

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY
INSTRUCTIONS IN CRIMINAL
CASES – REPORT NO. 2016-06

CASE NUMBER: SC16-1185

MOTION FOR REHEARING AND NOTICE OF SCRIVENER’S ERROR

The Standard Jury Instruction Committee in Criminal Cases (“Committee”), by and through its Chair, respectfully requests the Court reconsider one issue pertaining to standard jury instructions 10.9 and 10.10. Additionally, there is a scrivener’s error in instruction 13.1.

In the recently-issued opinion, the Court changed the “inference provision” portions of the Committee’s proposals that cover § 790.163(3), Florida Statutes (which is in Instruction 10.9) and § 790.164(3), Florida Statutes (which is in Instruction 10.10.) Both statutes say the same thing: Proof that a person accused of violating this section knowingly made a false report is prima facie evidence of the accused person’s intent to deceive, mislead, or otherwise misinform any person.

The Committee had recommended the Court to treat those two “prima facie” statutes as creating inferences. The Committee’s proposal for both Instruction 10.9 and 10.10 was: **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's proposals were based on the historical practice of treating statutes using “prima facie” language as creating inferences. For example, § 810.07(1), Florida Statutes, reads: "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."

The corresponding section of the standard burglary instruction (13.1) reads: "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."

Similarly, § 414.39(8)(a), Florida Statutes, states: "The introduction into evidence of a paid state warrant made to the order of the defendant is prima facie evidence that the defendant did receive public assistance from the state."

The corresponding section of the standard welfare fraud instruction (20.6) reads: "You may conclude that (defendant) did receive public assistance from the state if you find that there was a paid state warrant made to the order of the defendant."

Even when the Legislature promulgates a statute that includes the phrase "that evidence is sufficient by itself to establish," the Committee and the Court have treated such language as an inference for purposes of the jury. For example, § 316.193(12), Florida Statutes, reads:

If the records of the Department of Highway Safety and Motor Vehicles show that the defendant has been previously convicted of the offense of driving under the influence, that evidence is sufficient by itself to establish that prior conviction for driving under the influence. However, such evidence may be contradicted or rebutted by other evidence. This presumption may be considered along with any other evidence presented in deciding whether the defendant has been previously convicted of the offense of driving under the influence.

The corresponding section of the standard DUI instructions states:

If the records of the Department of Highway Safety and Motor Vehicles show that the defendant has been previously convicted of Driving under the Influence, you may conclude that the State has established that prior Driving under the Influence conviction. However, such evidence may be contradicted or rebutted by other evidence. Accordingly, this inference may be considered along with any other evidence in deciding whether the defendant has a prior Driving under the Influence conviction.

Despite the historical practice, the Court used the following language for both instruction 10.9 and 10.10:

Proof that a person knowingly made a false report is prima facie evidence of that person's intent to deceive, mislead, or otherwise misinform any person.

The Committee asks the Court to reconsider its “prima facie” language for two reasons. First, “prima facie” is a technical legal term, and an average juror will have no idea what “prima facie” means. But more importantly, the Committee believes this Court will ultimately conclude that “prima facie” language in a standard jury instruction creates an unconstitutional presumption for jurors.

The Committee relies on *Wilhelm v. State*, 568 So. 2d 1 (Fla. 1990). In that case, the underlying statute was § 316.1934(2)(c), Florida Statutes, which states: "If there was at that time a blood-alcohol level or breath-alcohol level of 0.08 or higher, that fact is prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired...."

The *Wilhelm* jury was instructed: "[I]f you find from the evidence ... that the defendant had point one zero percent or more by weight of alcohol in his blood, *it is [a] prima facie case* that the defendant was under the influence of alcoholic beverages to the extent his normal faculties were impaired." *Id.* (emphasis added.)

The *Wilhelm* court reversed the defendant’s conviction writing:

"Prima facie" is a technical legal term without a common meaning for the lay person. Confronted with such a term in the jury instructions, and provided with no definition, a reasonable juror would be forced to guess at its meaning from the context in which it is used. In this case, that context is an explanation in the jury instructions of what the jury can and cannot “presume.” Further, there was no language in the instruction immediately following that challenged which instructed the jury that evidence of blood-alcohol content as it related to intoxication could be rebutted by the defendant. Although such language would not have cured the instruction, *Francis v. Franklin*, 471 U.S. 307, 318, 105 S. Ct. 1965, 1973, 85 L. Ed. 2d 344 (1985), its absence makes it possible that the jury understood the instruction not only as a mandatory presumption, but one which is irrebuttable. *Id.* at 3.

If the “prima facie” language in *Wilhelm* created reversible error, then the “prima facie” language in the Court’s recent Instructions 10.9 and 10.10 are likely to lead to the same result.

Therefore, the Committee (by unanimous vote) continues to recommend its original proposal for the “inference provision” in instruction 10.9, which was:

§ 790.163(3), Fla. Stat.

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 (by unanimous vote) also continues to recommend its original proposal for the “inference provision” in instruction 10.10, which was:

§ 790.164(3), Fla. Stat.

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 notes that if the Court does not like the Committee’s proposed language, then *State v. Rolle*, 560 So. 2d 1154 (Fla. 1990), suggests that it would be constitutional to instruct jurors as follows:

If you find that (defendant) knowingly made a false report, that evidence would be sufficient by itself to establish that [he] [she] had the intent to deceive, mislead, or otherwise misinform any person.

The Committee does not recommend such language. The Committee notes that two justices in *Rolle* thought the verbiage of “would be sufficient by itself to establish” created an unconstitutional presumption. Additionally, a federal court thought such language created an unconstitutional presumption. *See Miller v. Norvell*, 775 F. 2d 1572 (11th Cir. 1985). Finally, the Committee believes the “would be sufficient by itself to establish” language will not only lead to unnecessary litigation but may very well lead this Court – or a federal Court in a habeas petition - to disagree with the *Rolle* court. No matter what, the Committee urges the Court to abandon its use of “prima facie” in the standard jury instructions numbered 10.9 and 10.10.

Separately, there is a scrivener’s error in the Burglary instruction. Specifically, in the “§ 843.22, Fla. Stat.,” the standard instruction was issued as follows:

Traveling from county of residence into another county with intent to commit a burglary and with purpose to thwart law enforcement efforts to track stolen property. § 843.22, Fla. Stat.

If you find (defendant) guilty of [Burglary] [Attempted Burglary] [Solicitation to Commit Burglary] [Conspiracy to Commit Burglary], you

must also determine whether the State proved beyond a reasonable doubt that:

- 1. (Defendant) had a county of residence within Florida; and**
- 2. (Defendant) travelled any distance with the intent to commit a burglary in a county in Florida other than [his] [her] county of residence; and**
- 3. The purpose of (defendant's) travel was to thwart law enforcement attempts to track items stolen in the burglary.**

“County of residence” means the county within this state in which a person resides.

Evidence of a person's county of residence includes, but is not limited to:

- 1. The address on a person's driver license or state identification card;**
- 2. Records of real property or mobile home ownership;**
- 3. Records of a lease agreement for residential property;**
- 4. The county in which a person's motor vehicle is registered;**

The county in which a person is enrolled in an educational institution;

- 6. The county in which a person is employed.**

Obviously, there should be a number #5 before "**The county in which a person is enrolled in an educational institution.**" The corrected section should read as follows:

Traveling from county of residence into another county with intent to commit a burglary and with purpose to thwart law enforcement efforts to track stolen property. § 843.22, Fla. Stat.

If you find (defendant) guilty of [Burglary] [Attempted Burglary] [Solicitation to Commit Burglary] [Conspiracy to Commit Burglary], you must also determine whether the State proved beyond a reasonable doubt that:

1. (Defendant) **had a county of residence within Florida; and**
2. (Defendant) **travelled any distance with the intent to commit a burglary in a county in Florida other than [his] [her] county of residence; and**
3. **The purpose of (defendant's) travel was to thwart law enforcement attempts to track items stolen in the burglary.**

“County of residence” means the county within this state in which a person resides.

Evidence of a person's county of residence includes, but is not limited to:

1. **The address on a person's driver's license or state identification card;**
2. **Records of real property or mobile home ownership;**
3. **Records of a lease agreement for residential property;**
4. **The county in which a person's motor vehicle is registered;**
5. **The county in which a person is enrolled in an educational institution;**
6. **The county in which a person is employed.**

Respectfully submitted this 17th day of
February, 2017.

s/ Judge F. Rand Wallis
The Honorable F. Rand Wallis
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CERTIFICATE OF SERVICE AND FONT SIZE

I hereby certify that this Motion for Rehearing and Notice of Scrivener's Error 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 was emailed to Julianne Holt, Ex-President of the Florida Public Defenders Association, at holtj@pd13.state.fl.us; and to Mr. Luke Newman at lukenewmanlaw.com; this 17th day of February, 2017.

s/ Judge F. Rand Wallis
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