

APPENDIX B

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**Committee on Standard Jury Instructions in Criminal Cases
Honorable F. Rand Wallis, Chair
Report 2016-06**

LUKE NEWMAN

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June 21, 2016

Mr. Bart Schneider
Senior Attorney II - General Counsel's Office
Office of the State Courts Administrator - Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399

Re: *Amendments to Jury Instructions in Criminal Cases – Pub. May 15, 2016*
Via US Mail and Email: schneidb@flcourts.org and CrimJuryInst@flcourts.org

Dear Mr. Schneider:

The Florida Association of Criminal Defense Lawyers submits this letter as a comment on the proposed criminal jury instructions published in the May 15, 2016 edition of The Florida Bar News.

Amendment to Instructions 3.3(a) and (b).

FACDL objects to the proposed amendments to Instructions 3.3(a) and (b) which define the term “carry” as it relates to the aggravation of a felony by carrying a firearm. The proposed amendment would define the term “carry” as “...having the firearm on one’s person or having it readily available”.

FACDL’s position is that this proposed definition is overly broad and would allow the aggravation of felony offenses where the evidence establishes that a firearm is relatively remote from a defendant’s person (ie: located in a different room). FACDL suggests that the term “carry” should be defined, most broadly, as meaning “within immediate grasp” as explained in *Smith v. State*, 438 So. 2d 10, 14 (Fla. 2d DCA 1983). Additionally, the actual possession language in instruction 3.3(d) provides guidance in defining actual possession as “within immediate physical reach with ready access.”

Webster’s New World College Dictionary defines “carry”¹ as “to hold or support while moving” indicating that personal possession is a necessary element to properly understand an item as being “carried”. Webster’s New World College Dictionary 229 (5th ed. 2014).

The committee’s proposed definition of “carry” relies on *Menendez v. State*, 521 So. 2d 210 (Fla. 1st DCA 1988). Three years after *Menendez* was published, the First District issued the opinion in *Robins v. State*, 587 So. 2d 581 (Fla. 1st DCA 1991)(quashed on other grounds 602 So. 2d 1272 (Fla. 1992)). In the *Robbins* opinion, the First District clarified the definition of “carry” published earlier in *Menendez*:

¹ *Inter alia*, “carry” has over 20 dictionary definitions.

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In our view, the key factor to be considered for application of section 775.087(1) is whether the defendant had the advantage of the presence of a weapon during the commission of an offense in which he took an active part and relied upon the weapon at least in part in the furtherance of the offense.

Robins, 587 So. 2d at 583.

Section 775.081(1), Florida Statutes applies to all felonies. If the Florida Legislature intended to aggravate all felonies to the next higher degree where a defendant merely had readily available firearms - it's hard to believe that the legislature would have used the term "carries" in body of the statute.

For the reasons stated above, FACDL objects to the proposed definition of "carry" in Instructions 3.3(a) and (b).

Amendment to Instructions 10.9 and 10.10.

FACDL objects to the proposed amendments to Instructions 10.9 and 10.10 which add an inference of criminal intent to the respective offenses.

The underlying statute, Section 790.163, Florida Statutes, does not allow the jury to make any inferences. The language of the statute simply allows that proof of a knowingly false report is prima facie evidence of an intent to deceive, mislead, or misinform. The language allows for the State to get its case to the jury on the final element (intent to deceive) when it presents sufficient evidence to withstand a judgment of acquittal on the second-to-final element (knowingly false report). FACDL's position is that this language in the statute is a codification of case law which holds intent is almost always an issue for the jury. The statute never mentions any inference or presumption.

The proposed amendment is an improper comment on the evidence by the trial judge in violation of Section 90.106, Florida Statutes.

The proposed inference is inappropriate when compared to the inference present in the theft instruction. A theft statute, Section 812.022, Florida Statutes, actually sets forth inference language. This language therefore supports the inferences included in Instruction 14.1. Even in the case of theft, the instruction allows for specific evidence to give rise to an inference unless the circumstance is "adequately explained." FACDL objects to the inclusion of any inference of criminal intent. If an inference is placed in the jury instruction, FACDL asks that, at minimum, an opportunity for an adequate explanation be included.

For the reasons stated above, FACDL objects to the proposed addition of an inference of criminal intent in Instructions 10.9 and 10.10.

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Amendment to Instruction 16.10.

FACDL objects to the definition of "possess" proposed as to Instruction 16.10. The proposed amendment would change the definition of "possess" to: "...to be aware of the material and to exercise control or ownership over it."

A definition of "possess" is already found in the standard jury instructions, at Instruction 10.15 which defines "possess" as: "...to have personal charge of or exercise the right of ownership, management, or control over an object."

The traditional concepts related to possession relate to child pornography cases. *Jenrette-Smith v. State*, 114 So. 3d 427, 431 (Fla. 2d DCA 2013). There does not appear to be any statutory or case law-based definition which would justify a difference in the concept of possession.

For the reasons stated above, FACDL objects to the proposed addition of possess in Instruction 16.10.

Thank you for your time and attention in this matter. Please do not hesitate to contact me with any questions or concerns.

Sincerely,



Luke Newman,
Luke Newman, P.A.

ENCLOSURES:

None



Florida Public Defender Association, Inc.

June 14, 2016

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Dear Committee Members:

The Florida Public Defender Association (FPDA) offers the following comments on the proposed amendments published in the May 15, 2016, edition of The Florida Bar News. The FPDA represents 19 of Florida's 20 elected Public Defenders and almost 1,000 attorney assistants. These attorneys work with jury instructions daily in Florida's trial and appellate courts. Our experience advocating on behalf of criminal defendants gives us particular insight into the standard instructions.

As a preliminary observation, the instructions frequently use the words "defendant" and "victim" within brackets. The brackets signify an optional term. The committee intends trial courts to substitute the names of the defendant and victim for the bracketed words. However, too often, trial courts simply use the word "victim" rather than identify the alleged victim's name. Unfair prejudice often results, especially in trials in which it is unclear whether anyone was a "victim." A sexual battery case with a defense of consent is a classic example.

The problem could be ameliorated by creating a user's guide at the beginning of the standard instructions. The guide would instruct courts on the use of brackets and parentheses, caution against using the words "defendant" and "victim," and explain the distinction between Category One and Category Two lesser included offenses. (Chapter 33 of the Standard Instructions appearing on the Court's website contains a discussion of the difference between the two categories of lesser included offenses. The same information appears after the last of the substantive instructions, 29.25, in West's Florida Criminal Laws and Rules 2016. However, because each instruction also includes the schedule of lessers for that offense, the separate schedule has become largely obsolete and is rarely consulted.)

Comments on specific proposals follow.

3.3(a) AGGRAVATION OF A FELONY BY CARRYING A FIREARM and 3.3(a) AGGRAVATION OF A FELONY BY CARRYING A WEAPON OTHER THAN A FIREARM:

The FPDA opposes the proposed instruction, based on Menendez v. State, 521 So. 2d 210 (Fla. 1st DCA 1988), stating that “[t]o ‘carry’ a firearm during the commission of a crime means either having the firearm in one’s possession or having it immediately available.” First, State v. Rodriguez, 602 So. 2d 1270 (Fla. 1992), arguably overruled Menendez. The supreme court held in Rodriguez that “when a defendant is charged with a felony involving the ‘use’ of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony.” Id. at 1272.

Second, Menendez is weak authority for this instruction. There police found a firearm bearing the defendant’s fingerprint between the mattress and box spring of the room occupied by the defendant. Addressing Menendez’ argument that the evidence was sufficient to prove he trafficked in drugs while in possession of a firearm, the appellate court stated that “if the firearm is readily available to [the offender], that is sufficient.” Id. at 212. This observation on whether evidence is competent, substantial evidence to reach the jury should not be parlayed into an instruction to a jury determining whether the defendant is guilty beyond a reasonable doubt that having a firearm readily available is the same as carrying the firearm.

Finally, the “readily available” language from Menendez is merely one of several terms used by appellate courts in deciding whether a scenario fits section 775.087(1). In Smith v. State, 438 So. 2d 10 (Fla. 2d DCA 1983), the Second DCA concluded that discovery of a firearm “within the immediate area” of the defendant and “within his immediate grasp” constituted legally sufficient evidence under section 775.087(1). The Committee’s proposal favors the state while disregarding the language from Smith favorable to the defendant. By analogy to the rule of lenity in section 775.012(1), Florida Statutes, any ambiguity in section 775.087(1) as reflected in Menendez and Smith should be resolved in favor of an instruction more favorable to the accused.

For these reasons, the FPDA opposes the “Menendez” instruction on grounds that it invades the province of the jury in a manner favoring the prosecution and without clear supporting precedent. Should the committee and Court deem an instruction appropriate, the FPDA favors the following: “To ‘carry’ a firearm during the commission of a crime means either having the firearm in one’s possession or within one’s immediate grasp.”

3.6(c) PSYCHOTROPIC MEDICATION: The FPDA welcomes the availability of this instruction upon defense request, and suggests adding the following sentence: “You shall not allow the defendant’s condition or any apparent side effect from the medication to affect your verdict.” In addition, the Committee may wish to consider a comment allowing the judge, at defense request, to identify the possible side effects.

8.18 VIOLATION OF INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE and 8.19 VIOLATION OF INJUNCTION FOR PROTECTION AGAINST

[REPEAT] [SEXUAL] [DATING] VIOLENCE: These proposed instructions specify that the injunction must have been “for the benefit of (victim).” The underlying statutes, sections 741.31(4)(a) and 784.047, Florida Statutes, require that the person who files the petition for protection must be the person who benefits from the injunction. For this reason, as well as the concern that some courts will use the word “victim” rather than the petitioner’s name, the FPDA

suggests instructing juries that the injunction must have been “for the benefit of (petitioner).” Also, the word “person” rather than “victim” should be used in both instructions on the third-degree felony of violation of these provisions by persons with prior convictions enacted in Chapter 2016-187, Laws of Florida.

8.22(a) THREAT TO [KILL] [DO SERIOUS BODILY HARM TO] A [PUBLIC OFFICIAL][FAMILY MEMBER OF A PUBLIC OFFICIAL]: The FPDA advocates instructing jurors that the state must prove that the defendant knew that the person threatened was within the class of protected persons identified in the statute. As noted in the Committee’s proposed comment, the Fifth DCA held in Ramroop v. State, 174 So. 3d 584 (Fla. 5th DCA 2015), that in a prosecution for threatening a law enforcement officer under section 784.07, Florida Statutes, the state must prove that the defendant knew that the person threatened was an officer. The court in Ramroop based on its decision on five considerations: (1) the Florida Supreme Court’s decision in Thompson v. State, 695 So. 2d 691 (Fla. 1993), requiring a “knowledge” instruction on the crime of attempted murder of a law enforcement officer; (2) the “substantial enhancement in penalty” in the statute; (3) a comparison with similar statutes; (4) the Legislature’s omission of a provision making knowledge not required; and (5) the rule of lenity. These considerations also weigh in favor of including a knowledge element in this standard instruction on the new first-degree misdemeanor for a first offense, and third-degree felony for a second offense, created by Chapter 2016-156, Laws of Florida.

8.24 VIOLATION OF INJUNCTION FOR PROTECTION AGAINST [STALKING][CYRBERSTALKING]

This instruction implements the portion of section 784.087(4), Florida Statutes, that creates the crime of violating an injunction issued under section 784.0485. Section 784.0485(1) allows a person to obtain an injunction on behalf of herself or on behalf of a minor child. This proposed instruction consistently uses the term “(victim),” meaning, presumably, the person on whose behalf the injunction was obtained. However, the acts constituting the crime defined by section 784.0487(4) all concern actions taken against “the petitioner.” Until the Legislature uses broader language, either the term “petitioner” or the name of the petitioner should be used instead of “victim” in the instruction. This would preclude a conviction of this offense for violation of an injunction obtained by a petitioner on behalf of a minor child. However, the fix must come from the Legislature, not from an instruction contrary to the statutory language.

Separately, in the paragraph concerning previous convictions, the instruction should specify “same person” rather than “same victim.”

10.9 FALSE REPORTS 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 PERSONS] and **10.10 FALSE REPORTS 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].**

First, although both the titles and bodies of these instructions are already amply bracketed, the FPDA suggests also bracketing “Weapon of Mass Destruction” so that a jury considering evidence of a milder explosive is not automatically put in mind of WMDs.

Second, the language of the inference should be omitted, or at least modified as follows: “You may infer that a person who knowingly made a false report had the intent to deceive, or otherwise misinform any person, if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent existed.” The source of the committee’s proposed instruction, section 790.163(3), Florida Statutes, specifies: “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 term “prima facie evidence” suggests that the Legislature sought to convey to courts that making a false report is legally sufficient evidence of intent to reach a jury. See Jenkins v. State, 1 So. 3d 317, 320 (Fla. 3d DCA 2009) (noting that state is “required during its case in chief to present a prima facie case of guilt through the offer of competent substantial evidence on each element of the crime sought to be proven”). The proposed instruction transforms an expression of legislative intent on what constitutes competent, substantial evidence into an instruction that invades the province of the jury in favor the prosecution.

If the instruction is retained, it should include the caveat on proof beyond a reasonable doubt, in accord with the proposed Instruction 16.10 on the inference of intent to promote a sexual performance by a child, also published in the May 15, 2016, Florida Bar News.

11.10(c)-(f) LEWD OR LASCIVIOUS MOLESTATION/CONDUCT/EXHIBITION

These offenses all have age thresholds of 18 or older for the defendant, 12 or younger for the alleged victim, or both. The Committee has proposed Category One lesser included offenses for offenses involving defendants less than 18, victims between 12 and 16, or both. This is an apparent response to White v. State, 183 So. 3d 1168 (Fla. 4th DCA 2016), in which the appellate court reduced a capital sexual battery conviction to misdemeanor battery because the state failed to prove that the defendant was 18 or older. The FPDA opposes these proposed Category One lesser included offenses. An allegation that a defendant is 18 or older does not subsume the lesser included offense involving a defendant under 18. The two are mutually exclusive, as are a charged offense of a victim younger than 12 and a lesser included offense of a victim between 12 and 16.

If the Legislature intended lesser included offenses in this scenario, it could have created baseline offenses involving defendants under 18 and alleged victims 12 or older, then provided for upward reclassification for older defendants and younger alleged victims.

The FPDA is grateful for the opportunity to provide these comments.

Respectfully submitted,

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