**IN THE SUPREME COURT OF FLORIDA**

**IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES — REPORT 2015-06** **CASE NO.: SC15-**

To the Chief Justice and Justices of the Supreme Court of Florida:

This report, proposing 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** | **2.1** | **Preliminary Instructions** |
| **Proposal 2** | **8.2** | **Aggravated Assault** |
| **Proposal 3** | **8.10** | **Assault on a Law Enforcement Officer, Firefighter, etc.** |
| **Proposal 4** | **8.12** | **Aggravated Assault on a Law Enforcement Officer, Firefighter, etc.** |
| **Proposal 5** | **8.15** | **Aggravated Assault on a Person 65 Years of Age or Older** |
| **Proposal 6** | **10.5** | **Improper Exhibition of a [Weapon] [Firearm]** |
| **Proposal 7** | **11.17(c)** | **Traveling to Meet a Minor** |
| **Proposal 8** | **11.17(d)** | **Traveling to Meet a Minor Facilitated by Parent, etc.** |
| **Proposal 9** | **16.4** | **Contributing to [Delinquency] [Dependency] of a Minor** |

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*. Two comments were received regarding the Aggravated Assault/Assault on a LEO proposals. One comment was from the Florida Public Defender Association (FPDA); the other comment was from Attorney Blaise Trettis. Both comments are in Appendix B. Note: Some of their comments pertain to committee proposals that are not a part of this report.

## PROPOSAL #1: INSTRUCTION 2.1

The idea to amend Instruction 2.1 came from the former chair of the Committee, Judge Joseph Bulone, who pointed out that Fla. R. Crim. P. 3.390(a) allows for closing arguments to be made either before or after the jurors are given the final instructions. Accordingly, the Committee voted unanimously to make these two choices clear by adding an italicized note along with new language for an Alternative A and an Alternative B.

Committee members thought other parts of this instruction could also be improved. For example, in the third paragraph, the Committee altered: "**The definition of the elements of** (crime charged) **will be explained to you later**" to "**The elements of** (crime(s) charged) **will be explained to you later.**"

Furthermore, the Committee proposes to re-locate the first sentence of the fourth paragraph ("**It is your solemn responsibility…**") to a place within the sixth paragraph. (The re-located and slightly re-worded sentence would read: "**It is your solemn responsibility to determine if the State proved its accusation beyond a reasonable doubt against** (defendant) **in accordance with the law that I provide to you.**") Also, the second sentence of the fourth paragraph ("**Your verdict must be based solely on the evidence…**") would be re-located more toward the end of the instruction.

In the fifth paragraph, the Committee added an explanation that the State's charging document is called an information or indictment.

In the sixth paragraph, the Committee did not think jurors needed to be instructed the judge decided what laws apply. Instead, jurors could simply be told the judge will explain the law to them. Also, the Committee did not think jurors should be instructed they determine facts. Technically speaking, jurors do not determine facts. What jurors determine is whether the State proved its accusation beyond a reasonable doubt, which is what the revised sentence states.

The only other substantive change was to delete "[him] [her]" in the section about jurors talking to other people during the trial. This part of the instruction should not have an alternative "[him] [her]" because it is unclear whether a male or female would be trying to speak to a juror later on during the trial.

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

## PROPOSALS #2 – #5: INSTRUCTIONS 8.2, 8.10, 8.12, & 8.15

The following explanation covers all four instructions (8.2, 8.10, 8.12, and 8.15): The Committee's proposals consist mostly of minor stylistic/technical formatting changes, such as deleting brackets in elements 4a and 4b and amending the italicized notes to "*Give 4a and/or 4b as applicable*." Additionally, in the

"objective standard of fear" paragraphs, the Committee proposes that "**the victim**" be changed to "(victim)" so that the trial judge does not refer to the alleged victim as "the victim."

In its published proposals, the Committee had put asterisks in the boxes of lesser-included offenses next to Improper Exhibition of a Weapon/Firearm. Those asterisks were designed to refer to a new note in the Comment sections that would have informed judges to delete the verbiage of "a rude, careless, or angry manner" for the lesser crime of Improper Exhibition of a Weapon or Firearm, unless the words "rude, careless, or angry" were included in the charging document. However, the Committee altered the Comment sections in response to the comments generated from publication in the Bar *News*.

As seen in Exhibit B, the FPDA pointed out there is a conflict in the case law about whether Improper Exhibition is a necessary lesser-included offense in cases where the language of the Aggravated Assault with a Deadly Weapon statute was charged. Separately, Mr. Trettis wrote that he believed the proposals for the Comment sections constituted advocacy on the state's part by reminding the judge to question the lesser-included offense instructions.

Upon post-publication review, the Committee decided to delete the references to not instructing on "rude, careless, or angry" as part of the lesser-included offense of Improper Exhibition unless those words were included in the charging document. The Committee's decision was based on the fact that there was no case law explicitly holding that "rude, careless, or angry" should be excluded unless those words were in the charging document. The Committee also unanimously agreed with the FPDA about there being a conflict regarding whether Improper Exhibition is a necessary lesser-included offense in cases where the charging document tracks the Aggravated Assault with a Deadly Weapon statute.

Accordingly, the Committee's final proposals include asterisks in the lesser-included boxes for Improper Exhibition. However, the asterisks refer to a new note in the Comment sections regarding the conflict in the DCAs about the lesser-included offense of Improper Exhibition of a Weapon or Firearm. The Committee voted unanimously to send the four proposals to the Court.

## PROPOSAL #11: INSTRUCTION 10.5

Because there is an issue regarding whether jurors should be instructed on "rude, careless, or angry" when instructed on Improper Exhibition of a Weapon/Firearm as a lesser-included offense of Aggravated Assault with a Deadly Weapon, the Committee thought it best to insert brackets around "rude," "careless," "angry," "or," and "threatening" in the standard Improper Exhibition instruction. Other than technical formatting amendments, no other changes were made to the published proposal for Instruction 10.5.

No comments were received as a result of publication in the Bar *News*. Upon post-publication review, the Committee discussed two new issues pertaining to the use of an antique firearm and the crime of Improper Exhibition.

Specifically, the definition of firearm in s. 790.001(6), Fla. Stat. states: "The term firearm does not include an 'antique firearm' unless the antique firearm is used in the commission of a crime." This definition led the Committee to question whether someone could be prosecuted for Improper Exhibition of an antique firearm. The Committee was unsure of the answer. On one hand, the Committee considered *Bostic v. State*, 902 So. 2d 225 (Fla. 5th DCA 2005), which states that a convicted felon cannot be prosecuted for possessing an antique firearm. On the other hand, the Committee considered *Williams v. State,* 492 So. 2d 1051, 1053 (Fla. 1986), *receded from on other grounds by Brown v. State*, 719 So. 2d 882 (Fla. 1998), in which this Court wrote: "We do not believe that the legislature, when enacting section 790.23, intended that a convicted felon could be acquitted when possessing a concealed, loaded weapon by using the excuse that the weapon is an antique or a replica thereof. This literal requirement of the statute exhalts form over substance to the detriment of public policy, and such a result is clearly absurd. It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result."

Because of the uncertainty, the Committee decided to add an asterisk within the section of the standard instruction that defines "firearm." This asterisk refers to a new note in the Comment section that highlights the uncertainty regarding whether a person who improperly exhibits an antique firearm can be prosecuted for s. 790.10, Fla. Stat.

The second issue pertained to the question of which party has the burden of persuasion on the affirmative defense that the firearm was an antique firearm. Because of the way the standard instruction is now written, it appears the State must prove beyond a reasonable doubt that the firearm was not an antique firearm. To alleviate that possible misimpression, the Committee added another asterisk in the Comment section that highlights this issue and that explicitly states it is uncertain which party has the burden of persuasion on the antique firearm affirmative defense. The Committee thought a note in the Comment section was sufficient to address this issue because questions surrounding antique firearms in the context of an Improper Exhibition trial do not arise often.

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

## PROPOSALS #12 & #13: INSTRUCTIONS 11.17(c) & 11.17(d)

In the jury instruction case of SC14-2035, the Committee sent proposals to the Court for Instructions 11.17(c) and 11.17(d) that left open the question of whether Solicitation was a separate offense or a lesser-included offense of

Traveling to Meet a Minor and Traveling to Meet a Minor Facilitated by a Parent. When the Court issued its opinion, the Court did not publish Instructions #11.17(c) or #11.17(d) because the solicitation question was still pending. See *In re STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES—REPORT NO. 2014–07*, 163 So. 3d 468 (Fla. 2015). Since that time, the Court held in *State v. Shelley*, 40 Fla. L. Weekly S362 (Fla. June 25, 2015) that Solicitation is not a separate offense, but is instead a necessary lesser-included offense.

Accordingly, the Committee has retained the amendments it first proposed in SC14-2035. These changes include new language for the enhancement in s. 775.0862, Fla. Stat.; and an italicized cite to s. 847.001, Fla. Stat., for relevant definitions; and new verbiage that "an object" includes a finger. In addition, the Committee has added Solicitation in the Category One lesser-included box in both Instructions #11.17(c) and #11.17(d).

The proposal passed unanimously and was published in the Bar *News.* No comments were received. The Committee voted unanimously to send these two proposals to the Court.

## PROPOSAL #14: INSTRUCTION 16.4

A committee member proposed that Instruction 16.4 be reworked because it was out-of-date. The Committee agreed.

The initial changes were 1) to amend the title to "**Contributing to Child [Delinquency] [Dependency] [In Need of Services]**" and 2) to change the statutory cite at the top of the instruction to s. 827.04(1), Fla. Stat.

The next change was simply to capitalize certain words in the introductory paragraph.

The Committee then decided the best way for users to understand this instruction was to make clearer that the instruction covers both s. 827.04(1)(a), Fla. Stat., and s. 827.04(1)(b), Fla. Stat., in two separate sections. These sections are delineated with new italicized headings. The two sections are then organized so that each section has one element in one regular sentence (no bracketed words in a column). The single element in both sections is worded to track the statute, with one exception.

The word "knowingly" is not in the statute, but is currently in the s. 827.04(1)(a), Fla. Stat., section of this instruction and is not currently in the s. 827.04(1)(b), Fla. Stat., section of this instruction. The Committee concluded that the word "knowingly" was probably added to the initial section by a prior committee because of *Shamrani v. State*, 370 So. 2d 1, 2 (Fla. 1979), in which the Court stated: "We believe it to be implicit in the cited decisions, and we so construe the statute, that the acts proscribed by the law must be performed under such circumstances that a person of common understanding would know that they

would cause or tend to cause or encourage or contribute to the delinquency or dependency of a person under the age of eighteen years." The Committee concluded that if the word "knowingly" was in the s. 827.04(1)(a), Fla. Stat., section, then it should also be added to the s. 827.04(1)(b), Fla. Stat. section.

The Committee then added a definition for "knowingly" which came from a footnote in the *Shamrani* opinion. The Committee also added statutory definitions for "child in need of services," ""delinquent child," and "dependent child." Finally, since the statute covers the situation where a child has yet to be found delinquent, the Committee added a section that would require the judge to explain the elements of the violation of law that would make the child delinquent.

The proposal passed the Committee unanimously and was published in the Bar *News*. 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 13th day of October, 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. R. Blaise Trettis, at btrettis@pd18.net and to Ms. Julianne Holt, at jholt@pd13.state.fl.us, this 13th day of October, 2015.

s/ Jerri L. Collins
HONORABLE JERRI L. COLLINS
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