IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES REPORT 2017-09

CASE NO.: SC17-

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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 #	**Topic**
Proposal 1	**2.13**	**Prior Inconsistent Statement as Impeachment**
Proposal 2	**3.9(c)**	**Eyewitness Identification**
Proposal 3	**5.1**	**Attempt**
Proposal 4	**8.26**	**Sexual Cyberharassment**
Proposal 5	**21.10**	**Tampering with a [Witness] [Victim] [Informant]**
Proposal 6	**21.12**	**Corruption by [Harm] [Threat of Harm] Against a Public Servant**
Proposal 7	**25.13(f)**	**[Ownership] [Lease] [Rental] of a Place for [[Trafficking in] [Sale of] a Controlled Substance] [Manufacturing a Controlled Substance Intended for Sale or Distribution]**
Proposal 8	**28.13**	**Reckless [Operation of a Vessel] [Manipulation]**

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.

Proposals 1–4 were published in the *Bar News* on September 15, 2017. Proposals 5, 6, and 8 were published in the *Bar News* on October 1, 2017. Proposal 7 was published in the *Bar News* on January 15, 2017.

Comments on proposals 1, 4, and 7 were received from the Florida Public Defender's Association ("FPDA"). A comment for Proposal 7 was received from the Florida Association of Criminal Defense Attorneys ("FACDL"). The FPDA's submission dated February 8, 2017, and FACDL's submission contain some comments that are not relevant to the proposals in this report. All comments are in Appendix B.

Proposal 1 – 2.13

A former Committee member (Jim Altman) suggested a standard instruction that informs jurors about how they are allowed to consider prior inconsistent statements that were introduced for impeachment purposes only. The Committee numbered the new instruction as 2.13 because it is designed to be given during the trial. The published instruction read as follows:

To be given if requested.

The evidence that a witness may have made a prior statement that is inconsistent with [his] [her] testimony in court should be considered only for the purpose of weighing the credibility of the witness's testimony and should not be considered as evidence or proof of the truth of the prior statement or for any other purpose.

One comment from the FPDA was received. But before the comment was received, Mr. Altman realized it might be beneficial for the Comment section to include a statement highlighting that this instruction is to be used only when the prior inconsistent statement was introduced for impeachment purposes. The body of the instruction did not change, but Mr. Altman suggested adding the underlined parts below:

To be given <u>if applicable and</u> if requested.

The evidence that a witness may have made a prior statement that is inconsistent with [his] [her] testimony in court should be considered only for the purpose of weighing the credibility of the witness's testimony and should not be considered as evidence or proof of the truth of the prior statement or for any other purpose.

Comments

<u>This instruction should not be used for prior inconsistent statements that are admissible as substantive evidence and not merely as impeachment, e.g., prior testimony at a trial, hearing or other proceeding (§ 90.801(2)(a), Fla. Stat.) or statements by a defendant (§ 90.803(18), Fla. Stat.).</u>

In the meantime, a FPDA representative (Mr. Glen Gifford) contacted Committee staff and coincidentally inquired about prior inconsistent statements introduced as substantive evidence. Mr. Altman's proposal was sent to Mr. Gifford. As the Court can see from the comment in Appendix B, the FPDA does not oppose the newer proposal. No other comments were received.

The Committee voted unanimously to file the later version of the proposal with the Court. No one thought re-publication was necessary because the only post-publication changes were to add "*if applicable*" to the italicized heading and to add Mr. Altman's one clarifying sentence in the Comment section.

Proposal 2 – 3.9(c)

In Chapter 2017-91, Laws of Florida, the Legislature created § 92.70, Fla. Stat., which pertains to lineups. The law, which went into effect on October 1, 2017, requires judges to instruct jurors that they may consider evidence of compliance or noncompliance with the new lineup law in order to determine the reliability of eyewitness identifications.

Essentially the new law requires lineups to be conducted by an independent administrator, which is defined as a person who is not participating in the investigation and who does not know which person in the lineup is the suspect. There are some specified procedures that may be employed in lieu of an independent administrator. Also, the new law requires that the eyewitness receive specific instructions and sign an acknowledgment that he or she received a copy of the lineup instructions. These statutory requirements were simply copied into the proposed jury instruction in a new section that has an italicized heading that refers to § 92.70, Fla. Stat.

The proposal was published and no comments were received. Upon final review, the vote was unanimous to file the proposal with the Court.

Proposal 3 – 5.1

There are only two changes proposed for the standard Attempt instruction.

First, the existing instruction uses "**attempt to commit** (crime charged)." That language led to reversible error in a recent case because the defendant was charged with Attempted Sexual Battery and the judge instructed the jury about an "attempt to commit Attempted Sexual Battery." *Heathcock v. State*, 225 So. 3d 362

(Fla. 5th DCA 2017). To prevent that problem from recurring; the Committee changed all the instances of "(crime charged)" to "(crime attempted)."

The second change was to add a sentence that states:

The crime of (crime attempted) **is defined as** (insert elements of crime attempted)**:**

By doing so, the jury will be able to determine whether the defendant attempted to commit a certain crime.

The proposal was published, and no comments were received. Upon final review, the vote was unanimous to file the proposal with the Court.

Proposal 4 – 8.26

The crime of Sexual Cyberharassment is defined as willfully and maliciously sexually cyberharassing another person.

Because the Legislature did not define "maliciously," the Committee added the "actual malice" and the "legal malice" definitions of "maliciously" along with an italicized note regarding the issue. The Committee also inserted its standard explanation of "willfully" as "knowingly, intentionally, and purposefully."

Instead of creating only one element and then later defining "sexually cyberharasses," the Committee decided it would be easier for jurors if the instruction separates the definition of "sexually cyberharass" into four elements.

According to § 784.049(2)(c), Fla. Stat.: "'sexually cyberharass' means to publish a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an Internet website without the depicted person's consent, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person."

To capture this definition, the Committee's elements are:

1. D published a sexually explicit image of V on an internet website.

2. The image contained or conveyed V's personal identification information.

3. D did so willfully and maliciously, for no legitimate

purpose, and with the intent of causing substantial emotional distress to V.

4. V did not consent to the publication.

The Committee then provided statutory-based definitions for "sexually explicit image," "image," "nudity, "sexual conduct," and "personal identification information."

The Committee identified no Category 1 lesser-included offenses but did put Attempt in the Category 2 box.

According to § 784.049(3)(b), Fla. Stat., the crime is reclassified from a first-degree misdemeanor to a third-degree felony for a person who has a prior conviction for Sexual Cyberharassment. The Legislature and the courts have not decided whether the existence of a prior conviction is a recidivist factor that can be found by the judge at sentencing or whether it is an element that must be found by the jury. Similarly, it is unclear whether a conviction includes a withhold of adjudication. Given these uncertainties, the Committee inserted its usual format for these issues into the Comment section.

The proposal was published, and a comment from the FPDA was received. The FPDA contends that the existence of a prior conviction is an element and notes that other instructions treat the existence of a prior conviction as an element. However, instructions such as the theft instruction are based on case law and there is no case law for Sexual Cyberharassment. No one on the Committee changed his or her mind as a result of the FPDA comment, particularly since the Committee's prostitution-related proposals were rejected by the Court when the Committee assumed the Court would treat a prior conviction as an element. The final vote was unanimous to file the published proposal with the Court.

Proposal 5– 21.10

The only proposed change is in element #3 where the phrase should read "involved the investigation or prosecution." In other words, "proceeding" should be replaced with "prosecution" to properly reflect the crime in § 914.22, Fla. Stat. The proposal was published. No comments were received. Upon final review, the vote was unanimous to file the proposal with the Court.

Proposal 7 – 21.12

The only substantive change to this instruction was to ensure the definition of "public servant" is consistent with the latest version in § 838.014(7), Fla. Stat.

The Committee added a more specific statutory cite to the definition of "harm" and also added a cite to *Pagano v. State*, 387 So. 2d 349 (Fla. 1980), as authority for the proposition that there is no crime of Attempt to Corrupt a Public Servant by Threat. The proposal passed unanimously. No comments were received. Upon final review, the Committee included the § 838.021(7)(b) and (7)(c), Fla. Stat. definitions of "public servant" in the supplemental paragraph that defines "public servant." The final vote was unanimous to file the proposal with the Court.

Proposal 8 – 25.13(f)

A Committee member thought there should be a standard instruction for the crime in § 893.1351(1), Fla. Stat., and therefore created Instruction 25.13(f). The Committee concluded the crime can be covered in two elements: 1) D owned, leased, or rented any place, structure (or part thereof), or conveyance; and 2) At that time, D knew the place, structure (or part thereof) or conveyance would be used for the purpose of Trafficking, Sale, or Manufacture of a Controlled Substance that was intended for sale or distribution to another.

The Committee treated the prima facie language in § 893.1351(4), Fla. Stat., as an inference and then provided statute-based definitions for cannabis, structure, conveyance, and manufacture. The definition of "sell" came from the existing standard drug instruction 25.2.

The lesser-included offenses are dependent on what is charged and what evidence is elicited, so the Committee thought it was better to explain that issue in a note rather than have a confusing set of lesser-included offense boxes. The Committee also added a series of comments that it thought would be helpful. The comments include a note that a special instruction will be required if the defense is that the defendant did not know of the illicit nature of the controlled substance.

The proposal was approved unanimously and published. A comment was received from both FPDA and FACDL.

When the Committee published its proposal, it had used the verbiage of "At the time" as the first three words in element #2. The FPDA (in the comment dated February 8, 2017) pointed out that the phrase "At the time" was vague because it did not refer to any specific time frame. Upon post-publication review, the Committee voted to change "At the time" to "At that time," which should help clear up the ambiguity.

FACDL commented on the Committee's lesser-included offense section wherein the Committee proposes the following:

If a person owns, leases, or rents a place knowing that the place will be used for trafficking, sale or manufacture of drugs, then the person is guilty of Trafficking, Sale, or Manufacture of drugs as an aider or abettor. Therefore, Trafficking or Sale or Manufacture are Category One lesser-included offenses depending on what is charged. Moreover, Trafficking can be committed by sale, purchase, manufacture, delivery, bringing into this state, or actual or constructive possession of various amounts of drugs. Trial judges must review not only the evidence but also the charging document to determine all of the appropriate lesser-included offenses.

FACDL states that it is incorrect to state that a person who owns, leases, or rents a place knowing the place will be used for trafficking, sale, or manufacture of drugs is guilty of Trafficking, Sale, or Manufacture as an aider or abettor because the owning, leasing, or renting does not establish that the person intended to participate in the crime. No one on the Committee agreed with the FACDL comment; everyone thought that owning, leasing, or renting a place knowing it would be used to commit crime x, establishes that the person intended to participate in crime x.

Upon final review, the Committee made two minor changes that it did not think warranted republication. First, the Committee added an italicized cite to *Dubose v. State*, 210 So. 3d 641 (Fla. 2017), in the heading above the definition of "structure" and also added: **[The enclosure need not be continuous as it may have an ungated opening for entering and exiting.].** The second change was to add an italicized note for the judge to insert the elements of the Trafficking alleged, if applicable. This new italicized note was added above the definitions of "sell" and "manufacture." The final vote was unanimous to file the proposal with the Court.

Proposal 9 – 28.13

The idea for a new standard instruction that covers Reckless [Operation of a Vessel] [Manipulation] came from a Committee member. The first-degree misdemeanor crime can be found in § 327.33(1), Fla. Stat. The Committee thought three elements would cover the crime. Although the second and third elements are somewhat duplicative, the Committee thought it best to track the statute with: 1) D [operated a vessel] [manipulated any water skis, aquaplane or similar device]; 2) D did so with a willful or wanton disregard for the safety of persons or property; and

3) D [operated the vessel] [manipulated the water skis, aquaplane, or similar device] at a speed or in a manner as to [endanger or that was likely to endanger life or limb] [or] [injure a person] [or] [damage the property of a person].

A Chapter 327-based statutory definition of "operate" and "person" are provided. The Committee relied on case law, which are cited in italicized headings, in order to define "vessel," "willful," and "wanton." Because the statute states that the crime includes a violation of § 327.331(6), Fla. Stat., the Committee added a paragraph that covers that statute (which prohibits being within certain distances of divers-down warning devices depending on the type of body of water). Finally, the Committee did not think there were any Category 1 lesser-included offenses, but because culpable negligence is closely related to recklessness, the Committee added Culpable Negligence in the Category 2 box.

The proposal passed unanimously and generated no comments upon publication. After final review, the Committee again voted unanimously to file the proposal with the Court.

In conclusion, the Committee requests the Court authorize for use the proposals as outlined in Appendix A.

Respectfully submitted this 16th day of November, 2017.

s/ Judge F. Rand Wallis_____
The Honorable F. Rand Wallis
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 a copy of the report and the appendices have been emailed to the Honorable Robert Dillinger, President of the FPDA, at pd6@wearethehope.org; to Attorney Glen Gifford of the FPDA at

glen.gifford@flpd2.com; to Attorney Luke Newman of FACDL, at lukenewmanlaw.com, and to Attorney William Ponall at bponall@ponalllaw.com; this 16th day of November, 2017.

s/ Judge F. Rand Wallis
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