IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES — REPORT 2016-01 **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), Florida Constitution.

	Instruction #	Title
Proposal 1	**3.6(a)**	**Insanity**
Proposal 2	**3.6(p)**	**Abnormal Mental Condition**
Proposal 3	**5.1**	**Attempt to Commit a Crime**
Proposal 4	**5.2**	**Criminal Solicitation**
Proposal 5	**5.3**	**Criminal Conspiracy**
Proposal 6	**6.6**	**Attempted Manslaughter by Act**
Proposal 7	**7.7**	**Manslaughter**
Proposal 8	**7.7(a)**	**Aggravated Manslaughter**
Proposal 9	**8.25**	**Violation of a Condition of Pretrial from a Domestic Violence Charge**
Proposal 10	**28.4(a)**	**Leaving the Scene of a Crash Involving Only Damage to an Attended Vehicle or Attended Property**

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.

After publication in the Florida Bar *News* (dates of publication listed below), comments were received from the Florida Public Defenders Association (FPDA); the Florida Association of Criminal Defense Lawyers (FACDL); and Public Defender Mr. Blaise Trettis. Some of the comments pertain to proposals that are not a part of this report, but all comments are in Appendix B. A minority report regarding Proposals 1 and 2 is in Appendix C.

PROPOSAL #1: INSTRUCTION 3.6(a)

The idea to amend the insanity instruction came from a member who stated that evidence of some mental condition of the defendant is often admitted that could be used by the jury improperly. The Committee agreed this was not an uncommon occurrence and that the insanity instruction should be amended to clarify the law for jurors.

Separately from that member's idea, the Committee unanimously agreed to re-locate the paragraph about a defendant who believed what he or she was doing was morally right not being insane because the Committee thought all of the "*Give if applicable*" paragraphs should be located right next to each other.

The Committee then published the following new paragraph in the June 15, 2015 issue of the Bar *News*:

Give if applicable and if requested.

Although insanity is a defense, other mental or psychiatric conditions not constituting insanity are not defenses to any crime in this case. Unless there is clear and convincing evidence that (defendant) **was insane at the time of crime(s) alleged, any evidence of mental illness, an abnormal mental condition, or diminished mental capacity may not be taken into consideration to show that the [he] [she] lacked the specific intent or did not have the state of mind essential to proving that [he] [she] committed the crime[s] charged [or any lesser crime].**

This proposal generated two comments. The FPDA commented that although the proposed new language correctly stated the law, it was nevertheless an unnecessary addition because it was designed solely to forestall the unethical conduct of arguing a defense unsupported in law.

Mr. Trettis commented the first sentence is misleading because it insinuates that insanity is a psychiatric condition, like schizophrenia, and will allow a prosecutor to argue that the defense witness testified that the defendant's psychiatric condition was not insanity. Mr. Trettis further commented that the second sentence constitutes a curative instruction for the state that would be applicable only if the jury heard some evidence about diminished mental capacity that the court ruled was inadmissible. Mr. Trettis contends the state will request - and the judge will agree to give - this paragraph in every insanity case and that without some evidence of diminished mental capacity, the reading of the proposed paragraph will constitute reversible error.

Upon post-publication review, the majority of the Committee concluded that the proposed language, which comes from *Chestnut v. State*, 538 So. 2d 820 (Fla.

1989). correctly informs the jury of the law. The majority of the Committee believed the language is clear, does not negate the insanity defense, and should not allow a prosecutor to make an improper argument.

Accordingly, the Committee made only two minor alterations. First, in order to help alleviate any possible misleading of the jury as suggested by Mr. Trettis, the Committee deleted the word "other" from the first sentence. Second, in an effort to give trial judges more guidance regarding the circumstance under which this new paragraph should be given, the Committee added an asterisk which refers judges and lawyers to the Comment section. The Committee's final proposal, which passed by a vote of 6-3, reads as follows:

**Give if applicable and if requested.*

Although insanity is a defense, mental or psychiatric conditions not constituting insanity are not defenses to any crime in this case. Unless there is clear and convincing evidence that (defendant) **was insane at the time of crime(s) alleged, any evidence of mental illness, an abnormal mental condition, or diminished mental capacity may not be taken into consideration to show that [he] [she] lacked the specific intent or did not have the state of mind essential to proving that [he] [she] committed the crime[s] charged [or any lesser crime].**

Comments

*This paragraph should be read only where it is applicable and appropriate under the facts of the case. "[D]iminished capacity is not a viable defense in Florida." *Evans v. State*, 946 So. 2d 1, 11 (Fla. 2006); *Lukehart v. State*, 70 So. 3d 503, 515 (Fla. 2011). Evidence of an abnormal mental condition not constituting legal insanity is inadmissible "for the purpose of proving either that the accused could not or did not entertain the specific intent or state of mind essential to proof of the offense in order to determine whether the crime charged, or a lesser degree thereof, was in fact committed." *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989). In some cases, however, such evidence, or something that jurors might interpret as such evidence, might be admitted presumably for another purpose or might simply be obvious or apparent from the facts of the case. In such cases, it could be appropriate in the court's discretion to give this instruction to avoid the possibility of juror confusion.

Three Committee lawyers opposed the proposal and filed a minority report. Their position will be discussed below as part of the related Proposal #2 for Abnormal Mental Condition.

PROPOSAL #2: INSTRUCTION 3.6(p)

The proposal for a new instruction entitled "Abnormal Mental Condition" came from the same member who drafted the insanity proposal. The proposal that was published in the June 15, 2015 printed edition of the Bar *News* was similar to the language proposed in the insanity instruction. Once again, the Committee slightly altered its proposal in response to comments received after publication. The Committee's final proposal, which passed by a vote of 6-3, is as follows:

**Give if applicable and if requested, and only if insanity is not an issue and if no notice of intent to rely on the defense of insanity has been filed. If insanity is an issue in the case, give instruction 3.6(a).*

Mental illness, an abnormal mental condition, or diminished mental capacity is not a defense to any crime in this case. Any such evidence may not be taken into consideration to show that the defendant lacked the specific intent or did not have the state of mind essential to proving that [he] [she] committed the crime[s] charged [or any lesser crime].

Comments

*This instruction should be given only where it is applicable and appropriate under the facts of the case. "[D]iminished capacity is not a viable defense in Florida." *Evans v. State*, 946 So. 2d 1, 11 (Fla. 2006); *Lukehart v. State*, 70 So. 3d 503, 515 (Fla. 2011). Evidence of an abnormal mental condition not constituting legal insanity is inadmissible "for the purpose of proving either that the accused could not or did not entertain the specific intent or state of mind essential to proof of the offense in order to determine whether the crime charged, or a lesser degree thereof, was in fact committed." *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989). In some cases, however, such evidence, or something that jurors might interpret as such evidence, might be admitted presumably for another purpose or might simply be obvious or apparent from the facts of the case. In such cases, it could be appropriate in the court's discretion to give this instruction to avoid the possibility of juror confusion.

This instruction was adopted in 2016.

In response to both the comments and the minority report, the Committee states: The minority argues the Committee's proposed new paragraph for Instruction 3.6(a) and the proposal for a new Instruction 3.6(p) are incorrect statements of the law. The minority cites the following cases where evidence of a defendant's mental condition was relevant and therefore admissible to prove the

defendant's state of mind for self-defense: *Filomeno v. State*, 930 So.2d 821 (5th DCA 2006) ("fight or flight" response); *State v. Mizell*, 773 So.2d 618 (1st DCA 2000) (post-traumatic stress disorder); and *State v. Hickson*, 630 So.2d 172 (Fla. 1993) (battered spouse syndrome). The minority argues that at least in these instances, the proposed instructions would not be applicable.

The majority of the Committee concluded that these cases are accounted for in the proposed italicized directions to the trial court to: "*Give if applicable and if requested.*" The proposal includes an asterisk directing the trial judge and lawyers to the Comment section, which specifies that "*This instruction should be read only where it is applicable and appropriate under the facts of the case*" and that it "*could be appropriate in the court's discretion … to avoid the possibility of juror confusion.*" The proposed instruction does not purport to control the trial court's evidentiary rulings. Moreover, in situations where the instruction might not be appropriate, the trial court is explicitly provided the latitude not to give the instruction.

FACDL states that the proposal violates a defendant's due process right to present a defense in that it presumes the existence of criminal intent in all non-insanity prosecutions. FACDL also states that medical-related conditions other than diminished capacity may be defenses (such as medication, epilepsy, infancy, and senility) and the proposal makes no exception for those conditions. Finally, FACDL argues that if evidence of a medical condition is not relevant, the State should object at the time the evidence is offered. FACDL states that once the evidence is admitted, it was deemed relevant, and then to give this instruction poses a significant risk of negating a possible defense.

The Committee also believes that the proposed instruction accommodates these concerns. The instruction states the law as pronounced by this Court in *Chestnut* and other cases. As to conditions mentioned by FACDL which may be exceptions to the *Chestnut* rule, the proposal directs the trial court to give the instruction only "if applicable and appropriate under the facts of the case." If the trial court believes that the condition does not come within the *Chestnut* rule and that evidence of such a condition is relevant and admissible, the judge would obviously not give the instruction. Finally, as to FACDL's complaint that once the evidence is admitted it must have been deemed relevant, this is explained in the instruction's Comment section, as follows: "In some cases, however, such evidence, or something that jurors might interpret as such evidence, might be admitted presumably for another purpose or might simply be obvious or apparent from the facts of the case. In such cases, it could be appropriate in the court's discretion to give this instruction to avoid the possibility of juror confusion."

The FPDA took a different approach by commenting that although the proposal correctly stated the law, it nevertheless was unnecessary because it was

designed solely to forestall the unethical conduct of arguing a defense that is unsupported in law. Also, Mr. Trettis commented that the instruction is nothing more than a curative instruction for the state. Mr. Trettis wrote that if evidence of some sort of diminished capacity was not relevant, it should not have been admitted. If the evidence was admitted, then it was deemed relevant. Mr. Trettis believes the state will request the instruction in every case where the defense argues about some mental condition, the judge will accede to the state's request, and that doing so will create reversible error in many cases because the instruction will be given in cases where it should not be given.

The majority of the Committee disagreed that the instruction is designed solely to forestall an unethical defense argument and is unnecessary. Again, as stated in the Comment section, there are times when such evidence or something the jury may consider as such evidence may be admitted for another purpose, or under the rule of completeness, or simply be apparent from the facts of the case. In such cases, it could be appropriate in the court's discretion to avoid juror confusion as to the proper use of such evidence. This concept is similar to the portion of Instruction 3.6(d) dealing with voluntary intoxication, which informs the jury that voluntary intoxication is not a defense and that evidence of voluntary intoxication may not be taken into consideration to show that the defendant lacked the specific intent to commit a crime. The purpose of the two instructions is the same, which is to correctly inform the jury of the law, because without being so instructed, the jury might believe that an abnormal mental condition (or voluntary intoxication) might be a defense or something they should take into consideration.

In sum, the proposal states that the instruction should not be given in all cases, but only "if applicable and appropriate under the facts of the case." The majority of the Committee concluded that trial judges will be able to figure out when this instruction should be given and when it should not be given.

PROPOSALS #3 – #5: INSTRUCTIONS 5.1 – 5.3

The idea to amend the instructions for the inchoate crimes came from staff who pointed out that the standard instructions did not address the burden of persuasion for the defense of renunciation in § 777.04(5), Fla. Stat.

At the time the Committee first discussed this idea, the case law was silent regarding which party had the burden of persuasion for the affirmative defense of renunciation. The Committee initially decided not to allocate the burden of persuasion without case law support and therefore voted 8-1[1] to publish the Committee's usual format[2] for an undetermined affirmative defense instruction.

---

[1] The dissenter thought the instructions should not address the burden of persuasion for the affirmative defense of renunciation. However, his vote was prior to the

Separately, the Committee thought it would be a good idea to alert everyone in the Comment section that it is unclear whether renunciation could be used as an affirmative defense in cases where harm was done. For example, if a defendant fired a bullet into a victim with the intent to kill, but then decided not to pull the trigger a second time because of a change in mind about killing, the Committee doubted whether the courts would allow that defendant to escape punishment for Attempted Murder if the victim survived the gunshot.

The proposals were published in June 15, 2015 issue of the Bar *News*.

Before the Committee met for post-publication review, the First District issued *Harriman v. State,* 174 So. 3d 1044 (Fla. 1st DCA 2015), which held the burden of persuasion for the affirmative defense of renunciation was on the defendant to prove the defense by a preponderance of the evidence. Accordingly, the Committee revised its proposals to incorporate the *Harriman* holding. Instead of republishing the proposals for the inchoate crimes, the Committee incorporated the *Harriman* holding in proposals related to attempted murder, which were published in the October 15, 2015 issue of the Bar *News*.

As a result of the two publications, one for the inchoate crimes and one for the attempted murders, the Committee received three comments (FPDA, FACDL, and Mr. Trettis).

In response to the publication of the proposals for the inchoate crimes (the comment dated July 15, 2015), the FPDA wrote that the substantive contours of the renunciation defense had not been elaborated by Florida courts and there was insufficient legal support for the Committee's proposals. In response to the publication of the attempted murder proposals (the comment dated November 12, 2015), the FPDA stated that 1) *Harriman* had not yet run its course through the appellate process, 2) *Harriman* conflicts with other Florida cases that allocate the burden of persuasion of affirmative defenses to the state, and 3) the Committee's proposal is too broad given Florida case law, particularly for involuntary renunciation to include "….circumstances that increased the probability of being apprehended." According the FPDA, those circumstances have to be known to the defendant.

Mr. Trettis also believed that the Committee had gone beyond Florida case law in explaining involuntary renunciation. Mr. Trettis further argued the

---

issuance of *Harriman v. State,* 174 So. 3d 1044 (Fla. 1st DCA 2015).

[2] The Committee's usual format is used, for example, in the Resisting Recovery of Stolen Property instruction. The usual format explains the issue in an italicized note and gives the trial judges two options, one where the burden of persuasion is on the defendant and one where the burden of persuasion is on the state.

Committee should not add a note in the Comment section because to do so would cause the courts to depart from their neutral role.

FACDL wrote to the Committee that renunciation is not an affirmative defense to an attempt because renunciation negates the element within an attempt that the defendant had to intend to commit a crime. FACDL also commented that the proposal was premature because *Harriman* had not yet run its course through the appellate process.

The Committee made one change to its proposals in response to these comments. The single alteration was to accept the idea from the FPDA regarding the defendant having to know of the circumstances that increased the probability of being apprehended. Accordingly, the vote was unanimous to add the words "known by the defendant". The final proposal to explain involuntary renunciation reads as follows:

Renunciation is not complete and voluntary where the defendant failed to complete the crime because of unanticipated difficulties, unexpected resistance, a decision to postpone the crime to another time, or circumstances known by the defendant that increased the probability of being apprehended.

Other than that one change, the Committee disagreed with the commenters. The Committee's responses are as follows:

1) The First District Court of Appeals (in *Harriman v. State*, 174 So. 3d 1044 (Fla. 1st DCA 2015)) and the Committee do not agree with FACDL that renunciation is a defense, but not an affirmative defense.

2) In February 2016, this Court declined to accept jurisdiction in Mr. Harriman's appeal. Accordingly, the First District's *Harriman* holding is now binding on all trial courts.

3) The Committee decided the law of renunciation is sufficiently clear from *Carroll v. State*, 680 So. 2d 1065 (Fla. 3d DCA 1996). The Committee noted that the *Carroll* court relied on Lafave and Scott's book, *Substantive Criminal Law*, and that book mentions unanticipated difficulties and a change in circumstances that would increase the likelihood the defendant would be caught as examples of involuntary renunciation. Furthermore, the Committee saw no reason why the law of renunciation in Florida would deviate from the Montana/Rhode Island/Michigan case law cited in the July 15, 2015 FPDA comment. (*State v. Mahoney*, 870 P.2d 65 (Montana 1994); *State v. Latraverse,* 443 A.2d 890 (R.I. 1982); *People v. Kimball,* 311 N.W.2d 343 (Mich. Ct. App. 1981)). Finally, the language in the Florida statute – "…under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose…" appears to be copied from the Model Penal Code § 5.01(4), which states that the renunciation is not voluntary if

"motivated, in whole or in part, by circumstances not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose." Therefore, the Committee voted unanimously to retain its explanation of renunciation, except for the addition of the words "known by the defendant."

4) The Committee did not agree with Mr. Trettis that adding a note in the Comment section would cause courts to deviate from their neutral roles, particularly since the Comment section consists of Committee comments, not Court comments.

In sum, the Committee voted unanimously to approve these proposals because they accurately reflect Florida law.

Final note: Because voluntary renunciation is an affirmative defense to all three inchoate crimes, the proposals for Attempt, Solicitation, and Conspiracy essentially mirror each other. The main difference is that the Attempt instruction refers to abandonment of the offense while the Solicitation and Conspiracy proposals refer to persuading another not to commit the crime. The difference (abandonment vs. persuasion) is based on the statutory language within § 777.04(5)(a), Fla. Stat., which applies to attempts, and § 777.04(5)(b) and (5)(c), Fla. Stats., which apply to solicitation and conspiracy, respectively. Also, for the Solicitation proposal, the Committee changed the explanation of "to 'solicit'" in a way that did not require the use of the word "solicited." Instead, the proposal is for the instruction to read:

To "solicit" means to ask earnestly or to try to induce another person to engage in specific conduct.

PROPOSAL #6: INSTRUCTION 6.6

This instruction covers the crime of Attempted Manslaughter by Act. There are only minor changes proposed. Instead of having a paragraph in the body of the instruction that addresses renunciation, the Committee thought it better to strike that paragraph and to add a sentence in the Comment section that refers people to the standard Attempt instruction (#5.1). The Committee did so because no one thought renunciation was a common defense to Attempted Manslaughter by Act.

The Committee also made minor changes in the paragraph that explains the state does not have to prove the defendant had an intent to cause death. Instead of the judge telling jurors the defendant's act was not "**justifiable or excusable attempted homicide, as I have previously explained those terms**…." the Committee thought it would better for the judge to tell the jury the defendant's act was not "**justifiable or excusable attempted homicide, as I have instructed you**." The Committee also added an italicized note as a reminder that the

Introduction to Attempted Homicide instruction (#6.1) must be read because that instruction explains attempted justifiable and attempted excusable homicide.

The proposal was published in the October 15, 2015 issue of the Bar *News*. The comments from Mr. Trettis, the FPDA, and the FACDL are relevant to this proposal. However, because the Committee's method of covering the concept of renunciation is to refer people in the Comment section in the standard Attempt instruction, the Court can address the substance of an appropriate renunciation instruction when it deals with the standard Attempt instruction, which is a part of this report. Upon post-publication review, the Committee voted unanimously to approve this instruction.

PROPOSAL #7: INSTRUCTION 7.7

The Committee reviewed the Manslaughter instruction in response to *Pethtel v. State,* 177 So. 3d 631 (Fla. 2d DCA 2015). In that case, the Second District decided that Aggravated Manslaughter is neither a reclassification nor an enhancement of Manslaughter and instead is a separate offense from Manslaughter. In order for the standard instructions to be consistent with *Pethtel,* the Committee voted unanimously to delete the Aggravated Manslaughter language from the Manslaughter instruction (#7.7) and to create a new standard instruction for Aggravated Manslaughter (to be numbered #7.7(a)).

The only other substantive change was to model the standard Manslaughter instruction after the standard Attempted Manslaughter by Act instruction. To do so, the Committee added the words "**…as I have previously instructed you"** to the paragraph that informs jurors the defendant cannot be guilty of Manslaughter if the defendant's act was merely negligent or justifiable or excusable homicide. The bold sentence is followed by a new italicized note that is designed to act as a reminder to the judge and the lawyers that the Introduction to Homicide instruction (#7.1) must be read because that instruction explains justifiable and excusable homicide. As a result, there is no need for a judge to repeat the same instruction within the Manslaughter instruction.

There were no other changes to the Manslaughter instruction other than minor amendments to make the Comment section read better. The proposal passed the Committee unanimously and was published on October 15, 2015 in the Bar *News*. The FPDA commented that they supported the proposed changes to this instruction. Upon post-publication review, the Committee voted unanimously to approve this proposal.

PROPOSAL #8: INSTRUCTION 7.7(a)

As mentioned above, the Committee proposes to create a new instruction for Aggravated Manslaughter, to be numbered #7.7(a), as a result of the *Pethtel*

opinion. Pursuant to § 782.07(3) and (4), Fla. Stat., the only way Aggravated Manslaughter can be committed is via a defendant's culpable negligence. Thus the Committee created three elements: 1) Victim is dead; 2) Victim's death was caused by the culpable negligence of defendant; and 3) V's status (elderly person, child, firefighter, etc.).

The remainder of the proposal is copied from the existing Manslaughter instruction. It includes an explanation for culpable negligence, a reminder that the defendant cannot be guilty if the killing was justifiable or excusable homicide, and the pertinent statutory definitions. The Committee put Manslaughter - § 782.07 as a Category 1 lesser-included offense. (The only apparent difference between Manslaughter by Act and Manslaughter by Culpable Negligence is that the act was one of culpable negligence.) The Committee also put an asterisk next to four non-homicide lesser-included offenses in Category 1: 1) Neglect by Culpable Negligence of an Elderly Person or Disabled Adult or Child Causing Great Bodily Harm, 2) Neglect by Culpable Negligence of an Elderly Person or Disabled Adult or Child Without Causing Great Bodily Harm, 3) Culpable Negligence Inflicting Injury, and 4) Culpable Negligence Exposing Another to Injury. The asterisk refers to the Comment section which informs everyone that non-homicide lesser-included offenses do not have to be given if the parties agree that 1) causation is not in dispute and 2) the victim is dead. Finally, the Committee noted in the Comment section there is no statutory requirement nor is there case law requiring the state to prove the defendant knew the victim's status.

The proposal passed the Committee unanimously and was published on October 15, 2015 in the Bar *News*. No comments were received. Upon post-publication review, the Committee again voted unanimously to approve this proposal.

PROPOSAL #9: INSTRUCTION #8.25

In 2015, the legislature amended § 903.047(1)(b), Fla. Stat., by adding language stating that an order of no contact is effective immediately and enforceable for the duration of the pretrial release or until modified by the court. Additionally, the legislature stated that unless otherwise specified by the court, the term "no contact" includes:

1. Communicating orally or in any written form, either in person, telephonically, electronically, or in any other manner, either directly or indirectly through a third person, with the victim or any other person named in the order. If the victim and the defendant have children in common, at the request of the defendant, the court may designate an appropriate third person to contact the victim for the sole purpose of facilitating the defendant's contact with the children. However, this

subparagraph does not prohibit an attorney for the defendant, consistent with rules regulating The Florida Bar, from communicating with any person protected by the no contact order for lawful purposes.
2. Having physical or violent contact with the victim or other named person or his or her property.
3. Being within 500 feet of the victim's or other named person's residence, even if the defendant and the victim or other named person share the residence.
4. Being within 500 feet of the victim's or other named person's vehicle, place of employment, or a specified place frequented regularly by such person.

As a result, the Committee added a section to define "no contact" consistent with the new statute. The proposal passed the Committee unanimously and was published in the Bar *News* on October 15, 2015. One comment was received from the FPDA, who thought the explanation of "no contact" should not be added to this instruction because it invades the province of the jury, creates a presumption not present in the statute, and breaches judicial neutrality.

Upon post-publication review, the Committee disagreed with the FPDA. The new instruction does not direct the jury to find that the conditions listed in the statute were part of the no contact order because the proposed instruction includes the phrase: "**Unless otherwise specified by the judge…**" In other words, if the judge's order of "no contact with the victim" differed from § 903.047(1)(b), Fla. Stat., the jury would be able to find the defendant not guilty given the Committee's proposal. Second, the Committee was comfortable with the idea that the statute does assume that all no contact orders necessarily include the conditions listed in the statute unless the judge makes an affirmative statement to the contrary. And finally, the proposal does not relieve the state of its burden to prove the conditions listed in the order. The proposal merely covers what the Committee believes will be the usual circumstance: The judge will order "no contact" and a form that mimics the statute will be given to the defendant. The only change the Committee made upon post-publication review was to ensure that the proposal listed all the conditions in § 903.047(1)(b)1—4, Fla. Stat. as constituting "no contact" because the published proposal erroneously just listed the conditions in § 903.047(1)(b)1—2, Fla. Stat.

The Committee vote was unanimous to approve this proposal.

PROPOSAL #10: INSTRUCTION #28.4(a)

The idea to amend the Leaving the Scene of a Crash Involving Only Damage to an Attended Vehicle or Attended Property came from a member. There are only two proposed changes: 1) In the elements section, the Committee inserted the

phrase "crash or accident" as opposed to just "crash" for two reasons. First, both "crash" and "accident" are used in the case law. Second, the word "crash" has a connotation that the collision was intentional which is not required by the statute. By adding the words "or accident," there should be no confusion that the collision could have been unintentional. 2) The statute has no *mens rea* but there can be an argument that the courts will add a *mens rea* when the issue is raised. The Committee did not feel comfortable making that legal decision but did think it appropriate to highlight the issue in the Comment section.

The vote was unanimous to publish the proposal in the Bar *News*. The proposal was published on October 15, 2015. Two comments were received, one from the FPDA and one from FACDL. FACDL stated that an element should be added that would require the state to prove the defendant knew of the crash or of the property damage. FACDL bases its argument on one of the rationales used to decide *State v. Dorsett*, 158 So. 3d 557 (Fla. 2015). According to FACDL, when a statute requires an affirmative duty on a driver to act, it necessarily follows that the driver must be aware of the facts giving rise to the duty. As mentioned above, the Committee was unwilling to assume the courts would use the same rationale when interpreting § 316.061, Fla. Stat. Additionally, the Committee thought if the courts were to add a *mens rea*, the courts might use "knew or should have known" instead of just "knew." Therefore, the Committee maintained its original proposal, which mentions FACDL's issue in the Comment section.

Separately, the FPDA commented the word "accident" should not be used in this instruction because the statute uses the word "crash." The Committee disagreed because all three "Leaving the Scene" statutes (§316.027, Fla. Stat.; §316.061, Fla. Stat.; and § 316.063, Fla. Stat.) have contained only the word "crash" for a long time, but the case law is replete with the word "accident" substituted for the word "crash" for all three statutes. See, for example, *State v. Dorsett*, 158 So. 3d 557 (Fla. 2015); *Yeye v. State*, 37 So. 3d 324 (Fla. 4th DCA 2010); and *Powell v. State*, 28 So. 3d 958 (Fla. 1st DCA Fla. 2010). Additionally, as mentioned above, "accident" was preferred by the Committee so that there would be no confusion the collision could have been unintentional. Finally, the existing instruction for Leaving the Scene of a Crash with Death or Injury (#28.4) has the phrase "crash or accident" in the elements section and thus this Leaving the Scene proposal is consistent with that Leaving the Scene instruction.

Accordingly, upon post-publication review, the Committee made no changes the published proposal. The vote was unanimous to approve this proposal.

CONCLUSION

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

Respectfully submitted this 28th day of April, 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 Appeals
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 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 three appendices were emailed through the portal to Ms. Julianne Holt at jholt@pd13.state.fl.us; Mr. Luke Newman at luke@lukenewmanlaw.com; Mr. William Ponall at ponallb@criminaldefenselaw.com, Mr. R. Blaise Trettis at btrettis@pd18.net; Mr. Glen Gifford at glen.gifford@flpd2.com; Ms. Kathryn Strobach at KStrobach@duttonlawgroup.com; Mr. Scott Richardson at snr@scottnrichardsonlaw.com; and Ms. Ashley Greene at AWG@bedellfirm.com; this 28th day of April, 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 Appeals
300 South Beach Street
Daytona Beach, Florida 32114
Florida Bar Number: 980821
WallisR@flcourts.org