

10.6 DISCHARGING A FIREARM [IN PUBLIC] [ON RESIDENTIAL PROPERTY]

§ 790.15, Fla. Stat.

To prove the crime of Discharging a Firearm [in Public] [on Residential Property], the State must prove the following element beyond a reasonable doubt:

Give a, b, c, and/or d as applicable.

- a. (Defendant) **knowingly discharged a firearm in a public place.**
- b. (Defendant) **knowingly discharged a firearm [on] [over] the right of way of a paved public road, highway, or street.**
- c. (Defendant) **knowingly discharged a firearm over an occupied premises.**
- d. (Defendant) **[recklessly] [negligently] discharged a firearm outdoors on property [used primarily as the site of a dwelling] [zoned exclusively for residential use].**

Definitions.

“Knowingly” means with full knowledge and intentionally.

“Recklessly” means with a conscious and intentional indifference to consequences.

“Negligently” means failing to use reasonable care under the circumstances.

Optional Definition.

A “public place” is any place intended or designed to be frequented or resorted to by the public.

§ 810.011(2), Fla. Stat.

“Dwelling” means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.

§ 790.001, Fla. Stat.

A “firearm” is any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive [including any machine gun or any destructive device]. [The term “firearm” does not include an antique firearm unless the antique firearm is used in the commission of a crime.]

§ 790.001, Fla. Stat.

["Antique firearm" means any firearm manufactured in or before 1918 (including any matchlock, flintlock, percussion cap, or similar early type of ignition system) or replica thereof, whether actually manufactured before or after the year 1918, and also any firearm using fixed ammunition manufactured in or before 1918, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.]

§ 790.001, Fla. Stat.

["Destructive device" means any bomb, grenade, mine, rocket, missile, pipebomb, or similar device containing an explosive, incendiary, or poison gas and includes any frangible container filled with an explosive, incendiary, explosive gas, or expanding gas, which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled; any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms; any type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and which has a barrel with a bore of one-half inch or more in diameter; and ammunition for such destructive devices, but not including shotgun shells or any other ammunition designed for use in a firearm other than a destructive device.

"Destructive device" does not include:

- a. a device which is not designed, redesigned, used, or intended for use as a weapon;**
- b. Any device, although originally designed as a weapon, which is redesigned so that it may be used solely as a signaling, line-throwing, safety, or similar device;**
- c. Any shotgun other than a short-barreled shotgun; or**
- d. Any nonautomatic rifle (other than a short-barreled rifle) generally recognized or particularly suitable for use for the hunting of big game.]**

Affirmative Defense. See § 790.15(1), Fla. Stat.

The statute and case law (with the exception of self-defense, defense of others, and defense of property case law) are silent as to 1) which party bears the burden of persuasion of the affirmative defense and 2) the standard for the burden of persuasion. Under the common law, defendants had both the burden of production and the burden of persuasion on an affirmative defense by a preponderance of the evidence.

The Florida Supreme Court has often decided, however, that once a defendant meets the burden of production on an affirmative defense, the burden of persuasion is

on the State to disprove the affirmative defense beyond a reasonable doubt (e.g., self-defense and consent to enter in a burglary prosecution). In the absence of case law, trial judges must resolve the issue via a special instruction. See the opinions in *Dixon v. United States*, 548 U.S. 1 (2006), for further guidance.

It is a defense to the crime of Discharging a Firearm [in Public] [on Residential Property] if the defendant was [lawfully defending life or property] [performing official duties requiring the discharge of a firearm] [discharging a firearm on public roads or property expressly approved for hunting by the Fish and Wildlife Conservation Commission or Division of Forestry].

If burden of persuasion is on the defendant:

If you find that defendant proved (insert appropriate burden of persuasion) that [he] [she] was [performing official duties requiring the discharge of a firearm] [discharging a firearm on public roads or property expressly approved for hunting by the Fish and Wildlife Conservation Commission or Division of Forestry], you should find [him] [her] not guilty. If the defendant did not prove (insert appropriate burden of persuasion) that [he] [she] was [performing official duties requiring the discharge of a firearm] [discharging a firearm on public roads or property expressly approved for hunting by the Fish and Wildlife Conservation Commission or Division of Forestry], you should find [him] [her] guilty, if all the elements of the charge have been proven beyond a reasonable doubt.

If burden of persuasion is on the State:

If you find that the State proved (insert appropriate burden of persuasion) that the defendant was not [lawfully defending life or property] [performing official duties requiring the discharge of a firearm] [discharging a firearm on public roads or property expressly approved for hunting by the Fish and Wildlife Conservation Commission or Division of Forestry], you should find [him] [her] guilty, if all of the elements of the charge have been proven beyond a reasonable doubt. However, if the State failed to prove (insert appropriate burden of persuasion) that the defendant was not [lawfully defending life or property] [performing official duties requiring the discharge of a firearm] [discharging a firearm on public roads or property expressly approved for hunting by the Fish and Wildlife Conservation Commission or Division of Forestry], you should find [him] [her] not guilty.

Lesser Included Offenses

DISCHARGING A FIREARM [IN PUBLIC] [ON RESIDENTIAL PROPERTY] — 790.15			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

As of October 2020, the term “in a public place” has not been defined for purposes of this statute by the Florida Supreme Court or a District Court of Appeal.

Similarly, neither the Florida Supreme Court nor any District Court of Appeal have determined whether cells or common areas inside of a jail or a prison are “in a public place.” The term “public place” has been interpreted to include the inside of a vehicle that is located in a public parking lot and the inside of a stall in a public restroom if freely visible from a public area. *See State v. Folks*, 723 So. 2d 369 (Fla. 4th DCA 1998) and *Ward v. State*, 636 So. 2d 68 (Fla. 5th DCA 1994). When crafting a special instruction for unique circumstances, trial judges may also want to consider § 876.11, Fla. Stat., which provides a definition of “public place” that includes all walks, alleys, streets, boulevards, avenues, lanes, roads, highways or other ways or thoroughfares dedicated to public use or owned or maintained by public authority, and all grounds and buildings owned, leased by, operated, or maintained by public authority.

This instruction was adopted in 1981 and was amended in 1989 [543 So. 2d 1205], 2013 [131 So. 3d 755], 2016 [190 So. 3d 614], and on November 20, 2020.