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M E M O R A N D U M
(4/29/2020)

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 23rd edition of the book was published in 2019. The Administrative Office of the Courts' website includes Word "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" version of newly-created and/or substantially revised instructions, are attached to the memorandum which appears on the AOC's website. If the committee changed a comment and/or footnote but did not change the text of an instruction, the instruction will be listed below but it will not be posted on the AOC's website.

1.00– Preliminary jury instructions

a) Rename the instruction as follows:

> Preliminary jury instructions (To be given to the jury only after the jury is sworn)

b) Add a new footnote to the title and renumber subsequent footnotes accordingly. The text of the footnote should read as follows:

> State v. Merrilees, M2019-01194-CCA-R3-CD, 2020 WL 755054 (Tenn. Crim. App., Jackson, 2/14/20).

1.09 – No independent research or discussion

a) Replace the second paragraph of the instruction with the following language:

> Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. During your deliberations, you must not communicate with or provide any information to anyone by any means about this case outside the jury deliberation room. You may not use any

electronic device or media, such as a telephone, cell phone, smart phone, iPhone, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website, including, but not limited to, Facebook, LinkedIn, YouTube, Snapchat, Instagram, Google, Twitter, or any other social media, to communicate to anyone any information about this case or to conduct any research about this case until you have returned your verdict and the trial has concluded.

3.01 – Criminal responsibility for conduct of another [not to be charged as a separate offense or be put on a verdict form]

a) After the last sentence of paragraphs 3 and 4 before the closing bracket, add the following definition:

> "Intent" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.

b) Add the following after the existing language of footnotes 4 and 5:

> The culpable mental state for the underlying offense needs to be defined by the trial judge. Specifically, the court must determine if the offense is a result-of-conduct offense or a nature-of-conduct offense. State v. Ducker, 27 S.W.3d 889, 896 (Tenn. 2000).

c) Add the following paragraph before the last paragraph of the instruction:

> Criminal responsibility is not a separate criminal charge of the indicted charge or any lesser included offense(s), but is an alternate theory of criminal liability by which the state may prove the defendant's guilt based upon the conduct of another person. Consequently, there is no separate verdict form for criminal responsibility. You will use the verdict form for the offense for which you find the defendant criminally responsible, should the defendant be found guilty of any offense under this theory.

d) Add a footnote to the new paragraph. The text of the footnote should read as follows:

> State v. Welcome, 280 S.W.3d 215, 220-21 n. 1 (Tenn. Crim. App. 2007).

6.10 – [Influencing] [attempting to influence] a domestic assault witness

a) Insert attachment one to this memorandum as a new instruction numbered 6.10.

10.23 – Soliciting sexual exploitation of a minor

a) Change the definition of "lascivious" to read as follows:

> ["Lascivious" means tending to incite lust; lewd; indecent.]

b) Change the wording of existing footnote 4 to read as follows:

> State v. Hall, ___ S.W.3d ____, 2019 WL 117580 (Tenn. 2019). See Comment 3.

c) Add a new comment 3 to the instruction. The text of the comment should read as follows:

> In deciding whether or not materials are "lascivious," the Supreme Court in *State v Whited*, 506 S.W.3d 416, 438 (Tenn. 2016), held that
>
> > the fact-intensive determination of whether particular materials contain sexual activity or a lascivious exhibition of private body areas is not facilitated by the adoption of a one-size-fits-all "multi-factor analysis" such as the *Dost* factors. See *Grzybowicz*, 747 F.3d at 1306. Lower courts should refrain from using the *Dost* factors as a test or an analytical framework in making such a determination.

11.01 – Theft of property

a) Replace the first sentence of Comment One with the following:

> Theft of property or services is graded as follows for sentencing on or after 1/1/17, regardless of the date of the offense. See State v. Menke, 590 S.W.3d 455 (Tenn. 2019).

b) Amend the last sentence of Comment One to read as follows:

> Theft of a firearm on or after 7/1/2019 shall be punished by confinement for not less than thirty (30) days in addition to any other penalty authorized by law. T.C.A. § 39-14-105(d).

11.02 – Theft of services

a) Amend the last sentence of Comment One to read as follows:

> See Comment One to T.P.I. – Crim. 11.01, Theft of property.

11.03(a) - Fixing value
11.03(b) – Fixing apparent value

If the indictment charges more than one criminal act committed in a single count to aggregate the value, as set out in T.C.A. § 39-14-105(b), we suggest that you instruct the jury as to the definitions of "common scheme, purpose, intent or enterprise" as defined and suggested by the Tennessee Supreme Court in *State v. Jones*, 589 S.W.3d 747, 763-64 (Tenn. 2019). The Committee is presently drafting a pattern charge and verdict form for this statute for its approval in June.

11.05 – Forgery

a) Amend the last sentence of Comment Two to read as follows:

> See also Comment One to T.P.I. – Crim. 11.01, Theft of property.

11.06 – Criminal Simulation

a) Amend the last sentence of Comment One to read as follows:

> See also Comment One to T.P.I. – Crim. 11.01, Theft of property.

11.08 – Organized retail crime

a) Amend the last sentence of Comment One to read as follows:

> See Comment One to T.P.I. – Crim. 11.01, Theft of property.

11.10 – False or fraudulent insurance claim

a) Amend the last sentence of Comment One to read as follows:

> See Comment One to T.P.I. – Crim. 11.01, Theft of property.

b) Add the following definition after Part B, element 2:

> "Claim" means any effort to obtain monies under an insurance contract through the presentation of information to the insurer.

c) Add a footnote to the new definition. Renumber subsequent footnotes accordingly. The text of the footnote should read as follows:

State v. Mitchell, 592 S.W.3d 431 (Tenn. 2019).

11.13 – Recorded devices [only for offenses committed prior to 7/1/09. For offenses committed on or after that date, see T.P.I.-Crim. 11.41, Violation of Recording Laws)

a) Delete this instruction but leave the number as "Reserved".

11.17 – Theft of merchandise

a) Amend the second sentence of Comment One, after the citation to T.C.A. § 39-14-146(a), to read as follows:

See Comment One to T.P.I. – Crim. 11.01, Theft of property.

11.33 – Communication theft

a) Amend the second sentence of Comment One to read as follows:

See Comment One to T.P.I. – Crim. 11.01, Theft of property.

11.41 – Violation of recording laws

a) Amend the title of this instruction as follows:

Violation of recording laws [only for offenses committed on or after 7/1/09]

b) Add a footnote at the end of the new bracketed phrase. The text of the phrase should read as follows:

For offenses committed prior to that date, see T.P.I. 11.13 (23rd Ed. 2019) or an earlier edition.

12.02 – Intentional killing of animal

a) Amend the last sentence of Comment One to read as follows:

See Comment One to T.P.I. – Crim. 11.01, Theft of property, and 11.03(a), Fixing Value.

14.01 – Burglary

a) After Part B, element 4, change the next sentence to read as follows:

[See footnote 3 below.]

b) After Part C, element 4, change the next sentence to read as follows:

[See footnote 4 below.]

c) After Part D, element 5, change the next sentence to read as follows:

[See footnote 5 below.]

d) Add the following at the end of the existing language of footnote 4:

There is also no requirement in Part C that the building entered not be open to the public, but only that the entry and the felony, theft or assault be attempted or accomplished without the effective consent of the property owner. State v. Welch, 595 S.W.3d 615 (Tenn. 2020).

14.04 – Vandalism

a) Amend the last sentence of Comment One to read as follows:

See Comment One to T.P.I. – Crim. 11.01, Theft of property.

14.09 – Critical infrastructure vandalism

a) Amend the last sentence of Comment One to read as follows:

See Comment One to T.P.I. – Crim. 11.01, Theft of property.

16.01 – Computer fraud

a) Amend the sentence of Comment One after the citation to T.C.A. § 39-14-602(a) to read as follows:

See Comment One to T.P.I. – Crim. 11.01, Theft of property.

16.02 – Computer tampering

a) Amend the sentence of Comment One after the citation to T.C.A. § 39-14-602(b)(2) to read as follows:

See Comment One to T.P.I. – Crim. 11.01, Theft of property.

16.03 – Receiving, concealing, or using proceeds resulting from computer [fraud] [tampering]

a) Amend the sentence of Comment One after the citation to T.C.A. § 39-14-602(c) to read as follows:

See Comment One to T.P.I. – Crim. 11.01, Theft of property.

29.13 – [Physical abuse] [only for offenses committed prior to 1/1/19: gross neglect] of impaired adult resulting in serious harm (for offenses committed on or after 7/1/07)

a) Change the title of the instruction to the following:

[Physical abuse] [only for offenses committed prior to 1/1/19: gross neglect] of impaired adult resulting in serious harm (for offenses committed on or after 7/1/07, but prior to 1/1/2020)

29.14(a) – [Abuse] [only for offenses committed prior to 1/1/19: gross neglect] [exploitation] of adult (for offenses committed on or after 6/11/07)

a) Change the title of the instruction to the following but keep the existing footnote after 6/11/07:

[Abuse] [only for offenses committed prior to 1/1/19: neglect] [exploitation] of adult (for offenses committed on or after 6/11/07, but prior to 1/1/2020)

29.14(b) – Financial exploitation of [*an elderly*] [*a vulnerable*] adult (for offenses committed on or after 7/1/17)

a) Amend Part C of the definition of "financial exploitation: as follows:

(C) The act of obtaining or exercising control over an elderly or vulnerable adult's property **[Only for offenses committed on or after 1/1/20:** , without receiving the *[elderly] [vulnerable]* adult's effective consent,**]** by a caregiver committed with intent to benefit the caregiver or other third party.

b) Add the following new definition in brackets after the definition of "Caregiver":

["Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

[(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof]*;] or

[(b) given by a person the defendant knows is not authorized to act as an agent;] or

[(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or

[(d) given solely to detect the commission of an offense].]

c) Add a footnote after the new definition of "effective consent" and renumber any subsequent footnotes accordingly. The text of the footnote should read as follow:

T.C.A. § 39-11-106.

29.15 – Aggravated neglect of [an elderly] [a vulnerable] adult

a) Amend element 2 to read as follows:

That the defendant **[only for offenses committed prior to 1/1/2020:** willfully and**]** knowingly neglected the *[elderly] [vulnerable]* adult so as to adversely affect *[his] [her]* health or welfare;

b) Amend Part C of the definition of "financial exploitation: as follows:

(C) The act of obtaining or exercising control over an elderly or vulnerable adult's property **[Only for offenses committed on or after 1/1/20:** , without receiving the *[elderly] [vulnerable]* adult's effective consent,**]** by a caregiver committed with intent to benefit the caregiver or other third party.

c) Add the following new definition in brackets after the definition of "Confinement":

["Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

[(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof]*;] or

[(b) given by a person the defendant knows is not authorized to act as an agent;] or

[(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or

[(d) given solely to detect the commission of an offense].]

d) Add a footnote after the new definition of "effective consent" and renumber any subsequent footnotes accordingly. The text of the footnote should read as follow:

T.C.A. § 39-11-106.

e) Amend part (ii) of the definition of "neglect" as follows:

(ii) The failure of a caregiver to make a reasonable effort to protect *[an elderly] [a vulnerable]* adult from **[Only for offenses committed on or after 1/1/20:** abuse, sexual exploitation, **]** neglect or financial exploitation by others;

29.16 – Neglect of [an elderly] [a vulnerable] adult [other than due to abandonment or confinement alone without injury]

a) Amend element 2 to read as follows:

That the defendant **[only for offenses committed prior to 1/1/2020:** willfully and**]** knowingly neglected the *[elderly] [vulnerable]* adult so as to adversely affect *[his] [her]* health or welfare;

b) Amend Part C of the definition of "financial exploitation: as follows:

(C) The act of obtaining or exercising control over an elderly or vulnerable adult's property **[Only for offenses committed on or after 1/1/20:** , without receiving the *[elderly] [vulnerable]* adult's effective consent,**]** by a caregiver committed with intent to benefit the caregiver or other third party.

c) Add the following new definition in brackets after the definition of "Confinement":

["Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

[(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof]*;] or

[(b) given by a person the defendant knows is not authorized to act as an agent;] or

[(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or

[(d) given solely to detect the commission of an offense].]

d) Add a footnote after the new definition of "effective consent" and renumber any subsequent footnotes accordingly. The text of the footnote should read as follow:

T.C.A. § 39-11-106.

e) Amend part (ii) of the definition of "neglect" as follows:

(ii) The failure of a caregiver to make a reasonable effort to protect *[an elderly] [a vulnerable]* adult from **[Only for offenses committed on or after 1/1/20:** abuse, sexual exploitation, **]** neglect or financial exploitation by others;

29.17 – Neglect of [an elderly] [a vulnerable] adult [due to abandonment or confinement alone without injury]

a) Amend element 2 to read as follows:

> That the defendant **[only for offenses committed prior to 1/1/2020:** willfully and**]** knowingly neglected the *[elderly] [vulnerable]* adult so as to adversely affect *[his] [her]* health or welfare;

b) Amend Part C of the definition of "financial exploitation: as follows:

> (C) The act of obtaining or exercising control over an elderly or vulnerable adult's property **[Only for offenses committed on or after 1/1/20:** , without receiving the *[elderly] [vulnerable]* adult's effective consent,**]** by a caregiver committed with intent to benefit the caregiver or other third party.

c) Add the following new definition in brackets after the definition of "Confinement":

> ["Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:
>
> [(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof]*;] or
>
> [(b) given by a person the defendant knows is not authorized to act as an agent;] or
>
> [(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or
>
> [(d) given solely to detect the commission of an offense].]

d) Add a footnote after the new definition of "effective consent" and renumber any subsequent footnotes accordingly. The text of the footnote should read as follow:

> T.C.A. § 39-11-106.

e) Amend part (ii) of the definition of "neglect" as follows:

> (ii) The failure of a caregiver to make a reasonable effort to protect *[an elderly] [a vulnerable]* adult from **[Only for offenses committed on or after 1/1/20:** abuse, sexual exploitation, **]** neglect or financial exploitation by others;

29.18 – [Aggravated] abuse of [an elderly] [a vulnerable] adult (for offenses committed on or after 1/1/20)

a) Insert attachment two to this memorandum as new instruction 29.18.

29.19 – Sexual exploitation of [an elderly] [a vulnerable] adult

a) Insert attachment three to this memorandum as new instruction 29.19.

31.01- Controlled substances: Manufacture, delivery or sale

a) Replace the existing instruction with the substantially revised instruction in attachment four to this memorandum.

31.04 – Controlled substances: Possession with intent to sell or deliver

a) Remove elements 4(a) and 4(b), along with the corresponding footnotes. Renumber the remaining footnotes accordingly.

b) Rearrange the definitions in the following order:

> ["Deliver" or "delivery"
> [There are two types of possession…
> [The law also recognizes…
> ["Sell" or "sale"
> "Knowingly"
> The requirement of "knowingly"
> "Intentionally"

c) Renumber the corresponding footnotes of each definition according to the new placement.

d) Add the following as a new paragraph at the end of the instruction:

> [If the defendant is charged with committing this crime in a drug-free zone or with the intended recipient having been under eighteen (18) years of age, which substantially enhances the punishment, the trial judge should now instruct the jury as to either T.P.I. – Crim. 31.12(a) or 31.12(b), but not both, pursuant to T.C.A. § 39-17-432(g).]

e) Replace Comment One with the following:

> The penalty prescribed for possession of a controlled substance with the intent to sell or deliver can range from a Class A felony to a Class A misdemeanor depending on the amount and schedule of a controlled substance. It will be necessary for the trial judge to refer to T.C.A. §§ 39-17-417(b), et seq. to determine the applicable fine and term of imprisonment.

31.12(a) – Supplemental instruction: Drug-free zone

a) Insert attachment five to this memorandum as a new instruction numbered 31.12(a).

31.12(b) – Supplemental instruction: Intended Recipient Under Eighteen (18) Years Of Age

a) Insert attachment six to this memorandum as a new instruction numbered 31.12(b).

38.08 – Driving under the influence: Supplemental instruction number one

a) Replace the existing instruction with attachment seven to this memorandum.

38.11 Violation of Habitual Motor Vehicle Offender Act

a) Delete this instruction but keep the number as "Reserved".

38.17(a) – *[Refusing] [preventing] [obstructing]* the administration of a required *[breath] [blood]* test (for offenses committed on or after 7/1/17)

a) Amend the title of the instruction to read as follows:

> *[Refusing] [preventing] [obstructing]* the administration of a required *[breath] [blood]* test (for offenses committed on or after 7/1/17 but prior to 7/1/19)

40.01 – Defense: Ignorance or mistake of fact

a) Add the following language as new comment 1. Renumber the existing comments accordingly.

> The defendant need not testify in order to insure that this general defense is raised in the proof. " '[I]n all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.' Tenn. Const. Art. 1, § 9; U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself[.]"). Compelling the defendant to waive his right not to give evidence against himself or, instead, to provide evidence of his mental state to secure his constitutional right to a complete jury instruction is an untenable position. For that reason, it is incumbent upon the *court* to "draw all reasonable inferences in the defendant's favor" and not the *defendant* to provide such proof or inferences." *State v. Cole-Pugh*, 588 S.W.3d 254, 263 (Tenn. 2019).

40.03– Defense: Duress

a) Add the following language as new comment 1. Renumber the existing comments accordingly.

> The defendant need not testify in order to insure that this general defense is raised in the proof. " '[I]n all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.' Tenn. Const. Art. 1, § 9; U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself[.]"). Compelling the defendant to waive his right not to give evidence against himself or, instead, to provide evidence of his mental state to secure his constitutional right to a complete jury instruction is an untenable position. For that reason, it is incumbent upon the *court* to "draw all reasonable inferences in the defendant's favor" and not the *defendant* to provide such proof or inferences." *State v. Cole-Pugh*, 588 S.W.3d 254, 263 (Tenn. 2019).

40.05– Defense: Necessity

a) Add the following language as new comment 1. Renumber the existing comments accordingly.

> The defendant need not testify in order to insure that this general defense is raised in the proof. " '[I]n all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.' Tenn. Const. Art. 1, § 9; U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself[.]"). Compelling the defendant to waive his right not to give evidence against himself or, instead, to provide evidence of his mental state to secure his constitutional right to a complete jury instruction is an untenable position. For that reason, it is incumbent upon the *court* to "draw all reasonable inferences in the defendant's favor" and not the *defendant* to provide such proof or inferences." *State v. Cole-Pugh*, 588 S.W.3d 254, 263 (Tenn. 2019).

40.06(b) – Defense: Self-defense [enacted May 22, 2007]

a) Move the next to last paragraph that begins "[This defense is not available to the defendant…" to after the existing 6th paragraph. See revised version for clarification on placement. Renumber footnotes accordingly.

b) The footnote to the above paragraph (existing footnote 25) should be amended to read as follows:

> T.C.A. § 39-11-604. State v. Almahmmody, M2018-01274-CCA-R3-CD, 2019 WL 3992736 (Tenn. Crim. App., Nashville, 8/23/19) perm. app. denied (Tenn. January 15, 2020).

c) Add the following language as new comment 1. Renumber the existing comments accordingly.

> The defendant need not testify in order to insure that this general defense is raised in the proof. " '[I]n all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.' Tenn. Const. Art. 1, § 9; U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself[.]"). Compelling the defendant to waive his right not to give evidence

against himself or, instead, to provide evidence of his mental state to secure his constitutional right to a complete jury instruction is an untenable position. For that reason, it is incumbent upon the *court* to "draw all reasonable inferences in the defendant's favor" and not the *defendant* to provide such proof or inferences." *State v. Cole-Pugh*, 588 S.W.3d 254, 263 (Tenn. 2019).

40.07 – Defense: Defense of third person

a) Add the following language as new comment 1. Renumber the existing comments accordingly.

> The defendant need not testify in order to insure that this general defense is raised in the proof. " '[I]n all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.' Tenn. Const. Art. 1, § 9; U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself[.]"). Compelling the defendant to waive his right not to give evidence against himself or, instead, to provide evidence of his mental state to secure his constitutional right to a complete jury instruction is an untenable position. For that reason, it is incumbent upon the *court* to "draw all reasonable inferences in the defendant's favor" and not the *defendant* to provide such proof or inferences." *State v. Cole-Pugh*, 588 S.W.3d 254, 263 (Tenn. 2019).

40.08 – Defense: Protection of property

a) Rearrange the definitions in the following order:

> ["Deadly force"
> ["Force"
> "Property"
> ["Serious bodily injury"

b) Renumber the corresponding footnotes of each definition according to the new placement.

c) Add the following language as new comment 1. Renumber the existing comments accordingly.

> The defendant need not testify in order to insure that this general defense is raised in the proof. " '[I]n all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.' Tenn. Const. Art. 1, § 9; U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself[.]"). Compelling the defendant to waive his right not to give evidence against himself or, instead, to provide evidence of his mental state to secure his constitutional right to a complete jury instruction is an untenable position. For that reason, it is incumbent upon the *court* to "draw all reasonable inferences in the defendant's favor" and not the *defendant* to provide such proof or inferences." *State v. Cole-Pugh*, 588 S.W.3d 254, 263 (Tenn. 2019).

40.09 – Defense: Protection of a third person's property

a) Rearrange the definitions in the following order:

> ["Deadly force"
> ["Force"
> "Property"
> ["Serious bodily injury"

b) Renumber the corresponding footnotes of each definition according to the new placement.

c) Add the following language as new comment 1. Renumber the existing comments accordingly.

The defendant need not testify in order to insure that this general defense is raised in the proof. " '[I]n all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.' Tenn. Const. Art. 1, § 9; U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself[.]"). Compelling the defendant to waive his right not to give evidence against himself or, instead, to provide evidence of his mental state to secure his constitutional right to a complete jury instruction is an untenable position. For that reason, it is incumbent upon the *court* to "draw all reasonable inferences in the defendant's favor" and not the *defendant* to provide such proof or inferences." *State v. Cole-Pugh*, 588 S.W.3d 254, 263 (Tenn. 2019).

40.17 – Defense: Effective consent

a) Rearrange the definitions in the following order:

"Bodily injury"
"Effective consent"
["Serious bodily injury"
["Knowingly"
[The requirement of "knowingly"
["Intentionally"

b) Renumber the corresponding footnotes of each definition according to the new placement.

c) Add the following language as new comment 1. Renumber the existing comments accordingly.

The defendant need not testify in order to insure that this general defense is raised in the proof. " '[I]n all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.' Tenn. Const. Art. 1, § 9; U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself[.]"). Compelling the defendant to waive his right not to give evidence against himself or, instead, to provide evidence of his mental state to secure his constitutional right to a complete jury instruction is an untenable position. For that reason, it is incumbent upon the *court* to "draw all reasonable inferences in the defendant's favor" and not the *defendant* to provide such proof or inferences." *State v. Cole-Pugh*, 588 S.W.3d 254, 263 (Tenn. 2019).

42.23 – Duty to preserve evidence

a) Replace the second paragraph of the instruction with the following:

If, after considering all of the proof, you find that the State failed to gather or preserve evidence, the contents or qualities of which are at issue and the production of which would more probably than not be of benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant.

b) Replace the existing language of Comment 2 with the following:

In State v. Franklin, 585 S.W.3d 431, 460-61 (Tenn. Crim. App. 2019), the court held as follows:

"Our supreme court in *Ferguson* included in a footnote a jury instruction that a trial court may employ upon finding that the State's destruction of evidence violated a defendant's constitutional right to a fair trial. 2 S.W.3d at 917 n.11. The jury instruction provides in part, "The State has a duty to gather, preserve, and produce at trial evidence which may possess exculpatory evidence." *Id*. The court cited to *Trombetta* and *State v. Willits*, 96 Ariz. 184, 393 P.2d 274, 276 (Ariz. 1964), in support of the instruction. However, neither Trombetta nor Willits addressed whether the State has a duty to collect

evidence but addressed the State's failure to preserve evidence already in the State's possession. *See Trombetta*, 467 U.S. at 481; *Willits*, 393 P.2d 276-78 (holding that the trial court erred in failing to instruct the jury that if the jury determined that the State destroyed evidence whose contents or quality are at issue, the jury may infer that the evidence did not support the State's interests).

On numerous occasions, this court has held that a law enforcement officer's failure to collect certain items from a crime scene did not result in a *Ferguson* violation. See e.g., *State v. Bargery*, No. W2016-00893-CCA-R3-CD, 2017 Tenn. Crim. App. LEXIS 902 (Oct. 6, 2017), *no perm. app*. filed (holding that the State's failure to collect a bloody towel, fruit punch cans, blood stain samples, and fingerprints did not violate Ferguson because the State had no duty to collect such items); *State v. Hubbard*, No. W2016-01521-CCAR3-CD, 2017 Tenn. Crim. App. LEXIS 484, 2017 WL 2472372, at *6-8 (Tenn. Crim. App. June 7, 2017), *no perm. app. filed* (concluding that the State did not have a duty to preserve surveillance footage from a crime scene when officers failed to collect the footage); *State v. Bufford*, No. W2013-00841-CCAR3-CD, 2014 Tenn. Crim. App. LEXIS 478, 2014 WL 2129526, at *12-13 (Tenn. Crim. App. May 20, 2014) (rejecting the defendant's claim that "the State should have collected more evidence because that evidence might have been exculpatory" (emphasis in original)); *State v. Brock*, 327 S.W.3d 645, 698-99 (Tenn. Crim. App. 2009) (holding that the State did not have a duty to collect fingerprint evidence and a bloody footprint from the crime scene); *State v. Somerville*, No. W2001-00902-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 122, 2002 WL 1482730, at *4-5 (Tenn. Crim. App. Feb. 11, 2002) (concluding that the State did not have a duty to preserve surveillance footage from the scene of a Wal-Mart for a shoplifting charge when the State never had possession or control over the footage).

In concluding that the State's failure to collect evidence from a crime scene does not rise to the level of a *Ferguson* violation, this court has recognized that

"the State is not required to investigate cases in any particular way: Due process does not require the police to conduct a particular type of investigation. Rather, the reliability of the evidence gathered by the police is tested in the crucible of a trial at which the defendant receives due process. Moreover, [i]t is not the duty of this Court to pass judgment regarding the investigative techniques used by law enforcement unless they violate specific statutory or constitutional mandates." *Brock*, 327 S.W.3d at 698-99 (quoting *State v. Best*, No. E2007-00296-CCA- R3-CD, 2008 Tenn. Crim. App. LEXIS 744, 2008 WL 4367529, at *13 (Tenn. Crim. App. Sept. 25, 2008)) (internal citations omitted).*State v. Craighead*, 2018 Tenn. Crim. App. LEXIS 843, 2018 WL 5994974, at *9-10.

In this case, the trial court properly declined to give the jury a *Ferguson* instruction because the victim's underwear was not lost, and the State had no duty to collect and preserve the victim's underwear. Defendant is not entitled to relief on this issue."

T.P.I.-- CRIM. 6.10

[INFLUENCING] [ATTEMPTING TO INFLUENCE] A

DOMESTIC ASSAULT WITNESS

Any person who *[influences] [attempts to influence]* a *[prospective]* domestic assault witness is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant was *[a defendant] [a person acting at the direction of the defendant]* in a criminal case involving domestic assault pursuant to Tenn. Code Ann. § 39-13-111;

and

(2) that *[he] [she]* intentionally *[influenced] [attempted to influence]* _____, a witness in an official proceeding by means of persuasion to

(a) testify falsely

(b) withhold any *[truthful testimony] [information] [document] [evidence]*

(c) elude legal process summoning the witness to *[testify] [supply evidence]* or

(d) be absent from an official proceeding to which _____ had been legally summoned;

and

(3) that the means of persuasion was not coercion.

"Coercion" means a threat, however communicated, to commit any offense, wrongfully accuse any person of any offense, expose any person to hatred, contempt or ridicule, harm the credit or business repute of any person, take or withhold action as a public servant or cause a public servant to take or withhold action.[2]

"Official proceeding" means any type of administrative, executive, legislative or judicial proceeding that may be conducted before a public servant authorized by law to take statements under oath.[3]

"Intentional" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[4]

COMMENTS

1. Influencing or attempting to influence a domestic assault witness "is a Class A misdemeanor and, upon conviction, the sentence runs consecutively to the sentence for any other offense that is based in whole or in part on the factual allegations about which the person was seeking to influence a witness."

FOOTNOTES

1. T.C.A. § 39-16-507.

2. T.C.A. § 39-11-106.

3. T.C.A. § 39-11-106.

4. T.C.A. § 39-11-106.

T.P.I.-- CRIM. 29.18

[Aggravated] Abuse of [an elderly] [a vulnerable] adult

(for offenses committed on or after 1/1/20)

Any person who commits *[Aggravated]* Abuse of *[an elderly] [a vulnerable]* adult is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant abused *[an elderly] [a vulnerable]* adult;

and

(2) that the defendant acted knowingly.

[and

(3)(a) that the act resulted in *[serious psychological injury] [serious physical harm]*

or

(3)(b) that a deadly weapon was used to accomplish the act

or

(3)(c) that the abuse involved strangulation

or

(3)(d) that the abuse resulted in serious bodily injury].

"Abuse" means the infliction of physical harm.[2] “Physical harm” means physical pain or injury, regardless of gravity or duration.[3]

["Deadly weapon" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.][4]

[“Elderly adult” means a person seventy (70) years of age or older.][5]

[“Firearm” means *[any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive] [, or the frame or receiver of any such weapon]*[6] *[, or any firearm muffler or firearm silencer]*[7] *[any destructive device]*.[8] *[The definition of “firearm” does not include an antique firearm.*[9]***]***[10]]

["Serious bodily injury" means bodily injury that involves a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.[11] "Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.][12]

[“Serious physical harm” means physical harm of such gravity that:

(A) Would normally require medical treatment or hospitalization;

(B) Involves acute pain of such duration that it results in substantial suffering;

(C) Involves any degree of prolonged pain or suffering; or

(D) Involves any degree of prolonged incapacity.[13]

“Physical harm” means physical pain or injury, regardless of gravity or duration.][14]

["Serious psychological injury" means any mental harm that would normally require extended medical treatment, including hospitalization or institutionalization, or mental harm involving any degree of prolonged incapacity.][15]

[“Strangulation” means intentionally or knowingly impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person, regardless of whether that conduct results in any visible injury or whether the person has any intent to kill or protractedly injure the victim.][16]

[“Vulnerable adult” means a person eighteen (18) years of age or older who, because of intellectual disability or physical dysfunction, is unable to fully manage the person's own resources, carry out all or a portion of the activities of daily living, or fully protect against neglect, exploitation, or hazardous or abusive situations without assistance from others.][17]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.[18]

The requirement of “knowingly” is also established if it is shown that the defendant acted intentionally.[19]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[20]

COMMENTS

1. Abuse of an elderly adult is a Class E felony. Abuse of a Vulnerable adult is a Class D felony. T.C.A. §39-15-510. Aggravated abuse resulting in serious psychological injury or serious physical harm is a Class C felony. Aggravated abuse by a deadly weapon or strangulation, or which results in serious bodily injury is a Class B felony. T.C.A. §39-15-511.

Footnotes

1. T.C.A. §39-15-510.

2. T.C.A. §39-15-501.

3. T.C.A. §39-15-501.

4. T.C.A. §39-11-106.

5. T.C.A. §39-15-501.

6. The trial judge should consult 27 C.F.R. § 478.11 to draft the definition of “frame or receiver” if it is fairly raised in the proof.

7. The trial judge should consult 27 C.F.R. § 478.11 to draft the definition of “firearm muffler or firearm silencer” if it is fairly raised in the proof.

8. The trial judge should consult T.C.A. § 39-11-106 to draft the definition of “destructive device” if it is fairly raised in the proof.

9. The trial judge should consult T.C.A. § 39-11-106 to draft the definition of "antique firearm" if it is fairly raised in the proof.

10. T.C.A. §39-11-106.

11. T.C.A. §39-11-106.

12. T.C.A. §39-11-106.

13. T.C.A. §39-15-501.

14. T.C.A. §39-15-501.

15. T.C.A. §39-15-501.

16. T.C.A. §39-13-102(a)(2).

17. T.C.A. §39-15-501.

18. T.C.A. §39-11-106.

19. T.C.A. §39-11-301.

20. T.C.A. §39-11-106.

T.P.I.-- CRIM. 29.19

Sexual exploitation of [an elderly] [a vulnerable] adult

Any person who commits sexual exploitation of *[an elderly] [a vulnerable]* adult is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant sexually exploited *[an elderly] [a vulnerable]* adult;

and

(2) that the defendant acted knowingly.

["Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

[(a) induced by deception or coercion *[the trial judge should include in the instruction applicable language from the statutory definitions for deception or coercion if fairly raised in the proof]*;] or

[(b) given by a person the defendant knows is not authorized to act as an agent;] or

[(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter;] or

[(d) given solely to detect the commission of an offense].][2]

[“Elderly adult” means a person seventy (70) years of age or older.][3]

"Sexual exploitation" means an act committed upon or in the presence of *[an elderly] [a vulnerable]* adult, without that adult's effective consent, for purposes of sexual gratification. "Sexual exploitation" includes, but is not limited to, fondling; exposure of genitals to *[an elderly] [a vulnerable]* adult; exposure of sexual acts to *[an elderly] [a vulnerable]* adult; exposure of *[an elderly] [a vulnerable]* adult's sexual organs; an intentional act or statement by a person intended to shame, degrade, humiliate, or otherwise harm the personal dignity of *[an elderly] [a vulnerable]* adult; or an act or statement by a person who knew or should have known the act or statement would cause shame, degradation, humiliation, or harm to the personal dignity of *[an elderly] [a vulnerable]* adult. "Sexual exploitation" does not include any act intended for a valid medical purpose, or any act reasonably intended to be a normal caregiving act, such as bathing by appropriate persons at appropriate times.[4]

[“Vulnerable adult” means a person eighteen (18) years of age or older who, because of intellectual disability or physical dysfunction, is unable to fully manage the person's own resources, carry out all or a portion of the activities of daily living, or fully protect against neglect, exploitation, or hazardous or abusive situations without assistance from others.][5]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of

the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.[6]

The requirement of “knowingly” is also established if it is shown that the defendant acted intentionally.[7]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[8]

COMMENTS

1. Sexual exploitation of an elderly or vulnerable adult is a Class A misdemeanor. T.C.A. §39-15-512(b).

Footnotes

1. T.C.A. §39-15-512.
2. T.C.A. §39-11-106.
3. T.C.A. §39-15-501.
4. T.C.A. §39-15-501.
5. T.C.A. §39-15-501.
6. T.C.A. §39-11-106.
7. T.C.A. §39-11-301(a)(2).
8. T.C.A. §39-11-106.

T.P.I. -- CRIM. 31.01

CONTROLLED SUBSTANCES: MANUFACTURE, DELIVERY OR SALE

Any person who commits the offense of unlawful *[manufacture] [delivery] [sale]* of a controlled substance is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:[1]

(1) that the defendant *[manufactured] [delivered] [sold]* [specify controlled substance], a Schedule [insert schedule number] controlled substance;

and

(2) that the defendant acted knowingly.

[_____] is a Schedule [_____] controlled substance.[2]

["Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.][3]

[“Manufacture” means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. “Manufacture” does not include the preparation or compounding of a controlled substance by an individual for the individual’s own use [**Only for methamphetamine offenses committed on or after 3/30/05:** unless the controlled substance is methamphetamine, its salts, isomers, or salts of its isomers].[4]

“Production” includes the manufacturing, planting, cultivating, growing or harvesting of a controlled substance[5].]

[“Sell” or “sale” means a bargained-for offer and acceptance and an actual or constructive transfer or delivery of the substance.][6]

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.[7]

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.[8]

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.[9]

[The trial judge should now instruct the jury with respect to fixing the weight of the drug alleged to have been manufactured, delivered or sold, if more than the minimum amount is alleged in the indictment. See T.P.I. – Crim. 31.13, Fixing Weight.]

[If the defendant is charged with committing this crime in a drug-free zone or with the intended recipient having been under eighteen (18) years of age, which substantially enhances the punishment, the trial judge should now instruct the jury as to either T.P.I. – Crim. 31.12(a) or 31.12(b), but not both, pursuant to T.C.A. § 39-17-432(g).]

Footnotes

1. T.C.A. § 39-17-417(a).
2. “Controlled substance” means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416. T.C.A. § 39-17-402(4).
3. T.C.A. § 39-17-402(6).
4. T.C.A. § 39-17-402(15) in combination with T.C.A. § 39-17-417(m).
5. T.C.A. § 39-17-402(24).
6. State v. Holston, 94 S.W.3d 507, 510 (Tenn. Crim. App. 2002).
7. T.C.A. § 39-11-106.
8. T.C.A. § 39-11-301(a)(2).
9. T.C.A. § 39-11-106.

Comments

1. The penalty prescribed for unlawful sale, delivery or manufacture of a controlled substance can range from a Class A felony to a Class A misdemeanor depending on the amount and schedule of a controlled substance. It will be necessary for the trial judge to refer to T.C.A. §§ 39-17-417(b), et seq. to determine the applicable fine and term of imprisonment.

   For offenses committed on or after 7/1/14, a defendant convicted of the manufacture of any amount of methamphetamine shall be punished by confinement for not less than one hundred eighty (180) days, and the person shall serve at least one hundred percent (100%) of the one hundred eighty (180) day minimum. This mandatory minimum sentence shall not be construed to prohibit the defendant from participating in a drug or recovery court that is certified by the department of mental health and substance abuse services, and any person participating in such a court may receive sentence credit for up to the full one hundred eighty (180) day minimum. T.C.A. § 39-17-417(n). Even though the minimum sentence must be served at 100%, which precludes full probation, a defendant eligible for and granted diversion would not have to serve that minimum sentence, as “judicial diversion does not constitute a sentence, but rather a decision to defer sentencing.” State v. Dycus, 456 S.W.3d 918, at 928 (Tenn. 2015).

   For Class A, B, or C felony offenses committed on or after 1/1/17 for the manufacture, delivery, or sale of a controlled substance pursuant to § 39-17-417 in which the defendant has two (2) or more prior convictions for the manufacture, delivery, or sale of a controlled substance classified as a Class A, B, or C felony, prior to or at the time of committing the instant offense, there shall be no release eligibility until the person has served eighty-five percent (85%) of the sentence imposed by the court, less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236, or any other law, shall operate to reduce below seventy percent (70%) the percentage of sentence

imposed by the court such person must serve before becoming release eligible. T.C.A. § 40-35-501(u).

T.P.I. -- CRIM. 31.12(a)

SUPPLEMENTAL INSTRUCTION: DRUG-FREE ZONE[1]

If you find the defendant(s) guilty of _____ in Count _____ beyond a reasonable doubt, it will then be your duty to determine whether or not this act occurred *[on the grounds or facilities of a school] [within one thousand feet (1,000') of the real property that comprises a [public] [private] [elementary school] [middle school] [secondary school] [preschool] [child care agency] [public library] [recreational center] [park]]*.

If you find that this act occurred *[on the grounds or facilities of a school] [within one thousand feet (1,000') of the real property that comprises a [public] [private] [elementary school] [middle school] [secondary school] [preschool] [child care agency] [public library] [recreational center] [park]]*, beyond a reasonable doubt, you will indicate in your verdict for this count "We, the jury, also find the defendant(s) guilty of committing this act *[on the grounds or facilities of a school] [within one thousand feet (1,000') of the real property that comprises a [public] [private] [elementary school] [middle school] [secondary school] [preschool] [child care agency] [public library] [recreational center] [park]]*.

If you find the State has not proven that this act occurred *[on the grounds or facilities of a school] [within one thousand feet (1,000') of the real property that comprises a [public] [private] [elementary school] [middle school] [secondary school] [preschool] [child care agency] [public library] [recreational center] [park]]*, then you shall indicate in your verdict for this count "We, the jury do not find beyond a reasonable doubt that this act occurred *[on the grounds or facilities of a school] [within one*

thousand feet (1,000') of the real property that comprises a [public] [private] [elementary school] [middle school] [secondary school] [preschool] [child care agency] [public library] [recreational center] [park]]."

Your verdict must be unanimous.

Footnotes

1. T.C.A. § 39-17-432.

Comments

1. Felony possession with intent or manufacture, sale or delivery of controlled substances is not a lesser-included offense of committing those crimes in a drug-free zone. Therefore, the jury's finding as to drug-free zone must be stated by the jury in a separate finding. See State v. Jordan, E2018-00471-CCA-R3-CD, 2020 WL 360518 (Tenn. Crim. App., Knoxville, 1/21/20) citing State v. Smith, 48 S.W.3d 159, 167-68 (Tenn. Crim. App. 2000).
2. If the offense occurred on the grounds or facilities of any school or within one thousand feet (1,000') of the real property that comprises a public or private elementary school, middle school, or secondary school, the defendant shall be punished one (1) classification higher than is provided in § 39-17-417(b)-(i) for such violation, the maximum fines to be imposed are increased, and the minimum sentence in the defendant's range must be served at 100%. See T.C.A. § 39-17-432 and Davis v. State, 313 S.W.3d 751, 760-66 (Tenn. 2010). If the offense occurred on the grounds or facilities of a preschool, childcare center, public library, recreational center or park, the defendant shall be punished one

(1) classification higher for purposes of the fines set out in T.C.A. § 39-17-432(b)(2), and the minimum sentence in the defendant's range must be served at 100%, but the defendant shall not be punished one (1) classification higher for purposes of incarceration.

T.P.I. -- CRIM. 31.12(b)

SUPPLEMENTAL INSTRUCTION: INTENDED RECIPIENT UNDER EIGHTEEN (18) YEARS OF AGE[1]

If you find the defendant(s) guilty of _____ in Count _____ beyond a reasonable doubt, it will then be your duty to determine whether or not the recipient or the intended recipient of the controlled substance was under eighteen (18) years of age.

If you find the intended recipient of the controlled substance was under eighteen (18) years of age, beyond a reasonable doubt, you will indicate in your verdict for this count "We, the jury, also find the defendant(s) guilty of committing this act when the intended recipient of the controlled substance was under eighteen (18) years of age.

If you find the State has not proven that the intended recipient of the controlled substance was under eighteen (18) years of age, then you shall indicate in your verdict for this count "We, the jury do not find beyond a reasonable doubt that the intended recipient of the controlled substance was under eighteen (18) years of age.

Your verdict must be unanimous.

Footnotes

1. T.C.A. § 39-17-417(k).

Comments

1. Felony possession with intent to sell or deliver, or manufacture, sale or delivery of controlled substances is not a lesser-included offense of committing those crimes with the intended recipient being under eighteen (18) years of age. Therefore, the jury's finding as to the age of the intended recipient must be stated by the jury in a separate finding. See State v. Jordan, E2018-00471-CCA-R3-CD,

2020 WL 360518 (Tenn. Crim. App., Knoxville, 1/21/20) citing State v. Smith, 48 S.W.3d 159, 167-68 (Tenn. Crim. App. 2000), stating that committing these acts in a drug-free school zone was not a greater offense, but only a sentence enhancement.

2. If the jury finds that the intended recipient of the controlled substance was under eighteen (18) years of age, the offender shall be punished one (1) classification higher than provided in subsection T.C.A. § 39-17-417(k).

T.P.I. – CRIM. 38.08

DRIVING UNDER THE INFLUENCE:

SUPPLEMENTAL INSTRUCTION NUMBER ONE

Members of the Jury, you have determined that the defendant is guilty of driving under the influence of an intoxicant as charged in Count _____ of the indictment.

It will now be your duty to determine whether or not the defendant has previously been convicted of *[such offense] [vehicular homicide as a result of intoxication] [aggravated vehicular homicide] [vehicular assault] [adult driving while impaired]* and, if you so find, to fix the amount of the fine.

The statutory law of this state provides that when a person is convicted of a *[second] [third] [fourth or subsequent] [***only for offenses committed on or after 7/1/16:** *sixth] [***only for offenses committed on or after 7/1/19:** *seventh or subsequent]* offense of *[driving under the influence of an intoxicant] [vehicular homicide as a result of intoxication] [aggravated vehicular homicide] [vehicular assault] [adult driving while impaired] [any combination of the above]* then the punishment is enhanced or increased.

[The law of this state provides that a prior conviction for vehicular homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault, or adult driving while impaired, for the purpose of enhancing the punishment for the offense of driving under the influence of an intoxicant, shall be treated the same as a prior conviction for driving under the influence of an intoxicant.][1]

[**For offenses committed on or after 7/1/10 but prior to 7/1/19:** A person who is convicted of driving under the influence of an intoxicant shall not be considered a repeat or multiple offender if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of driving under the influence of an intoxicant that resulted in a conviction for such offense. If, however, the date of a person's violation of driving under the influence of an intoxicant is within ten (10) years of the date of the present violation, then the person shall be considered a multiple offender. If a person is considered a multiple offender under this part, then every violation of driving under the influence of an intoxicant that resulted in a conviction for such offense occurring within ten (10) years of the date of the immediately preceding violation shall be considered in determining the number of prior offenses. However, a violation occurring more than twenty (20) years from the date of the instant violation shall never be considered a prior offense for that purpose.]

or

[**For offenses committed on or after 7/1/19:** A person who is convicted of driving under the influence of an intoxicant shall not be considered a repeat or multiple offender if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of driving under the influence of an intoxicant that resulted in a conviction for such offense, and twenty (20) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of vehicular

homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault, or adult driving while impaired that resulted in a conviction for such offense. If, however, the date of a person's violation of driving under the influence of an intoxicant is within ten (10) years of the date of the present violation, or the date of the person's violation of vehicular homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault, or adult driving while impaired is within twenty (20) years of the date of the present offense, then the person shall be considered a multiple offender. If a person is considered a multiple offender under this part, then every violation of driving under the influence of an intoxicant that resulted in a conviction for such offense occurring within ten (10) years of the date of the immediately preceding violation, and every violation of vehicular homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault, or adult driving while impaired occurred within twenty (20) years of the date of the present offense shall be considered in determining the number of prior offenses. However, any violation occurring more than twenty (20) years from the date of the instant violation shall never be considered a prior offense for that purpose.][2]

[For purposes of determining if the defendant is a multiple offender, you may use a conviction for an offense committed in another state that would constitute the offense of *[driving under the influence of an intoxicant] [vehicular assault] [aggravated vehicular assault] [vehicular homicide as a result of intoxication] [aggravated vehicular homicide]* if it had been committed in this state. That offense shall be considered a prior conviction of an offense in this

state if the elements of that offense are the same as the elements of the offense in this state.][3]

For conviction on the second offense there shall be imposed a fine of not less than six hundred dollars ($600) nor more than three thousand five hundred dollars ($3,500) [For the third conviction there shall be imposed a fine of not less than one thousand one hundred dollars ($1,100) nor more than ten thousand dollars ($10,000).] [For the fourth or subsequent conviction there shall be imposed a fine of not less than three thousand dollars ($3,000) nor more than fifteen thousand dollars ($15,000).][4] [**Only for offenses committed on or after 7/1/16:** For the sixth or subsequent offense you may in your discretion fix a fine in any amount not to exceed $10,000.][5]

You will first determine whether or not the defendant has been previously convicted of *[driving under the influence of an intoxicant] [vehicular homicide as a result of intoxication] [aggravated vehicular homicide] [vehicular assault] [adult driving while impaired]* beyond a reasonable doubt. If you so find, then you will fix a fine within the instructed limits. Your verdict on each of these matters must be unanimous; each juror must agree to any verdict.

Any record of prior conviction[s] of the defendant is evidence which you may consider. A judgment of conviction of any person under the same name as that of the defendant may create an inference that the identity of such person is the same as the defendant. However, the jury is not required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by all the evidence in the case warrant the inference which the law permits the jury to draw.[6]

If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a second conviction then your verdict will be:

We, the jury, find the defendant, _____, guilty of a second offense of driving under the influence of an intoxicant." You will then report the amount of the fine.

[If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a third conviction then your verdict will be:

"We, the jury, find the defendant, _____, guilty of a third offense of driving under the influence of an intoxicant." You will then report the amount of the fine.]

[If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a fourth conviction then your verdict will be:

"We the jury, find the defendant, _____, guilty of a fourth offense of driving under the influence of an intoxicant." You will then report the amount of the fine.]

[If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a fifth conviction then your verdict will be:

"We the jury, find the defendant, _____, guilty of a fifth offense of driving under the influence of an intoxicant." You will then report the amount of the fine.]

[If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a sixth conviction then your verdict will be:

“We the jury, find the defendant, _____, guilty of a sixth offense of driving under the influence of an intoxicant.” You will then report the amount of the fine.]

[If you find beyond a reasonable doubt that the conviction as set out in your previous verdict is a seventh conviction then your verdict will be:

“We the jury, find the defendant, _____, guilty of a seventh offense of driving under the influence of an intoxicant.” You will then report the amount of the fine.]

If, however, you find that the defendant has not been previously convicted of driving under the influence of an intoxicant as charged in Count _____ of the indictment, or if you have a reasonable doubt thereof, then your verdict will be:

"We, the jury, find the defendant, _____, not guilty of Count _____."

In the event your verdict is that the defendant has committed a *[second] [third] [fourth] [fifth] [sixth] [seventh]* offense, then the fine you fix would replace the fine you reported to the Court by your verdict for Count _____. On the other hand, if you find that the defendant is not guilty of Count _____, then the fine which you set in the trial on Count _____ would be the fine for the case. As previously stated, the Court would fix other punishment.

You will take with you the indictment and the Court's previous written instructions. You should follow such previous instructions as to the law of consideration of evidence, deliberations, reasonable doubt, witnesses and any other relevant matters.

You may now retire to consider your verdict.

COMMENTS

1. A person whose convictions for violating DUI occur more than ten (10) years apart shall not be considered a multiple offender. T.C.A. §55-10-403(a)(3). However, prior convictions for vehicular homicide as a result of intoxication, aggravated vehicular homicide, vehicular assault and adult driving while impaired qualify if occurring any time within 20 years of the instant offense to qualify.

2. In addition to other punishment, a first offender's driver's license shall be revoked for one year; for a second offense, 2 years; for a third offense, 3 to 10 years for offenses committed prior to 7/1/11, 6 to 10 years for offenses committed on or after 7/1/11 but prior to 7/1/13, and 6 years for offenses committed on or after 7/1/13; for a fourth or subsequent offense, 5 years if committed prior to 7/1/11, and 8 years if committed on or after 7/1/11. T.C.A. §55-10-404(a)(1).

FOOTNOTES

1. T.C.A. §55-10-405(c), T.C.A. §55-10-418(b).

2. T.C.A. §55-10-405(a).

3. T.C.A. §55-10-405(b).

4. T.C.A. §55-10-403(a)(1).

5. T.C.A. §40-35-111(b)(3).

6. T.P.I.– Crim. 42.19, Inferences.