

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY

INSTRUCTIONS IN CRIMINAL CASES
REPORT 2016-06

CASE NO.: SC16-

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) of the Florida Constitution.

RECEIVED, 07/06/2016 12:33:29 PM, Clerk, Supreme Court

	<u>Instruction #</u>	<u>Title</u>
Proposal 1	8.22(a)	Threat to [Kill] [Do Serious Bodily Harm to] a [Public Official] [Family Member of a Public Official]
Proposal 2	10.9	False Report Concerning the [Placing or Planting of a Bomb, Dynamite, Other Deadly Explosive, or a Weapon of Mass Destruction] [Use of Firearms in a Violent Manner Against a Person]
Proposal 3	10.10	False Report Concerning the [Placing or Planting of a Bomb, Dynamite, Other Deadly Explosive, or a Weapon of Mass Destruction] [An Act of Arson or Other Violence] to Property Owned by the State [or any Political Subdivision]
Proposal 4	13.1	Burglary
Proposal 5	21.7	Giving False Name or Identification to Law Enforcement Officer Adversely Affecting Another

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.

All of the proposals were published in the Florida Bar News on May 15, 2016. Comments were received from 1) the Florida Public Defenders Association (“FPDA”) and 2) the Florida Association of Criminal Defense Lawyers

(“FACDL”). The two comments are in Appendix B, although some of the comments pertain to proposals that are not a part of this report.

PROPOSAL #1: INSTRUCTION 8.22(a)

The Committee created an instruction for the new misdemeanor crime in section 836.12(2), Florida Statutes, which becomes effective October 1, 2016, and which can be found in Chapter 2016-156. The new crime is set forth as follows:

Any person who threatens a law enforcement officer, a state attorney, an assistant state attorney, a firefighter, a judge, or an elected official, or a family member of such persons, with death or serious bodily harm commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s.775.083.

The Committee created two elements to capture the new statute: 1) D threatened to kill or do serious bodily harm to V; and 2) At the time, V was a law enforcement officer, state attorney, assistant state attorney, firefighter, judge, elected official, or a family member of one of those people. Because the Committee did not know whether the courts would add an element that D knew V was a police officer, judge, etc., the Committee noted that issue in the Comment section.

Statutory definitions of “family member,” “law enforcement officer,” and “firefighter” are provided. The Committee then added a section to cover the enhancement to a felony based on a prior violation, which is contained in section 836.12(3), Florida Statutes. The Committee also added a note in the Comment section that explains that jurors should not hear about the allegation of a prior violation until they render a verdict on the misdemeanor.

The Committee put Assault on a LEO, Assault, and Attempt in the Category 2 box of lesser-included crimes. Because it is not clear whether a lesser-included crime can have the same penalty as a greater crime, the Committee noted that issue in the Comment section.

The proposal passed unanimously. One comment was received from FPDA, who suggested that the Committee should add an element that the state must prove D knew of V’s status as a police officer, judge, etc. Upon post-publication review, the Committee voted unanimously to file the published proposal with the Court. The Committee concluded the addition of a knowledge element to the statute is within the purview of the judiciary, not the committee.

PROPOSAL #2: INSTRUCTION 10.9

In 2016, the legislature amended section 790.163(1), Florida Statutes, by making it unlawful for any person to make a false report, with the intent to deceive, mislead, or misinform any person, concerning the use of firearms against a person. The amendment can be found in Chapter 2016-156 and is effective on October 1, 2016.

To conform instruction 10.9 with the revised statute, the Committee changed the title of the crime to: False Report Concerning the [Placing or Planting of a Bomb, Dynamite, Other Deadly Explosive, or a Weapon of Mass Destruction] [Use of Firearms in a Violent Manner Against a Person].

In the elements section, the Committee concluded the state does not have to allege the name of the person receiving the false report or the name of the person that the defendant intended to deceive. Accordingly, the Committee tracked the statute by replacing the actual names of those people with “any person.” To capture the 2016 amendment, the Committee added the option in element #1 that the false report could pertain to the use of a firearms in a violent manner against a person.

In section 790.163(3), Florida Statutes, the legislature wrote that proof that a person knowingly made a false report is prima facie evidence of an intent to deceive. The Committee interpreted that as an inference and therefore proposes that jurors be instructed: **You may infer that a person who knowingly made a false report had the intent to deceive, mislead, or otherwise misinform any person.**

The Committee added the statutory definition of “weapon of mass destruction,” but there are no statutory definitions for “bomb,” “dynamite,” or “deadly explosive.” The Committee proposes to delete the part in the existing instruction that tells the judge to define the explosive alleged by adapting the definition of explosive in section 790.001(5), Florida Statutes, because there is no case law that supports that instruction. The Committee felt more comfortable noting the issue in the Comment section and highlighting that there is a definition of “explosive” in section 790.001(5).

The proposal passed unanimously. Comments were received from FACDL and the FPDA. FACDL objects to the inference part of the instruction. In FACDL’s opinion, the part of the statute that states proof that a person knowingly made a false report is prima facie evidence of an intent to deceive, should not be treated as an inference. Instead FACDL argues that section of the statute acts only as direction to a trial judge to deny a motion for a judgment of acquittal based on proof the defendant knew the report was false. (FPDA made the same argument; see below.) FACDL further argues the Committee’s proposed inference instruction constitutes a judicial comment on the evidence.

FPDA agrees with FACDL that the legislative intent in creating a “prima facie evidence” statute was to convey to the courts what constitutes competent, substantial evidence. FPDA also suggested that if any inference instruction should be given, it should include the following: “if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent existed.”

The Committee voted 6-3 to maintain its published proposal. The Committee noted that section 810.07(1), Florida Statutes, states: “In a trial on the charge of burglary, proof of the entering of such structure or conveyance at any time stealthily and without consent of the owner or occupant thereof is prima facie evidence of entering with intent to commit an offense.” That statute led to an inference instruction in the standard Burglary instruction that states: “You may infer that (defendant) had the intent to commit a crime inside a [structure] [conveyance] if the [entering] [attempted entering] of the [structure] [conveyance] was done stealthily and without the consent of the owner or occupant.” Additionally, the majority of the Committee (6-3) voted against the FPDA proposal to add “beyond a reasonable doubt” language to the inference instruction because it suggested that more facts and circumstances than just proof of a knowing false report is necessary. Finally, the Committee did not agree with FACDL’s argument that an inference instruction rises to the level of a judicial comment on the evidence pursuant to *Walker v. State*, 896 So. 2d 712 (Fla. 2005) (holding that an inference instruction on possession of recently stolen property is not an impermissible comment on the evidence when the inference instruction is inextricably intertwined with the crime). Finally, the FPDA proposed the Committee add brackets around “Weapon of Mass Destruction” in the name of the crime so that a jury considering evidence of a milder explosive is not automatically put in mind of WMD’s. No committee member agreed with that idea; everyone thought the name of the crime should track the statute.

PROPOSAL #3: INSTRUCTION 10.10

Before 2016 legislative changes, section 790.164, Florida Statutes, had the same provisions as section 790.163, Florida Statutes, except section 790.164 contained the additional element that the threat must relate to property owned by the state or any political subdivision.

For a reason unknown, the 2016 legislature amended section 790.164 to include the idea that it is unlawful for any person to make a false report, with the intent to deceive, mislead, or misinform any person, concerning the use of firearms against a person. *See* Chapter 2016-156. However, as pointed out in footnote 15 in the legislative staff analysis dated February 29, 2016, this new language means the exact same crime is contained in both section 790.164(1) and section 790.163(1).

To avoid unnecessary confusion, the Committee did not incorporate “the use of firearms in a violent manner against a person” in Instruction 10.10. Instead the Committee noted in the Comment section that Instruction 10.9 could be used to instruct the jury in cases where the state’s charging document referenced section 790.164 (instead of section 790.163(1)).

To bring Instruction 10.10 up-to-date with the revised statute, the Committee changed the title to:

False Report Concerning [the Placing or Planting of a Bomb, Dynamite, Other Deadly Explosive or a Weapon of Mass Destruction] [an Act of Arson or Other Violence] to Property Owned by the State [or any Political Subdivision].

In the elements section, because the state does not have to allege the name of the person who received the false report, the name of the person who owned the property, or the name of the person intended to be deceived, the Committee deleted all references to “(person alleged).” Instead element #1 would track the statute with:

(Defendant) made a false report to any person concerning [the placing or planting of a bomb, dynamite, other deadly explosive, or a weapon of mass destruction] [an act of arson or other violence] to property.

Element #2 requires the state to prove the property was owned by the state or any political subdivision. Element #3 requires the state to prove the defendant knew the report was false. Element #4 requires the state to prove that the report was made with the intent to deceive any person. In sum, the Committee believes its proposed revisions properly track section 790.164.

In section 790.164(3) the legislature again wrote that proof that a person knowingly made a false report is prima facie evidence of an intent to deceive. As explained above, the Committee interpreted that as an inference and therefore proposes that jurors be told: **You may infer that a person who knowingly made a false report had the intent to deceive, mislead, or otherwise misinform any person.**

The Committee added statutory definitions for “weapon of mass destruction” and “political subdivision.” There are no statutory definitions for “bomb,” “dynamite,” or “deadly explosive.” The Committee proposes to delete the part in the existing instruction that tells the judge to define the explosive alleged by adapting the definition of explosive in section 790.001(5), Florida Statutes, because there is no case law that supports that instruction. The Committee felt more comfortable noting the issue in the Comment section and highlighting that there is a definition of “explosive” in section 790.001(5).

Finally, in the lesser-included box, the Committee added the part of section 790.163(1), Florida Statutes, that refers to “false report regarding the placing a

bomb” in Category One because that crime is a necessarily-lesser included offense of “false report regarding the placing a bomb on state property.” In order to highlight that the new language about a “false report concerning the use of firearms against a person” is in both section 790.164(1) and section 790.163(1), the Committee put that crime in Category Two along with an asterisk that refers people to the Comment section.

The proposal passed unanimously. The comments from FACDL and FPDA regarding the inference instruction are pertinent to this instruction also. Upon post-publication review, the vote was 6-3 to maintain the Committee’s published proposal. As mentioned above, the three dissenters disagreed only because of the inference instruction.

PROPOSAL #4: INSTRUCTION 13.1

The idea to amend the standard Burglary instruction came from former Judge Chris Altenbernd, who suggested that the instruction include an option for the judge to instruct the jury on the elements of the offense intended. The Committee unanimously agreed with former Judge Altenbernd and added an italicized note in two separate places (one in the entering section and the other in the remaining section) that informs the judge to define the elements of the crime intended, if such an instruction is requested.

Additionally, the Committee discussed the best way to handle lesser-included offenses, which can become very complicated because there are many enhancements in the burglary statute. No one wanted to delete the boxes of lesser-included offenses because lawyers and judges are accustomed to seeing those boxes. However, the Committee thought the best way for lawyers and judges to handle burglary enhancements was for the jury to make special findings. Accordingly, the Committee added a note that states: "It is probably best for the jury to make special findings regarding enhancements instead of listing all of the necessary lesser-included offenses of the highest form of Burglary charged. See Justice Pariente’s concurring opinion in *Sanders v. State*, 944 So. 2d 203 (Fla. 2006)."

The Committee did not want to put this note in the Comment section for fear that it would be overlooked. As a result, the Committee deviated from its usual practice and put the note at the bottom of each lesser-included box. The Committee vote was unanimous. Upon post-publication review, no comments were received. The Committee then voted unanimously to file the proposal with the Court.

PROPOSAL #5: INSTRUCTION 21.7

The idea to amend Instruction 21.7 came from a former committee member/prosecutor who thought it would be a good idea to note that this

instruction could be used in a misdemeanor case where the defendant was charged with Giving a False Name to a LEO, pursuant to section 901.36(1), Florida Statutes.

The Committee agreed by adding two sentences to the Comment section that explain that the only difference between the felony in section 901.36(2) and the misdemeanor in section 901.36(1) is element #4. The proposal passed unanimously. No comments were received. Upon post-publication review, the Committee agreed unanimously to file the proposal with 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 6th day of July, 2016.

s/ Judge F. Rand Wallis
The Honorable F. Rand Wallis
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
Fifth District Court of Appeal
300 South Beach Street
Daytona Beach, Florida 32114
Florida Bar Number: 980821
WallisR@flcourts.org

CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I hereby certify that a true and correct copy of this report and the appendices were sent by e-mail to Julianne Holt, President of the Florida Public Defenders Association, at holtj@pd13.state.fl.us; and to Mr. Luke Newman at lukenewmanlaw.com; this 6th day of July, 2016.

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 F. Rand Wallis
The Honorable F. Rand Wallis
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal

Cases
Fifth District Court of Appeal
300 South Beach Street
Daytona Beach, Florida 32114
Florida Bar Number: 980821
WallisR@flcourts.org