

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY

INSTRUCTIONS CRIMINAL CASES
REPORT 2019-03

CASE NO.: SC19-

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.

| | <u>Instruction #</u> | <u>Topic</u> |
|------------|----------------------|--|
| Proposal 1 | 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 2 | 25.13(g) | Possession of a Place for [[Trafficking in] [Sale of] a Controlled Substance] [Manufacturing a Controlled Substance Intended for Sale or Distribution] |
| Proposal 3 | 25.13(h) | Possession of a Place Used to Manufacture A Controlled Substance Intended for Sale or Distribution (Minor Present or in Residence) |

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. The proposals were published in the *Bar News* on December 15, 2018. No comments were received.

Proposal 1 – 25.13(f)

The Committee studied the issue of whether a lesser-included offense could carry a more severe maximum penalty than an offense one-step higher. The answer was not immediately clear because some case law states that lesser-included offenses are determined based on the elements of the offenses, not on the penalties attached. Nevertheless, the Committee concluded such language is overbroad. The Committee also decided that *Weatherspoon v. State*, 214 So. 3d 578, 587 (Fla.

RECEIVED, 03/26/2019 01:33:30 PM, Clerk, Supreme Court

2017) can be used to conclude that if a secondary offense exposes a defendant to a higher degree of crime, the secondary offense cannot be a lesser-included offense. Based on this understanding, the Committee decided to amend the lesser-included section in standard instruction 25.13(f).

The existing lesser-included section states that 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.

The problem with the existing instruction is that Drug Trafficking is a first-degree felony and Sale of a Controlled Substance is a second-degree felony. However, the crime covered by instruction 25.13(f) is a third-degree felony. As a result, the Committee proposes to delete the entire note in the existing lesser-included section and to explain that Attempted Drug Trafficking has a higher maximum penalty than the crime in § 893.1351(1), Fla. Stat., which is why it is not included as a lesser-included offense. The Committee also proposes to add a lesser-included box with no Category 1 offenses, but with Attempts in Category 2.

The vote for these changes was unanimous. The proposal was published and no comments were received.

Upon final review, the Committee made one additional change to the comment section. Specifically, the Committee thought it would be helpful to alert everyone to *Delgado-George v. State*, 125 So. 3d 1031 (Fla. 2d DCA 2013) and *Hunt v. State*, 256 So. 3d 243 (Fla. 2d DCA 2018). In those cases, the Second District held that there must be a sufficient nexus between the vehicle that the defendant was using and the defendant's intended drug activity. Because the Committee's proposed elements track the statute, the Committee thought the best way to handle those cases was to state that a special instruction may be needed in cases where the defense argues the nexus is insufficient. The vote to add this additional comment was unanimous and the Committee also voted unanimously to file the proposal with the Court.

Proposal 2 – 25.13(g)

Because a standard instruction for § 893.1351(1), Fla. Stat. exists, the Committee thought it should also create a standard instruction for § 893.1351(2), Fla. Stat. The relevant portion of the statute reads:

A person may not knowingly be in actual or constructive possession of any place, structure, or part thereof, trailer, or other conveyance with the knowledge that the place, structure, or part thereof, trailer, or conveyance will be used for the purpose of trafficking in a controlled substance, as provided in s. 893.135; for the sale of a controlled substance, as provided in s. 893.13; or for the manufacture of a controlled substance intended for sale or distribution to another.

The Committee concluded that the crime could be captured in two elements. The proposed first element is: **D was knowingly in possession of a [place] [structure [or part thereof]] [conveyance].¹**

The proposed second element is: **At the time, D knew the [place] [structure [or part thereof]] [conveyance] would be used for the purpose of [Trafficking in (insert name(s) of controlled substance)] [Sale of a Controlled Substance] [Manufacture of a Controlled Substance that was intended for sale or distribution to another].**

The Committee added the inference in § 893.1351(4), Fla. Stat.; the definition of “cannabis” from § 893.02(3), Fla. Stat.; and the definition of “structure” and “conveyance” from § 810.011, Fla. Stat. If the facts of the case involve trafficking in a controlled substance, then the crime of trafficking must be defined, which is why there is an italicized note to insert the elements of trafficking if applicable. An explanation of “sell” - which is based on the explanation of “sell” in other standard drug instructions – is added; the § 893.02, Fla. Stat. definition of “manufacture” is also added; and the most recent explanation of criminal possession is inserted.

The Committee published a lesser-included box (discussed below) and added comments that explained: 1) the exact nature of the substance must be proven if the State is prosecuting under the trafficking prong of § 893.1351(2), Fla. Stat.; 2) a special instruction will be required if the defense is that the defendant did not know of the illicit nature of the controlled substance; and 3) the statutory language regarding timing is different in § 893.1351(1) and (2), Fla. Stats., from § 893.1351(3), Fla. Stat.

¹“Trailer” did not need to be included in element #1 because the definition of a “conveyance” includes a trailer.

No comments were received upon publication. However, upon final review, the Committee made two additional changes. First, the Committee added a comment that a special instruction might be needed to address the *Delgado-George* and *Hunt* opinions (as was done in instruction 25.13(f)). Second, the Committee revised the lesser-included section. Specifically, the crime covered by this instruction is a second-degree felony. Therefore, if the State charged the defendant with § 893.1351(2), Fla. Stat. in a way that also charged Attempted Trafficking in a Controlled Substance, then Attempted Trafficking in a Controlled Substance would be a lesser-included offense (because Attempted Trafficking does not have a higher maximum penalty). The next possible lesser-included offenses would be Attempted Sale and Attempted Manufacture (both of which would be third-degree felonies). The next possible lesser-included offense would be the third-degree felony listed in § 893.1351(1), Fla. Stat. Finally, the Committee added a generalized Attempt to cover any possible attempt charge.

The vote was unanimous to propose the lesser-included section and the entire instruction as set forth in Appendix A.

Proposal 3 – 25.13(h)

Because a standard instruction for § 893.1351(1), Fla. Stat. exists, the Committee thought it wise to also create an instruction for the crime in § 893.1351(3), Fla. Stat. The relevant portion of the statute reads:

A person who is in actual or constructive possession of a place, structure, trailer, or conveyance with the knowledge that the place, structure, trailer, or conveyance is being used to manufacture a controlled substance intended for sale or distribution to another and who knew or should have known that a minor is present or resides in the place, structure, trailer, or conveyance commits a felony of the first-degree,...

The Committee thought the crime could be captured in three elements as follows:

1. (Defendant) **was knowingly in possession of a [place] [structure] [conveyance].**
2. **At the time, (defendant) knew the [place] [structure] [conveyance] was being used to manufacture a controlled substance that was intended for sale or distribution to another.**

3. At the time, (defendant) knew or should have known that a minor was present or resided in the [place] [structure] [conveyance].

The Committee added the inference listed in § 893.1351(4), Fla. Stat.; the definition of “cannabis” from § 893.02(3), Fla. Stat.; and the definition of “structure” and “conveyance” from § 810.011, Fla. Stat. An explanation of “sell” is provided which is based on the explanation of “sell” in other standard drug instructions. The § 893.02, Fla. Stat. definition of “manufacture” is added and the most recent explanation of criminal possession is inserted.

In the lesser-included section, the Committee thought Manufacture of a Controlled Substance was the only Category One offense. The Committee added a comment that explains why § 893.1351(1) and (2), Fla. Stats., are not necessary lesser-included offenses. The Committee thought Category 2-related crimes should include Contributing to Delinquency, Manufacture of Certain Drugs in Presence of Person Under 16, and Attempt. Finally, the Committee added a comment that explains 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 passed unanimously and generated no comments upon publication. After final review, the Committee again voted unanimously to file the proposal in Appendix A with the Court.

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

Respectfully submitted this 26th day of
March, 2019.

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 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).

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