phrase used to be relevant when there were separate crimes of Driving while Intoxicated and Driving under the Influence. But many years ago, the legislature created just one crime – DUI – which can be committed in alternative ways (driving while impaired or driving with an unlawful breath or blood alcohol level). There is no need to instruct jurors they may

conclude a defendant is impaired with a blood or breath alcohol level of more than .08 because driving with such an alcohol level is itself the crime of DUI. Everyone on the Committee thought the third paragraph in this section is confusing and unnecessary. No one on the Committee could think of an example where the State's charging document contained just the impairment theory of DUI even though there was evidence that the defendant was over the legal limit. Thus the Committee added an italicized note explaining why there is no need to instruct on s. 316.1934(2)(c), Fla. Stat.

All of these changes passed unanimously and were published in the *Bar News*. The comments from Mr. Blaise Trettis and the FPDA made the same two points (see Appendix B). First, the commenters thought jurors would be confused by an instruction that read: "Impaired means worsened or diminished in some material respect." Second, the commenters believed the Committee should delete the italicized note above the explanation of actual physical control that states: "The option of "on a vehicle" pertains to vehicles such as motorcycles and bicycles" because there is no case law holding that a person can be guilty of DUI by sitting on a bicycle, as opposed to riding the bicycle.

Upon post-publication review, the Committee agreed to change the definition of impaired to read: "Impaired means diminished in some material respect." The Committee did not think its first proposal ("worsened or diminished in some material respect") was confusing but decided that the word "worsened" adds nothing to the definition. The Committee did not agree with the commenters, however, to change the italicized instruction above the definition of actual physical control. Although there may be no case law that holds one can be DUI by sitting on a bicycle while impaired or with an unlawful alcohol level, the Committee felt that 1) the statute was unambiguous and 2) the benefit from making it clear via a note that sitting on the bumper, the hood, or the trunk of a car does not constitute actual physical control far outweighs any possible misimpression.

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

#### **PROPOSAL #5: INSTRUCTION 28.4**

The Committee revised Instruction 28.4 due to changes made by the 2014 legislature to s. 316.027, Fla. Stat. The major legislative changes involved the creation of a new crime of Leaving the Scene of a Crash Involving Serious Bodily Injury and the addition of an enhancement for "vulnerable road user" victims.

To make the instruction consistent with the statute, the Committee added the option of "Serious Bodily Injury" in the title and changed the statutory citation at the top of the instruction to s. 316.027(2), Fla. Stat.

The Committee made no changes to the elements of the crime, but did add the option of “serious bodily injury” in an italicized note immediately above element #3.

The Committee thought the easiest way for the instruction to cover the new crime of Leaving the Scene of a Crash Involving Serious Bodily Injury was to treat the fact of “serious bodily injury” as an enhancement of Leaving the Scene of a Crash Involving Injury. Accordingly, there is a new section that allows jurors to determine whether the state proved beyond a reasonable doubt that the victim’s injury was a “serious bodily injury.” The definition of “serious bodily injury” is copied from the statute.

As mentioned above, the latest version of the statute also contains an enhancement in s. 316.027(2)(f), Fla. Stat., for cases in which the victim was a “vulnerable road user.” In order for the instruction to capture the statute, the Committee added an enhancement section that allows jurors to find that the state proved beyond a reasonable doubt the victim was a “vulnerable road user.” The definition of “vulnerable road user” was copied from the statute.

Other than technical formatting corrections, the only other change to the body of the instruction was to add an italicized note to the judge to insert applicable definitions from s. 316.003, Fla. Stat., for certain terms used in the “vulnerable road user” enhancement section.

For the lesser-included offenses section, the Committee debated whether Leaving the Scene of a Crash with Serious Bodily Injury or Leaving the Scene of a Crash Involving Injury were necessary lesser-included offenses of Leaving the Scene of a Crash Involving Death. On one hand, there is a line of cases that state where there is no dispute that the victim was killed as a result of the incident giving rise to the criminal charge, there is no need to instruct on non-homicide lesser included offenses. On the other hand, the Court recently held in *Griffin v. State*, 160 So. 3d 63 (Fla. 2015) that even though the sole defense at trial was the misidentification of the shooter, the defendant’s plea of not guilty still put the shooter’s intent or lack of intent at issue. Following the logic of *Griffin*, the Committee thought that even if a defendant did not dispute that a victim died in a Leaving the Scene of a Crash Involving Death case, the defendant’s plea of not guilty could still put the victim’s status as dead or alive at issue. Moreover, the Committee was of the belief that the courts look favorably on the giving of lesser-included offenses. Accordingly, the majority of the Committee took the conservative approach by voting 7-2 to put an asterisk next to Leaving the Scene of a Crash with Serious Bodily Injury and Leaving the Scene of a Crash with Injury in the Category One column and to explain the issue in the Comment section. The Committee then created a new lesser included offense box for the crime of Leaving the Scene of a Crash with Serious Bodily Injury. In this new box, Leaving the

Scene of a Crash with Injury was put in Category One and Attempt was put in Category Two.

Except for the two dissenting votes on the above-mentioned Category One issue, the proposal passed unanimously. It was published in the *Bar News*. No comments were received. Upon post-publication review, the Committee voted unanimously to delete the citations in the Comment section to *Mancuso*, *Dumas*, and *Dorsett* because the holdings of those cases were already reflected in the instruction. The Committee then voted unanimously to send the proposal to the Court.

#### **PROPOSAL #6: INSTRUCTION 28.4(b)**

The idea to create a new instruction for the misdemeanor crime of Leaving the Scene of a Crash Involving Damage to an Unattended Vehicle or Unattended Property came from a committee member. The Committee did not find it difficult to draft elements that tracked the statute (s. 316.063(1), Fla. Stat.). The Committee then added a definition for “vehicle” that also tracked the relevant statute (s. 316.003(75), Fla. Stat.). The Committee thought there were no necessary lesser-included offenses but there could be an Attempt, which was put in Category Two.

The proposal passed unanimously and was published in the *Bar News*. One comment was received from FACDL who argued that the Committee’s proposal was flawed because it omitted a requirement that the State prove the driver knew that a crash had occurred. FACDL recognized that this statute was different from the Leaving the Scene of a Crash Involving Death or Injury statute because the statute does not contain the word “willfully.” Nevertheless, FACDL argued that a rationale within *State v. Dorsett*, 158 So. 3d 557, 560 (Fla. 2015) dictates that where a statute imposes an affirmative duty to act, actual knowledge of involvement in a crash is implied.

The Committee was unwilling to make the legal decision to add a *mens rea* element into a statute that has no *mens rea*. The Committee thought only a court could do so. Nonetheless, the Committee thought FACDL’s idea merited mention in the Comment section. Therefore, upon post-publication review, the Committee added a note stating: “As of September 2015, there was no case law directly addressing the issue of whether the State must prove the defendant knew, or should have known, of either the crash or the property damage to violate this statute. Compare *State v. Dorsett*, 158 So. 3d 557 (Fla. 2015) and *Mancuso v. State*, 652 So. 2d 370 (Fla. 1995) dealing with § 316.027, Fla. Stat., which, unlike § 316.063, Fla. Stat., contains an explicit willfulness requirement.”

The vote was then unanimous to send the proposal to the Court.

### **PROPOSAL #7: INSTRUCTION 28.8(b)**

The crime covered in Instruction #28.8(b) involves someone who leaves the scene of a crash involving death, serious bodily injury, or injury, and then flees from the police and causes serious bodily injury or death. Accordingly, the Committee made the same changes to Instruction #28.8(b) that it made to the Leaving the Scene of a Crash Involving Death or [Serious Bodily] Injury instruction in Instruction 28.4 (proposal #5). Specifically, due to the 2014 legislative changes to s. 316.027, Fla. Stat., the Committee added the alternative of “serious bodily injury” in the title and in an italicized note. The Committee also added a new enhancement section if the victim in the initial Leaving the Scene of a Crash were a “vulnerable road user.” Other than technical formatting changes, the only other change to the body of the instruction was to add a definition of “serious bodily injury.” The Committee discussed whether the definition of “serious bodily injury” in the Leaving the Scene of a Crash statute should be the same definition for “serious bodily injury” used in the Aggravated Fleeing statute. Ultimately the Committee decided that it was acceptable to add one definition for “serious bodily injury” in the instruction, but to include an italicized cite to s. 316.027(1)(a), Fla. Stat., above that definition.

In the lesser-included offense box, the Committee changed the heading so that the box would pertain to Leaving the Scene of a Crash Involving Death, then causing Serious Bodily Injury or Death. With that change, the Committee added Leaving the Scene of a Crash Involving Death and Leaving the Scene of a Crash Involving Serious Bodily Injury as the first two Category One lesser included offenses. Then, the remaining Category One lesser included offenses are listed in descending order of severity. The Committee added asterisks and an explanation in the Comment section that Leaving the Scene of a Crash should not be given as a lesser-included offense if it were charged as a separate count from an Aggravated Fleeing.

The proposal was published in the *Bar News* and no comments were received. Upon post-publication review, the Committee voted unanimously to delete the citations in the Comment section to *Mancuso*, *Dumas*, and *Dorsett* because the holdings of those cases were already reflected in the instruction, The vote was unanimous to send the proposal to the Court.

### **PROPOSAL #8: INSTRUCTION 28.8(c)**

The crime covered in Instruction #28.8(c) involves someone who leaves the scene of a crash involving only property damage and then flees from the police and causes serious bodily injury or death. Within elements #1-#4, the Committee added “or accident” after the word “crash.” The Committee did so because the word “crash” has a connotation that the collision was intentional while the word

“accident” makes it clear that the collision could have come about unintentionally. The other changes to the body of the instruction involve only technical formatting changes. In the lesser-included box and in the Comment section, the Committee added an asterisk that explains that Leaving the Scene of a Crash should not be given as a lesser-included offense if a Leaving the Scene count is charged separately from the Aggravated Fleeing.

The proposal was published in the *Bar News*. Upon post-publication review, the Committee added a note in the Comment section that it was unclear whether the courts will add a *mens rea* element to the Leaving the Scene part of this crime. The Committee then voted unanimously to send the proposal to the Court.

### **PROPOSAL #9: INSTRUCTION 28.8(d)**

The crime covered in Instruction #28.8(d) involves someone who leaves the scene of a crash involving death, serious bodily injury, or injury, and then flees from the police and causes injury or property damage. Accordingly, the Committee made the same changes to Instruction #28.8(d) that it made to the Leaving the Scene of a Crash Involving Death or [Serious Bodily] Injury instruction in Instruction 28.4 (proposal #5). Specifically, due to the 2014 legislative changes to s. 316.027, Fla. Stat., the Committee added the alternative of “serious bodily injury” in the title and in an italicized note. The Committee also added a new enhancement section if the victim in the initial Leaving the Scene of a Crash were a “vulnerable road user.” Other than technical formatting changes, the only other change to the body of the instruction was to add a definition of “serious bodily injury.” The Committee again discussed whether the definition of “serious bodily injury” in the Leaving the Scene statute should be the same definition for “serious bodily injury” used in the Aggravated Fleeing statute. Ultimately the Committee decided that it was acceptable to add one definition for “serious bodily injury,” but to include an italicized cite to s. 316.027(1)(a), Fla. Stat., above that definition.

In the lesser-included offense box, the Committee changed the heading so that the box would pertain to Leaving the Scene of a Crash Involving Death, then causing Injury or Property Damage. With that change, the Committee added Leaving the Scene of a Crash Involving Death and Leaving the Scene of a Crash Involving Serious Bodily Injury as the first two Category One lesser included offenses. The remaining Category One lesser included offenses are listed in descending order of severity. The Committee added asterisks and an explanation in the Comment section that Leaving the Scene of a Crash should not be given as a lesser-included offense if charged as a separate count from the Aggravated Fleeing. All changes were approved unanimously.

The proposal was published in the *Bar News*. No comments were received. Upon post-publication review, the Committee voted unanimously to delete the

citations in the Comment section to *Mancuso*, *Dumas*, and *Dorsett* because the holdings of those cases were already reflected in the instruction. The Committee then voted unanimously to send the proposal to the Court.

#### **PROPOSAL #10: INSTRUCTION 28.8(e)**

The crime covered in Instruction #28.8(e) involves someone who leaves the scene of a crash involving only property damage and then flees from the police and causes injury or property damage. Within elements #1-#4, the Committee added “or accident” after the word “crash.” The Committee did so because the word “crash” has a connotation that the collision was intentional while the word “accident” makes it clear that the collision could have come about unintentionally. The other changes to the body of the instruction just involve technical formatting changes. In the lesser-included offense box and in the Comment section, the Committee added an asterisk that explains that Leaving the Scene of a Crash should not be given as a lesser-included offense if a Leaving the Scene of a Crash count is charged separately from the Aggravated Fleeing.

The proposal was published in the Bar News. No comments were received. Upon post-publication review, the Committee added a note in the Comment section that it was unclear whether the courts will add a *mens rea* element to the Leaving the Scene of a Crash part of this crime. The Committee then voted unanimously to send the proposal to the Court.

#### **PROPOSALS #11, #12, #13, & #14: INSTRUCTIONS 28.14 – 28.18**

The idea to amend the BUI-related instructions came from the committee member who thought the instructions were deficient because jurors do not have a good grasp of the meaning of “impaired.” The Committee agreed with the member and took the opportunity to make minor improvements to the standard instructions. (The changes discussed below pertain to 28.14 -28.18. The Committee will make the BUI Manslaughter instruction consistent with these proposals at a later date because the BUI Manslaughter instruction is currently pending before the Court in SC15-470 and it has other changes that are not pertinent to these instructions.)

The Committee’s first change was to add an italicized cite to s. 327.35(4), Fla. Stat. for the enhancement section. Other than some minor technical amendments, the next changes were simply to add italicized statutory references in Chapter 327 for the definitions of “normal faculties” and “operate.” The next change was to add a definition of “impaired,” which comes from *Shaw v. State*, 783 So. 2d 1097 (Fla. 5th DCA 2001). The next change was to add an italicized cite to s. 322.01(2), Fla. Stat., for the definition of “alcoholic beverages.” The last change pertains to the “presumptions of impairment” section. Changes in this section were made for the same reasons as the changes made in the DUI instructions. In short, the third paragraph in this section is confusing and



unnecessary because operating a vessel while over the legal alcohol limit makes one guilty of BUI and thus there is no need to tell jurors that they may conclude the operator was impaired.

All of these changes passed unanimously and were published in the *Bar News*. The comments received from Mr. Blaise Trettis and the FPDA regarding the definition of “impaired” are relevant to the BUI instructions also. Similar to the DUI proposals, upon post-publication review, the Committee changed the definition of impaired to “... diminished in some material respect.”

The Committee voted unanimously to send the four BUI instructions 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 13th day of October, 2015.

s/ Jerri L. Collins  
The Honorable Jerri L. Collins  
Chair, Supreme Court Committee on  
Standard Jury Instructions in Criminal Cases  
Criminal Justice Center  
101 Bush Boulevard  
Sanford, FL 32773  
Florida Bar Number #886981  
Jerri.Collins@flcourts18.org

### **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. Luke Newman, at [luke@lukenewmanlaw.com](mailto:luke@lukenewmanlaw.com); to Mr. William Ponall, at [ponallb@criminaldefenselaw.com](mailto:ponallb@criminaldefenselaw.com); to Mr. R. Blaise Trettis, at [btrettis@pd18.net](mailto:btrettis@pd18.net); and to Ms. Julianne Holt at [jholt@pd13.state.fl.us](mailto:jholt@pd13.state.fl.us), this 13th day of October, 2015.

s/ Jerri L. Collins  
HONORABLE JERRI L. COLLINS  
Chair, Committee on Standard Jury  
Instructions in Criminal Cases  
Florida Bar Number #886981  
Jerri.Collins@flcourts18.org