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APPENDIX B

**The Committee on Standard Jury Instructions in Criminal Cases
The Honorable Joseph A. Bulone, Chair
June 25, 2013**

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April 8, 2013

OFFICE OF THE
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BREVARD & SEMINOLE COUNTIES

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Standard Jury Instructions Committee in Criminal Cases
c/o Bart Schneider, General Counsel's Office
Office of the State Courts Administrator
500 S. Duval Street
Tallahassee, Florida 32399-1900

COMMENT THAT "OCCURRING ON PUBLIC OR PRIVATE PROPERTY"
SHOULD BE ADDED TO ELEMENT 1 OF INSTRUCTION 28.4


Section 316.027 Fla. Stat. applies to a driver of a vehicle "involved in a crash occurring on public or private property." Instruction 28.4 does not include the statutory language that the crash occur on public or private property. The location of an occurrence can be determinative of whether or not a crime is committed. A review of the instructions published in the April 1, 2013 edition of *The Florida Bar News* highlights this fact. For example, instructions 28.7, 28.8, 28.9, require that the crime be committed while the defendant was operating a vehicle upon a street or highway. Instruction 29.3 requires that the crime be committed on the premises where alcoholic beverages are stored or sold by the licensee.

Instruction 28.4 ignores the legislature's decision that the crime is committed when the crash occurs on public or private property. The jury instruction should track the language of the statute, as jury instructions are supposed to and always do. The committee should track the language of section 316.027(1)(a) in element 1 to read:

1. (Defendant) was the driver of a vehicle involved in a crash or accident occurring on public or private property resulting in [injury to] [death of] any person.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was sent electronically in Word format to CrimJuryInst@flcourts.org and was sent by U.S. mail delivery to Standard Jury Instructions in Criminal Cases, c/o Bart Schneider, 500 S. Duval St., Tallahassee, FL 32399-1900 this 8th day of April 2013.


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June 19, 2013

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Dear Committee Members:

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to Standard Jury Instructions published in the April 1, 2013 edition of The Florida Bar News.

The FPDA consists of nineteen elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for thousands of indigent criminal defendants annually, FPDA members have tremendous practical experience with the standard jury instructions and are deeply interested that those instructions promote fairness, integrity, and accuracy in the criminal justice system.

The FDPA agrees with the vast majority of those amendments and is grateful for all of the hard work and effort that is manifest in the many proposed amendments. The FPDA, however, is concerned with three of the amendments and appreciates this opportunity to comment on them. These comments will address the proposed standard jury instruction in the order published.

12.1, 12.2—Arson

The committee has proposed adding an instruction to be read in every case that: "In order to convict the defendant of Arson, it is not necessary for the State to prove [he] [she] intended to damage the [dwelling] [structure]." Thus, this proposal is a negative jury instruction, telling the jury on what are not the elements of this crime.

The proposal cites two cases as supporting this instruction, but neither case addressed the issue of jury instructions. Instead, both *N.K.D. v. State*, 799 So. 2d 428 (Fla. 1st DCA 2001), and *Knoghten v. State*, 568 So. 2d 1001 (Fla. 2d DCA 1990), address sufficiency of the evidence and hold that arson is general intent crime, one in which the person need only intend the actions, not the consequences.

First, this negative jury instruction is unnecessary. The arson instructions already tell the jury that the elements are: (1) an intent to start a fire; and (2) that it caused damage. Those two elements adequately tell the jury that intent goes only to the action, not the consequence.

Case law also suggests that such negative instructions are unnecessary. See *Peters v. State*, 33 So. 3d 812, 814 (Fla. 4th DCA 2010) (if jury is properly instructed on the elements of a principal, jury should not be instructed that mere presence at the scene is not sufficient for conviction); *McGuire v. State*, 639 So. 2d 1043, 1046-47 (Fla. 5th DCA 1994) (same); *Alvarez v. State*, 890 So. 2d 389, 395-97 (Fla. 1st DCA 2004) (if jury is properly instructed on evaluating witnesses, the jury need not be given an instruction that jail-house snitches are particularly unreliable); *Thomas v. State*, 494 So. 2d 240, 246-47 (Fla. 4th DCA 1986) (if instructed on the state's burden to prove case beyond reasonable doubt, jury need not be negatively instructed that if the jurors were not convinced beyond a reasonable doubt, they must acquit).

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Second, this negative jury instruction is little more than a jury argument, and should be left to the prosecutor. If this negative jury instruction were given, defense counsel could then ask for its own negative instruction, equally supported by case law: “if the fire was not set intentionally but negligently, then the jury must acquit.” See *J.H. v. State*, 107 So. 3d 1249, 1249 (Fla. 1st DCA 2013); *T.E. v. State*, 701 So. 2d 1237, 1238 (Fla. 3d DCA 1997). The trial court should not breach its neutrality by giving either negative instruction.

28.4, 28.82, 28.84—Leaving the Scene of an Accident and Fleeing and Eluding

The committee proposes amending all of these instructions to require that the defendant “knew or should have known from the nature of the crash or accident of the injury or death of the person.”

The “should have known” language first appeared as dicta in *State v. Mancuso*, 652 So. 2d 370, 372 (Fla. 1995). The prior element requiring that the defendant knew or should have known of the crash (the committee proposes adding “or accident”) is very much in doubt. As of January 2013, the law in the State of Florida is that actual knowledge of the crash or accident is required making the “or should have known” language an incorrect statement of law. *Dorsett v. State*, 38 Fla. L. Weekly D233 (Fla. 4th DCA Jan. 30, 2013). The state has sought, but not yet been granted, review of *Dorsett* in the Supreme Court of Florida. The FPDA believes that the entire concept of imputed knowledge under this statute is questionable.

Even assuming that such imputed knowledge is proper, and the Supreme Court of Florida will probably have to decide the issue, the standard jury instructions should not tell the jury to impute that knowledge from only one fact: “the nature of the crash or accident.”

Once again, that instruction is really an argument of counsel. Typically, prosecutors argue that a defendant should have known that someone was hurt based on the facts or severity of the crash itself. But directing the jury to look at only the nature of the crash is suggesting that the jury not look at other facts that may suggest a different outcome—severe weather, distracting circumstances on the roadway, distractions in the car, etc.

The jury should be free to look at all facts when coming to this decision. The trial court should not breach its neutrality by suggesting that the jury look to only one factor, the nature of the crash, in making its determination that a driver should have known about the crash.

28.18—Failure to Obey

Broadly read, section 316.072(3), Florida Statutes, criminalizes disobeying any lawful order by a police officer, making it, as a practical matter, redundant with the resisting without violence charge in section 843.02, Florida Statutes. The key element under both statutes is that the police action or order must be “lawful.” The problem is that what is “lawful” depends on the specific situation and a wide body of law that governs in various of contexts.

The issue was recognized by the Supreme Court of Florida almost 20 years ago in *State v. Anderson*, 639 So. 2d 609 (Fla. 1994), which upheld the standard jury instruction (telling the jury only that conviction requires a “lawful execution of a legal duty”) but then held: “However, in those cases where the defendant maintains that the arrest was unlawful and requests that the jury be instructed on that defense, an instruction should be given to insure that the jury understands that it must decide the issue.” *Id.* at 610. Thus, the standard instruction is sufficient only in cases where no special instruction is requested. See *Thomas v. State*, 970 So. 2d 460, 462 (Fla. 1st DCA 2007). The standard instruction has never been amended because the instructions have to be tailored to the specific case. See *Brown v. State*, 36 So. 3d 826, (Fla. 5th DCA 2010) (“Unfortunately, there is no standard instruction appropriate to all circumstances so courts have struggled with these instructions.”). Similarly, there is no one-size-fits-all option that makes this statute subject to a standard jury instruction.

The standard jury instruction on resisting without violence has become a trap for the unwary. See, e.g., *Stevens v. State*, 982 So. 2d 1239 (Fla. 5th DCA 2008); *Albury v. State*, 910 So. 2d 930, 933-34 (Fla. 2d DCA 2005);



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Bratcher v. State, 727 So. 2d 1114, 1117 (Fla. 5th DCA 1999); *Elliot v. State*, 704 So. 2d 606 (Fla. 4th DCA 1997). Generally, the standard jury instructions are presumed to be correct. It does no service to the criminal justice system to have a standard jury instruction that is admittedly inadequate except in the rarest of cases when the legality of the police officer's order or action is not at issue.

To use an example that has often troubled the disorderly conduct/breach of the peace statute, many times the police officers' orders are for citizens to leave a public forum (streets or sidewalks) and/or cease protesting (often with much vulgarity) police actions or presence. Such protests, however distasteful, are constitutionally protected even if they are disobeying police orders. See *C.N. v. State*, 49 So. 3d 831, 832 (Fla. 2d DCA 2010) ("[T]he officer instructed the teens in the vicinity to move along, but C.N. failed to do so and rolled her eyes."); *Fields v. State*, 24 So. 3d 646, 647 ("Fields did not comply with the verbal command [to get down on the ground] and responded by stating, 'What the f--- you got that gun out for, you are going to go and shoot me?'"); *B.R. v. State*, 657 So. 2d 1184, 1185 (Fla. 1st DCA 1995) (when police officer demanded to know defendant's name, she replied "I don't have to tell you a fucking thing."). Nothing in the proposed jury instruction begins to address these constitutional issues.

Additionally, there may be a narrowing construction that avoids many (but not all) of these constitutional problems. There is only one case interpreting section 316.072(3), *Koch v. State*, 39 So. 3d 464 (Fla. 2d DCA 2010), and that case arose in an unusual procedural posture—a request by the defense for an instruction on this statute as a lesser-included crime. As a result, no party was before the court who could point out constitutional problems with this statute: the defendant was trying to get a charge under this statute, and the state certainly was not going to point out the statute's more problematic aspects.

The narrow holding of *Koch* is that this statute is not a lesser included offense of fleeing and eluding. The *Koch* court did not consider whether there must be a nexus between traffic control and the lawful order. The proposed jury instructions list those as two separate elements with no nexus. That interpretation is probably incorrect. This statutory section is entitled: "Obedience to and effect of traffic laws." The prior section makes violating the traffic laws in chapter 316 a moving violation. The subsequent sections govern whether the traffic laws apply to work crews, emergency vehicles, and the like. A couple of sections later is the section requiring obedience to traffic control devices. § 316.074, Fla. Stat. (2012).

Statutes are to be interpreted in context. This statute is a traffic control statute, and the lawful order therefore must be an order regulating the flow of traffic. The proposed instruction, however, contains no such limitation—it allows conviction for disobeying any order if at the time the person given the order is a driver or pedestrian on any street or road even if the lawfulness of the order had nothing to do with traffic on the roadway. This interpretation does not comport with the rule of lenity codified in section 775.021(1), Florida Statutes.

The FPDA respectfully suggests that this committee not draft proposed jury instructions for this statute until the courts have had an opportunity to consider all of these issues. As it stands now, this committee's proposal is more of an attempt to make law than it is a reflection of existing law.

Respectfully submitted,

/S/ Julianne M. Holt

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