Administrative Office of the Courts

Nashville City Center, Suite 600
511 Union Street
Nashville, Tennessee 37219
615 / 741-2687 or 800 / 448-7970
FAX 615 / 741-6285

DEBORAH TAYLOR TATE
Director

M E M O R A N D U M
(12/23/17)

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 21st edition of the book was published in 2017. 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.

8.02 – Aggravated kidnapping

a) Add the phrase "during the removal or confinement" to the end of element 2(d) so that it reads as follows:

> that the alleged victim suffered serious bodily injury during the removal or confinement

b) Add a footnote to the end of element 2(d) and renumber subsequent footnotes accordingly.

c) The text of the new footnote should read as follows:

> State v. Henderson, No. W2015-00151-SC-R11-CD, 2017 WL 4414217 (Tenn. Oct. 5, 2017).

8.03- Especially aggravated kidnapping

a) Add a footnote after the word "confinement" in element 2(b). Renumber subsequent footnotes accordingly.

b) The text of the new footnote should reads as follows:

> If the defendant was a parent, guardian, or other person responsible for the general supervision of the minor's welfare, the indictment must allege, and the state must prove, that the minor

child was removed or confined by force, threat, or fraud. See the definition of "unlawfully" in this instruction and State v. Goodman, 90 S.W.3d 557, 565 (Tenn. 2002).

c) Add the phrase "during the removal or confinement" to the end of element 2(e) so that it reads as follows:

that the alleged victim suffered serious bodily injury during the removal or confinement

d) Add a footnote at the end of element 2(e) and renumber subsequent footnotes accordingly.

e) The text of the new footnote at the end of element 2(e) should read as follows:

State v. Henderson, No. W2015-00151-SC-R11-CD, 2017 WL 4414217 (Tenn. Oct. 5, 2017).

9.02 – Aggravated robbery

a) Add the following new bracketed paragraph after the paragraph that begins "The taking from the person…":

[If the act causing the alleged serious bodily injury suffered by the victim occurred after all intended taking from the person had been completed, the defendant cannot be guilty of aggravated robbery by serious bodily injury. A robbery accomplished with a deadly weapon is complete once the accused has completed his/her theft of all the property he/she intended to *[obtain] [exercise control over]*. If you find the victim suffered serious bodily injury, it is appropriate for you to consider the accused's conduct and intent when determining whether the underlying theft has been completed.]

b) Add at new footnote to the end of the new paragraph and renumber subsequent footnotes accordingly.

c) The text of the new footnote should read as follows:

State v. Henderson, No. W2015-00151-SC-R11-CD, 2017 WL 4414217 (Tenn. Oct. 5, 2017). The trial judge should use this language if there is a jury question as to whether or not the act causing the serious bodily injury occurred during the robbery or after it had been completed.

9.03 – Especially aggravated robbery

a) Add the following new bracketed paragraph after the paragraph that begins "The taking from the person…":

[If the act causing the alleged serious bodily injury suffered by the victim occurred after all intended taking from the person had been completed, the defendant cannot be guilty of especially aggravated robbery. A robbery accomplished with a deadly weapon is complete once the accused has completed his/her theft of all the property he/she intended to *[obtain] [exercise control over]*. If you find the victim suffered serious bodily injury, it is appropriate for you to consider the accused's conduct and intent when determining whether the underlying theft has been completed.]

b) Add at new footnote to the end of the new paragraph and renumber subsequent footnotes accordingly.

c) The text of the new footnote should read as follows:

State v. Henderson, No. W2015-00151-SC-R11-CD, 2017 WL 4414217 (Tenn. Oct. 5, 2017). The trial judge should use this language if there is a jury question as to whether or not the act causing the serious bodily injury occurred during the aggravated robbery or after it had been completed.

11.07 – Hindering secured creditors

a) Footnote 3 should be moved inside the closed bracket for the definition of "security interest".
b) After footnote 3, add the following inside the brackets:

> A security interest is created only if:
> (1) value has been given;
> (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
> (3) one (1) of the following conditions is met:
> (A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
> (B) the collateral is not a certificated security and is in the possession of the secured party under § 47-9-313 pursuant to the debtor's security agreement;
> (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under § 47-8-301 pursuant to the debtor's security agreement; or
> (D) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, or electronic documents, and the secured party has control under § 47-7-106, §47-9-104, § 47-9-105, § 47-9-106, and §47-9-107 pursuant to the debtor's security agreement.

c) After the closed bracket at the end of the new language above, add a new footnote and renumber subsequent footnotes accordingly.

d) The text of the new footnote should read as follows:

> T.C.A. §47-9-203. See also State v. Carey, No. E2016-01125-CCA-R3-CD, 2017 WL 3412150, at *8 (Tenn. Crim. App. Aug. 9, 2017).

11.08- Organized Retail Crime

a) Add attachment one to this memo as new instruction 11.08, Organized Retail Crime.

11.09- Worthless checks

a) In the bracketed paragraph that begins "It is an exception…", insert a new footnote after the first sentence that ends "… to insure payment."

b) The text of the footnote should read as follows:

> See Comment Four.

c) Add a new Comment Four.

d) The text of the new Comment Four should read as follows:

> If the proof shows by a preponderance of the evidence that the defendant asked the victim to hold the check for a few days, even though it was not post-dated, fraudulent intent is not established as a matter of law because the victim is relying on the defendant's promise at the time of issuance by agreeing to hold the check. While the defendant may be guilty of theft or subject to other civil penalties, he cannot be convicted of passing a worthless check because the fraudulent intent needed to establish the issuance of a worthless check is negated as a matter of law. State v. Bart Leo Tucker, No. M2016-01960-CCA-R3-CD, 2017 WL 3382802 (Tenn. Crim. App. Aug. 7, 2017).

e) Change the language of current footnote 10 so that it reads as follows:

> T.C.A. §39-14-121(a)(1).

f) Change the language of current footnote 18 so that it reads as follows:

> T.C.A. §39-14-121(a)(2).

g) The two sets of numbered sentences at the end of the instruction after the language "… the value falls within:…" should be deleted and replaced with the following:

1. One thousand dollars ($1,000) or less;
2. More than one thousand dollars ($1,000), but less than two thousand five hundred dollars ($2,500);
3. Two thousand five hundred dollars ($2,500) or more, but less than ten thousand dollars ($10,000);
4. Ten thousand dollars ($10,000) or more, but less than sixty thousand dollars ($60,000);
5. Sixty thousand dollars ($60,000) or more [**only for offenses committed on or after 7/1/12:** , but less than two hundred fifty thousand dollars ($250,000);
6. Two hundred fifty thousand dollars ($250,000) or more].

36.05(a) – Unlawful possession of a firearm by a convicted felon (for offenses committed on or after 7/1/08)

a) Change the language of Comment One to read as follows:

> Unlawful possession of a firearm by a defendant with a prior felony conviction involving the use or attempted use of force, violence, or a deadly weapon is a Class B felony, and is ineligible for probation. This offense is a Class C felony if committed prior to 7/1/17. T.C.A. §39-17-1307(b)(2). Unlawful possession of a firearm by a defendant with a prior felony drug conviction is a Class C felony. This is a Class D felony if committed prior to 7/1/17, and a Class E felony if committed prior to 7/1/12. T.C.A. §39-17-1307(b)(3).

T.P.I. – CRIM. 11.08

ORGANIZED RETAIL CRIME

Any person who commits the offense of Organized Retail Crime 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]

[Part A:

(1) that the defendant worked with one (1) or more persons to commit theft of any merchandise with a value exceeding one thousand dollars ($1,000) aggregated over a ninety-day period;

and

(2)(a) that the defendant did so with the intent to *[sell that property for monetary or other gain] [fraudulently return the merchandise to a retail merchant].*]

or

[Part B:

(1) that the defendant *[received] [possessed] [purchased]* any *[merchandise] [stored value cards]* obtained from a fraudulent return;

and

(2) that the defendant knew that the property was obtained by *[theft] [theft of merchandise]*.]

[Include here the elements of theft (11.01) or theft of merchandise (11.17)]

"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.[2]

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.[3]

"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.[4]

[There are two types of possession recognized in the law: actual possession and constructive possession. A person who knowingly has direct physical control over an object at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and intention at any given time to exercise dominion and control over an object is then in constructive possession of it.][5]

[The law also recognizes that possession may be sole or joint.[6] If one (1) person alone has actual or constructive possession of a thing, possession is sole. If two (2) or more persons have actual or constructive possession of a thing, their possession is joint.]

["Property" means anything of value, including but not limited to *[money] [real estate] [tangible or intangible personal property (including anything severed from land)] [library material] [contract rights] [chose-in-action] [interest in or claim*

to wealth] [credit] [admission or transportation tickets] [captured or domestic animals] [food and drink] [electric or other power].][7]

["Stored value card" means any card, gift card, instrument, or device issued with or without fee for the use of the cardholder to obtain money, goods, services, or anything else of value. Stored value cards include, but are not limited to, debit cards issued for use as a stored value card or gift card, and an account identification number or symbol used to identify a stored value card. "Stored value card" does not include a prepaid card usable at multiple, unaffiliated merchants or at automated teller machines, or both.][8]

[The trial judge should now instruct the jury with respect to fixing the value of the property obtained. See T.P.I. CRIM. -- 11.03(a).]

COMMENTS

1. Organized retail crime is punishable as theft. T.C.A. § 39-14-113(d). *See* the comment to T.P.I. – Crim. 11.01, Theft of property.

FOOTNOTES

1. T.C.A. § 39-14-113.

2. T.C.A. § 39-11-106(a)(18).

3. T.C.A. § 39-11-301(a)(2).

4. T.C.A. § 39-11-106(a)(20).

5. State v. Williams, 623 S.W.2d 121(Tenn. Crim. App. 1981).

6. State v. Copeland, 677 S.W.2d 471 (Tenn. Crim. App. 1984).

7. T.C.A. § 39-11-106(a)(28).

8. T.C.A. § 39-14-113(b).