

Proposed amendments to 13 Standard Jury Instructions in Criminal Cases

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases submits the following amended instructions for comment. The committee proposes the following:

- 10.6 – DISCHARGING A FIREARM [IN PUBLIC] [ON RESIDENTIAL PROPERTY]**
- 11.1 – SEXUAL BATTERY – VICTIM LESS THAN 12 YEARS OF AGE**
- 11.2 – SEXUAL BATTERY – VICTIM 12 YEARS OF AGE OR OLDER – GREAT FORCE OR DEADLY WEAPON**
- 11.3 – SEXUAL BATTERY – UNDER SPECIFIED CIRCUMSTANCES**
- 11.4 – SEXUAL BATTERY**
- 11.6 – ENGAGING IN AN ACT WHICH CONSTITUTES SEXUAL BATTERY UPON OR WITH A CHILD 12 YEARS OF AGE OR OLDER BUT YOUNGER THAN 18 YEARS OF AGE BY PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY**
- 11.6(a) – ENGAGING IN AN ACT [WHICH CONSTITUTES SEXUAL BATTERY] [INJURED THE SEXUAL ORGAN OF ANOTHER IN AN ATTEMPT TO COMMIT SEXUAL BATTERY] BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY UPON A PERSON LESS THAN 12 YEARS OF AGE**
- 11.10(c) – LEWD OR LASCIVIOUS MOLESTATION**
- 11.10(d) – LEWD OR LASCIVIOUS CONDUCT**
- 11.10(e) – LEWD OR LASCIVIOUS EXHIBITION PRESENCE OF CHILD**
- 11.10(f) – LEWD OR LASCIVIOUS EXHIBITION OVER COMPUTER SERVICE**
- 11.9 – UNLAWFUL EXPOSURE OF SEXUAL ORGANS**
- 29.1 – DISORDERLY INTOXICATION**

The committee invites all interested persons to comment on the proposals, reproduced in full at www.floridabar.org/news/news-journal under the Notices tab. Comments must be received by the committee in either electronic format or hard copy on or before November 6, 2020. The committee will review all comments received in response to the proposals at its next meeting and will consider amendments based upon the comments received. File your comments electronically to CrimJuryInst@flcourts.org, in the format of a Word document. If you cannot file electronically, mail a hard copy of the comment to 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 32399-1900.

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.

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

“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(6), 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(1), 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(4), 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 September 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], ~~and~~ 2016 [190 So. 3d 614], and 2020.

11.1 SEXUAL BATTERY —

VICTIM LESS THAN 12 YEARS OF AGE

§§ 794.011(2)(a) and (2)(b), Fla. Stat.

To prove the crime of Sexual Battery upon a Person Less Than 12 Years of Age, the State must prove the following three elements beyond a reasonable doubt:

Give 1a, 1b, 1c, and/or 1d as applicable.

1.
 - a. (Defendant) **committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].**
 - b. (Defendant) **committed an act [upon] [with] (victim) in which the [anus] [vagina] of [(victim)] [(defendant)] was penetrated by an object.** *The definition of “an object” includes a finger.*
 - c. (Defendant) **injured the sexual organ of (victim) in an attempt to commit an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] would have penetrated or would have had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].**
 - d. (Defendant) **injured the sexual organ of (victim) in an attempt to commit an act upon (victim) in which the [anus] [vagina] of (victim) would be penetrated by an object.** *The definition of “an object” includes a finger.*
2. **At the time of the offense, (victim) was less than 12 years of age.**

Give 3a or 3b as applicable.

3.
 - a. **At the time of the offense, (defendant) was 18 years of age or older.**
 - b. **At the time of the offense, (defendant) was less than 18 years of age.**

Give if applicable.

§ 794.011(1)(h), Fla. Stat.

However, any act done for bona fide medical purposes is not a sexual battery.

§ 794.021, Fla. Stat.

Ignorance of (victim's) age, (victim's) misrepresentation of his or her age, or a defendant's bona fide belief of (victim's) age is not a defense to the crime charged.

Give if applicable.

Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

"An object" includes a finger.

Give if applicable.

"Bona fide" means genuine.

"Union" means contact.

Give if requested. Khianthlat v. State, 974 So. 2d 359 (Fla. 2008).

Consent of (victim) is not a defense to the crime charged.

Give if requested. § 794.022, Fla. Stat.

(Victim's) lack of chastity is not a defense to the crime charged.

§ 794.021, Fla. Stat.

~~Ignorance of (victim's) age, (victim's) misrepresentation of his or her age, or a defendant's bona fide belief of (victim's) age is not a defense to the crime charged.~~

Lesser-Included Offenses

CAPITAL SEXUAL BATTERY — VICTIM UNDER 12, DEFENDANT 18 OR OVER — 794.011(2)(a)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sexual battery (Defendant less than 18, victim less than 12)		794.011(2)(b)	11.1
Sexual battery (Defendant 18 or older, victim 12 or older but less than 18)		794.011(5)(a)	11.4
Sexual battery (Defendant 18 or older, victim 18 or older)		794.011(5)(b)	11.4
Sexual battery (Defendant younger than 18, victim 12 or older)		794.011(5)(c)	11.4
Lewd or lascivious battery (Victim 12 or older but less than 16)		800.04(4)(a)1.	11.10(a)
Lewd or lascivious battery (Victim less than 16)*		800.04(4)(a)2.*	11.10(b)*
Battery		784.03(1)(a)1.	8.3
	<u>Sexual battery (Defendant less than 18, victim less than 12)</u>	<u>794.011(2)(b)</u>	<u>11.1</u>
	<u>Sexual battery (Defendant 18 or older, victim 12 or older but less than 18)</u>	<u>794.011(5)(a)</u>	<u>11.4</u>
	<u>Sexual battery (Defendant 18 or older, victim 18 or older)</u>	<u>794.011(5)(b)</u>	<u>11.4</u>
	<u>Sexual battery (Defendant younger than 18, victim 12 or older)</u>	<u>794.011(5)(c)</u>	<u>11.4</u>
	<u>Lewd or lascivious battery (Victim 12 or older but less than 16)</u>	<u>800.04(4)(a)1.</u>	<u>11.10(a)</u>

	<u>Lewd or lascivious battery (Victim less than 16)*</u>	<u>800.04(4)(a)2.*</u>	<u>11.10(b)*</u>
	Attempt	777.04(1)	5.1
	Aggravated Battery	784.045(1)(a)	8.4
	Felony Battery	784.041(1)	8.5
	Aggravated assault	784.021(1)(a)	8.2
	Battery	784.03(1)(a)2.	8.3
	Assault	784.011	8.1

Comments

~~If the ages of either the defendant or the alleged victim are not in dispute, the parties may agree to pare down the necessary lesser included offenses.~~

In *Allen v. State*, 298 So. 3d 704 (Fla. 1st DCA 2020); review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020), the court stated “the offense of sexual battery cannot constitute a necessarily lesser included offense of capital sexual battery” as each crime has different requirements as to the victim’s age.

*It is unclear whether the “encouraging, forcing, or enticing any person less than 16 years of age to engage in ... any other act involving sexual activity” part of Lewd or Lascivious Battery in § 800.04(4)(a)2., Fla. Stat., is a necessary lesser-included offense of § 794.011(2)(a), Fla. Stat., or § 794.011(2)(b), Fla. Stat. If so, the judge should instruct only on “sexual activity” and not on “sodomasochistic abuse, sexual bestiality, or prostitution,” unless those acts are included in the charging document.

In § 794.011(8)(c), Fla. Stat., the legislature created a crime that mirrors this crime except 1) the phrase “engages in any act ... which constitutes sexual battery” is used and 2) there is an additional element that the defendant was in a position of familial or custodial authority to the victim. See Instruction 11.6(a).

~~There are also sex-related crimes that could be Category 2 offenses depending on the charging document and the evidence.~~

See Instruction 11.16 or 11.16(a) if the State charged that the defendant qualified as a Dangerous Sexual Felony Offender, pursuant to § 794.0115, Fla. Stat.

This instruction was adopted in 1981 and was amended in 1987 [508 So.2d 1221], 1995 [657 So. 2d 1152], 2007 [863 So. 2d 236], 2015 [156 So. 3d 1037], and 2016 [190 So. 3d 1055], and 2020.

**11.2 SEXUAL BATTERY — VICTIM 12 YEARS OF
AGE OR OLDER — GREAT FORCE OR DEADLY WEAPON**
§ 794.011(3), Fla. Stat.

To prove the crime of Sexual Battery upon a Person 12 Years of Age or Older with the Use of [a Deadly Weapon] [or] [Physical Force Likely to Cause Serious Personal Injury], the State must prove the following four elements beyond a reasonable doubt:

Give 1a or 1b or both as applicable.

1. a. (Defendant) **committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].**
- b. (Defendant) **committed an act [upon] [with] (victim) in which the [anus] [vagina] of [(victim)] [(defendant)] was penetrated by an object.**

Give 2a or 2b or both as applicable.

2. (Defendant), **in the process,**
 - a. **used or threatened to use a deadly weapon.**
 - b. **used actual physical force likely to cause serious personal injury.**
3. **The act was done without the consent of (victim).**
4. **At the time of the offense, (victim) was 12 years of age or older.**

Definitions.

Give in all cases. § 794.011(1)(a), Fla. Stat.

“Consent” means intelligent, knowing, and voluntary consent and does not include coerced submission. Consent does not mean the failure by the alleged victim to offer physical resistance to the offender.

Give if applicable.

§ 794.022(4), Fla. Stat.

Evidence of (victim’s) mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing, and voluntary consent.

§ 794.011(1)(c), Fla. Stat.

“Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

§ 794.011(1)(b), Fla. Stat.

“Mentally defective” means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

“An object” includes a finger.

“Union” means contact.

Give if 2a alleged.

A “deadly weapon” is any object that will likely cause death or great bodily harm if used or threatened to be used in the ordinary and usual manner contemplated by its design and construction.

Give if applicable.

An object not designed to inflict bodily harm may nonetheless be a “deadly weapon” if it was used or threatened to be used in a manner likely to cause death or great bodily harm.

Give if 2b alleged.

§ 794.011(1)(g), Fla. Stat.

“Serious personal injury” means great bodily harm or pain, permanent disability, or permanent disfigurement.

“Great bodily harm” means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises.

Give if applicable. § 794.011(1)(h), Fla. Stat.

However, any act done for bona fide medical purposes is not a sexual battery. ~~“Bona fide” means genuine.~~

§ 794.021, Fla. Stat.

Ignorance of (victim’s) age, (victim’s) misrepresentation of his or her age, or a defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Give if applicable.

“Bona fide” means genuine.

Give if requested. § 794.022, Fla. Stat.

(Victim’s) lack of chastity is not a defense to the crime charged.

Lesser-Included Offenses

SEXUAL BATTERY — VICTIM OVER 12 — WEAPON OR FORCE — 794.011(3)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sexual battery (Defendant 18 or older, victim 12 or older but less than 18)		794.011(5)(a)	11.4
Sexual battery (Defendant 18 or older, victim 18 or older)		794.011(5)(b)	11.4
Sexual battery (Defendant younger than 18, victim 12 or older)		794.011(5)(e)	11.4
Lewd or lascivious battery (Victim 12 or older but less than 16)		800.04(4)(a)1.	11.10(a)
Lewd or lascivious battery (Victim less than 16)*		800.04(4)(a)2.*	11.10(b)*
Battery		784.03(1)(a)1.	8.3
	<u>Sexual battery (Defendant 18 or older, victim 12 or older but less than 18)</u>	<u>794.011(5)(a)</u>	<u>11.4</u>
	<u>Sexual battery (Defendant 18 or older, victim 18 or older)</u>	<u>794.011(5)(b)</u>	<u>11.4</u>
	<u>Sexual battery (Defendant younger than 18, victim 12 or older)</u>	<u>794.011(5)(c)</u>	<u>11.4</u>
	<u>Lewd or lascivious battery (Victim 12 or older but less than 16)</u>	<u>800.04(4)(a)1.</u>	<u>11.10(a)</u>
	<u>Lewd or lascivious battery (Victim less than 16)*</u>	<u>800.04(4)(a)2.*</u>	<u>11.10(b)*</u>
	Attempt	777.04(1)	5.1
	Aggravated battery	784.045(1)(a)	8.4
	Felony battery	784.041(1)	8.5
	Aggravated assault	784.021(1)(a)	8.2
	Battery	784.03(1)(a)2.	8.3
	Assault	784.011	8.1

Comments

If the ages of either the defendant or the alleged victim are not in dispute, the parties may agree to pare down the necessary lesser included offenses. The offenses in §§ 794.011(5)(a) — (5)(e), Fla. Stat., however, are included in any sexual battery offense charged under § 794.011(3), Fla. Stat., according to § 794.011(6)(a), Fla. Stat.

In *Allen v. State*, 298 So. 3d 704 (Fla. 1st DCA 2020); review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020), the court stated “the offense of sexual battery cannot constitute a necessarily lesser included offense of capital sexual battery” as each crime has different requirements as to the victim’s age.

*It is unclear whether the “encouraging, forcing, or enticing any person less than 16 years of age to engage in ... any other act involving sexual activity” part of Lewd or Lascivious Battery in § 800.04(4)(a)2., Fla. Stat., is a necessary lesser-included offense of § 794.011(3), Fla. Stat. If so, the judge should instruct only on “sexual activity” and not on “sodomasochistic abuse, sexual bestiality, or prostitution,” unless those acts are included in the charging document.

~~There are also sex-related crimes that could be Category 2 offenses depending on the charging document and the evidence.~~

See Instruction 11.16 or 11.16(a) if the State charged that the defendant qualified as a Dangerous Sexual Felony Offender, pursuant to § 794.0115, Fla. Stat.

The 2014 legislature added a sentencing multiplier to § 921.0024(1)(b), Fla. Stat., for sexual battery crimes involving a defendant 18 years of age or older and a victim younger than 18 years of age. If the State has charged and intends to use this sentencing multiplier, a special instruction will be necessary for the jury to make additional findings regarding ages.

A special instruction will be necessary in cases where the deadly weapon was an animal or a substance or something that is not commonly referred to as an “object.”

This instruction was adopted in 1981 and ~~was~~ amended in 1987 [508 So.2d 1221], 1995 [657 So. 2d 1152], 2003 [850 So. 2d 1272], 2008 [995 So. 2d 476], 2015 [156 So. 3d 1037], 2016 [190 So. 3d 1055], ~~and~~ on April 3, 2020, and 2020.

11.3 SEXUAL BATTERY — UNDER SPECIFIED CIRCUMSTANCES

§§ 794.011(4)(a), (4)(b), (4)(c), and (4)(d), Fla. Stat.

To prove the crime of Sexual Battery Under Specified Circumstances, the State must prove the following five elements beyond a reasonable doubt:

Give 1a and/or 1b as applicable.

1. a. (Defendant) **committed an act [upon] [with]** (victim) **in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].**
- b. (Defendant) **committed an act [upon] [with]** (victim) **in which the [anus] [vagina] of [(victim)] [(defendant)] was penetrated by an object.** *The definition of “an object” includes a finger.*

Give 2a – 2g as applicable.

2. a. (Victim) **was physically helpless to resist.**

- b. (Defendant) **coerced (victim) to submit by threatening to use force or violence likely to cause serious personal injury on (victim) and (victim) reasonably believed the (defendant) had the present ability to execute the threat.**

- c. (Defendant) **coerced (victim) to submit by threat of retaliation against (victim) or any other person and (victim) reasonably believed that (defendant) had the ability to execute the threat in the future.**

- d. (Defendant), **without prior knowledge or consent of (victim), administered or had knowledge of someone else administering to (victim) a narcotic, anesthetic, or other intoxicating substance that mentally or physically incapacitated (victim).**

- e. (Victim) **was mentally defective and (defendant) had reason to believe this or had actual knowledge of that fact.**

- f. (Victim) **was physically incapacitated.**

- g. (Defendant) **was at the time a[n] (insert official title or position) and was a[n] [certified [law enforcement officer] [correctional officer] [correctional probation officer]] [elected official exempt from certification] [person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting] and the [officer] [official] [person] was acting in such a manner as to lead (victim) to reasonably believe that (defendant) was in a position of control or authority as an agent or employee of government.**

3. (Defendant's) act was committed without the consent of (victim).

Give 4a or 4b as applicable.

4. a. At the time of the offense, (victim) was 12 years of age or older [but younger than 18 years of age].

b. At the time of the offense, (victim) was 18 years of age or older.

Give 5a or 5b as applicable.

5. a. At the time of the offense, (defendant) was 18 years of age or older.

b. At the time of the offense, (defendant) was younger than 18 years of age.

Definitions.

Give in all cases.

§ 794.011(1)(a), Fla. Stat.

“Consent” means intelligent, knowing, and voluntary consent and does not include coerced submission. Consent does not mean the failure by the alleged victim to offer physical resistance to the offender.

Give if applicable.

§ 794.011(9), Fla. Stat.

Acquiescence to a person reasonably believed by (victim) to be in a position of authority or control does not constitute consent and it is not a defense that (defendant) was not actually in a position of control or authority if the circumstances were such as to lead (victim) to reasonably believe that [he] [she] was in such a position.

§ 794.022(4), Fla. Stat.

Evidence of (victim's) mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing, and voluntary consent.

§ 794.011(1)(c), Fla. Stat.

"Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

§ 794.011(1)(b), Fla. Stat.

"Mentally defective" means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

"An object" includes a finger.

"Union" means contact.

Give if 2a alleged. § 794.011(1)(e), Fla. Stat.

"Physically helpless" means that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to act.

Give if 2b alleged. § 794.011(1)(g), Fla. Stat.

"Serious personal injury" means great bodily harm or pain, permanent disability, or permanent disfigurement.

Give if 2f alleged. § 794.011(1)(j), Fla. Stat.

“Physically incapacitated” means that a person is bodily impaired or handicapped and substantially limited in his or her ability to resist or flee an act.

Give if applicable. § 794.011(1)(h), Fla. Stat.

However, any act done for bona fide medical purposes is not a sexual battery.

Give if applicable. § 794.021, Fla. Stat.

Ignorance of (victim’s) age, (victim’s) misrepresentation of his or her age, or a defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Give if applicable.

“Bona fide” means genuine.

Give if requested. § 794.022, Fla. Stat.

(Victim’s) lack of chastity is not a defense to the crime charged.

Give if applicable. § 794.021, Fla. Stat.

~~Ignorance of (victim’s) age, (victim’s) misrepresentation of his or her age, or a defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.~~

§ 775.0862, Fla. Stat.

Enhancement for sexual battery against student by school authority figure.

Applicable only to §§ 794.011(4)(b), (4)(c), and (4)(d), Fla. Stat.

If you find that (defendant) committed the crime of Sexual Battery Under Specified Circumstances, you must also determine whether the State has proved beyond a reasonable doubt that (defendant) was an authority figure at a school and (victim) was a student at the same school.

“Authority figure” means a person 18 years of age or older who is employed by, volunteering at, or under contract with a school.

“School” means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, [or other public school level authorized under the rules of the State Board of Education]. The term “school” does not include facilities dedicated exclusively to the education of adults. *If needed, insert appropriate definitions from § 775.0862(1)(b), Fla. Stat. for “private school” or “voluntary prekindergarten education program” or “early learning program” or “public school as described in § 402.3025(1)” or “the Florida School for the Deaf and the Blind” or the “Florida Virtual School” or the “K-8 Virtual School.”*

“Student” means a person younger than 18 years of age who is enrolled at a school.

Lesser-Included Offenses

SEXUAL BATTERY — DEFENDANT 18 OR OLDER; VICTIM 12 – LESS THAN 18 — UNDER SPECIFIED CIRCUMSTANCES — 794.011(4)(a)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sexual battery under specified circumstances (Defendant 18 or older, victim 18 or older)		794.011(4)(b)	11.3
Sexual battery under specified circumstances (Defendant younger than 18, victim 12 or older)		794.011(4)(c)	11.3
Sexual battery*		794.011(5)(a)*	11.4*
Lewd or lascivious battery (Victim 12 or older but less than 16)		800.04(4)(a)1.	11.10(a)
Lewd or lascivious battery (Victim less than 16)**		800.04(4)(a)2.**	11.10(b)**
Battery		784.03(1)(a)1.	8.3
	<u>Sexual battery under specified circumstances (Defendant 18 or older, victim 18 or older)</u>	<u>794.011(4)(b)</u>	<u>11.3</u>
	<u>Sexual battery under specified circumstances (Defendant younger than 18, victim 12 or older)</u>	<u>794.011(4)(c)</u>	<u>11.3</u>
	<u>Sexual battery*</u>	<u>794.011(5)(a)*</u>	<u>11.4*</u>
	<u>Lewd or lascivious battery (Victim 12 or older but less than 16)</u>	<u>800.04(4)(a)1.</u>	<u>11.10(a)</u>
	<u>Lewd or lascivious battery (Victim less than 16)**</u>	<u>800.04(4)(a)2.**</u>	<u>11.10(b)**</u>

	Attempt	777.04(1)	5.1
	Aggravated battery	784.045(1)	8.4
	Felony battery	784.041(1)	8.5
	Aggravated assault	784.021(1)(a)	8.2
	Battery	784.03(1)(a)2.	8.3
	Assault	784.011	8.1

Comments

~~* If the ages of either the defendant or the alleged victim are not in dispute, the parties may agree to pare down the necessary lesser included offenses. The offenses in §§ 794.011(5)(a) – (5)(d), Fla. Stat., are included in any sexual battery offense charged under §§ 794.011(4)(a) – (4)(d), Fla. Stat., respectively, pursuant to §§ 794.011(6)(b) – (6)(e), Fla. Stat.~~

In *Allen v. State*, 298 So. 3d 704 (Fla. 1st DCA 2020); review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020), the court stated “the offense of sexual battery cannot constitute a necessarily lesser included offense of capital sexual battery” as each crime has different requirements as to the victim’s age.

**It is unclear whether the “encouraging, forcing, or enticing any person less than 16 years of age to engage in ... any other act involving sexual activity” part of Lewd or Lascivious Battery in § 800.04(4)(a)2., Fla. Stat., is a necessary lesser-included offense of § 794.011(4), Fla. Stat. If so, the judge should instruct only on “sexual activity” and not on “sodomasochistic abuse, sexual bestiality, or prostitution,” unless those acts are included in the charging document.

~~There are also sex-related crimes that could be Category 2 offenses depending on the charging document and the evidence.~~

Element 3g: See §§ 943.10(1), (2), (3), (6), (7), (8), (9), Fla. Stat., for the definition of a law enforcement officer, correctional officer, or correctional probation officer who must be either certified

pursuant to § 943.1395, Fla. Stat., or an elected officer exempt from certification pursuant to § 943.253, Fla. Stat.

If § 794.011(4)(d), Fla. Stat., is charged, this instruction can be used as a template with some amendments. Under that statute, the victim must be 12 years of age or older, the age of the defendant is irrelevant, and most of the alternatives regarding the prior conviction can probably be proven to the judge at a sentencing hearing. However, for an enhancement involving a prior conviction for a Kidnapping or False Imprisonment involving a minor, wherein the defendant committed a sexual battery or some enumerated lewd act upon the minor during the course of the kidnapping or false imprisonment, then *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is likely to require the jury to make certain findings regarding additional circumstances of the prior conviction.

See Instruction 11.16 or 11.16(a) if the State charged that the defendant qualified as a Dangerous Sexual Felony Offender, pursuant to § 794.0115, Fla. Stat.

In the event that multiple perpetrators is charged and proven, a special instruction is necessary. See § 794.023, Fla. Stat.

This instruction was adopted in 1981 and was amended in 1987 [508 So.2d 1221], 1992 [603 So.2d 1175], 1995 [657 So.2d 1152], 2003 [850 So.2d 1272], 2008 [995 So. 2d 476], 2015 [156 So. 3d 1037], and 2016 [190 So. 3d 1055], and 2020.

11.4 SEXUAL BATTERY

§§ 794.011(5)(a), (5)(b), (5)(c), and (5)(d), Fla. Stat.

To prove the crime of Sexual Battery, the State must prove the following four elements beyond a reasonable doubt:

Give 1a or 1b as applicable.

1. a. (Defendant) **committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].**

- b. (Defendant) committed an act [upon] [with] (victim) in which the [anus] [vagina] of [(victim)] [(defendant)] was penetrated by an object. *The definition of "an object" includes a finger.*

2. (Defendant's) act was committed without the consent of (victim).

Give 3a or 3b as applicable.

3. a. At the time of the offense, (victim) was 12 years of age or older [but younger than 18 years of age].
- b. At the time of the offense, (victim) was 18 years of age or older.

Give 4a or 4b as applicable.

4. a. At the time of the offense, (defendant) was 18 years of age or older.
- b. At the time of the offense, (defendant) was younger than 18 years of age.

Definitions.

Give in all cases. § 794.011(1)(a), Fla. Stat.

"Consent" means intelligent, knowing, and voluntary consent and does not include coerced submission. Consent does not mean the failure by the alleged victim to offer physical resistance to the offender.

Give if applicable.

§ 794.022(4), Fla. Stat.

Evidence of (victim's) mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing, and voluntary consent.

§ 794.011(1)(c), Fla. Stat.

“Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

§ 794.011(1)(b), Fla. Stat.

“Mentally defective” means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

Lahey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

“An object” includes a finger.

“Union” means contact.

§ 794.011(1)(h), Fla. Stat.

However, any act done for bona fide medical purposes is not a sexual battery.

§ 794.021, Fla. Stat.

Ignorance of (victim’s) age, (victim’s) misrepresentation of his or her age, or a defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Give if applicable.

“Bona fide” means genuine.

Give if requested. § 794.022, Fla. Stat.

(Victim's) lack of chastity is not a defense to the crime charged.

§ 775.0862, Fla. Stat.

Enhancement for sexual battery against student by school authority figure.

If you find that (defendant) committed the crime of Sexual Battery, you must also determine whether the State has proved beyond a reasonable doubt that (defendant) was an authority figure at a school and (victim) was a student at the same school.

“Authority figure” means a person 18 years of age or older who is employed by, volunteering at, or under contract with a school.

“School” means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, [or other public school level authorized under the rules of the State Board of Education]. The term “school” does not include facilities dedicated exclusively to the education of adults. *If needed, insert appropriate definitions from § 775.0862(1)(b), Fla. Stat. for “private school” or “voluntary prekindergarten education program” or “early learning program” or “public school as described in § 402.3025(1)” or “the Florida School for the Deaf and the Blind” or the “Florida Virtual School” or the “K-8 Virtual School.”*

“Student” means a person younger than 18 years of age who is enrolled at a school.

Lesser-Included Offenses

SEXUAL BATTERY — DEFENDANT 18 OR OVER; VICTIM 12–LESS THAN 18 — WITHOUT FORCE — 794.011(5)(a)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sexual battery (Defendant 18 or older, victim 18 or older)		794.011(5)(b)	11.4
Sexual battery (Defendant younger than 18, victim 12 or older)		794.011(5)(c)	11.4
Lewd or lascivious battery (Victim 12 or older but less than 16)		800.04(4)(a)1.	11.10(a)
Lewd or lascivious battery (Victim less than 16)*		800.04(4)(a)2.*	11.10(b)*
Battery		784.03(1)(a)1.	8.3
	<u>Sexual battery (Defendant 18 or older, victim 18 or older)</u>	<u>794.011(5)(b)</u>	<u>11.4</u>
	<u>Sexual battery (Defendant younger than 18, victim 12 or older)</u>	<u>794.011(5)(c)</u>	<u>11.4</u>
	<u>Lewd or lascivious battery (Victim 12 or older but less than 16)</u>	<u>800.04(4)(a)1.</u>	<u>11.10(a)</u>
	<u>Lewd or lascivious battery (Victim less than 16)*</u>	<u>800.04(4)(a)2.*</u>	<u>11.10(b)*</u>
	Attempt	777.04(1)	5.1
	Aggravated battery	784.045(1)	8.4

	Felony battery	784.041(1)	8.5
	Aggravated Assault	784.021(1)(a)	8.2
	Battery	784.03(1)(a)2.	8.3
	Assault	784.011	8.1

Comments

~~If the ages of either the defendant or the alleged victim are not in dispute, the parties may agree to pare down the necessary lesser included offenses.~~

In *Allen v. State*, 298 So. 3d 704 (Fla. 1st DCA 2020); review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020), the court stated “the offense of sexual battery cannot constitute a necessarily lesser included offense of capital sexual battery” as each crime has different requirements as to the victim’s age.

*It is unclear whether the “encouraging, forcing, or enticing any person less than 16 years of age to engage in ... any other act involving sexual activity” part of Lewd or Lascivious Battery in § 800.04(4)(a)2., Fla. Stat., is a necessary lesser-included offense of § 794.011(5), Fla. Stat. If so, the judge should instruct only on “sexual activity” and not on “sodomasochistic abuse, sexual bestiality, or prostitution,” unless those acts are included in the charging document.

~~There are also sex-related crimes that could be Category 2 offenses depending on the charging document and the evidence.~~

If § 794.011(5)(d), Fla. Stat., is charged, this instruction can be used as a template with some amendments. Under that statute, the victim must be 12 years of age or older, the age of the defendant is irrelevant, and most of the alternatives regarding the prior conviction can probably be proven to the judge at a sentencing hearing. However, for an enhancement involving a prior conviction for a Kidnapping or False Imprisonment involving a minor, wherein the defendant committed a sexual battery or some enumerated lewd act upon the minor during the course of the kidnapping or false imprisonment, then *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is likely to require the jury to make certain findings regarding additional circumstances of the prior conviction.

See Instruction 11.16 or 11.16(a) if the State charged that the defendant qualified as a Dangerous Sexual Felony Offender, pursuant to § 794.0115, Fla. Stat.

In the event ~~that~~ multiple perpetrators is charged and proven, a special instruction is necessary. See § 794.023, Fla. Stat.

This instruction was adopted in 1981 and was amended in 1987 [508 So. 2d 1221], 1995 [657 So. 2d 1152], 2003 [850 So. 2d 1272], 2015 [156 So. 3d 1037], ~~and~~ 2016 [190 So. 3d 1055], and 2020.

11.6 ENGAGING IN AN ACT WHICH CONSTITUTES SEXUAL BATTERY UPON OR WITH A CHILD 12 YEARS OF AGE OR OLDER BUT YOUNGER THAN 18 YEARS OF AGE BY PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY

§ 794.011(8)(b), Fla. Stat.

To prove the crime of Engaging in an Act Which Constitutes Sexual Battery Upon or With a Child 12 Years of Age or Older but Younger than 18 Years of Age by a Person in a Familial or Custodial Authority, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **engaged in any act which constituted sexual battery.**

2. **At the time of the offense, (victim) was 12 years of age or older but younger than 18 years of age.**

3. **At the time of the offense, (defendant) was in a position of familial or custodial authority to (victim).**

“Sexual Battery” means:

- a. **the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)];**

or

- b. **the [anus] [vagina] of [(victim)] [(defendant)] was penetrated by an object.**
The definition of "an object" includes a finger.

§ 794.011(8), Fla. Stat.

It is not a defense that (victim) was willing to engage in an act which constitutes sexual battery or consented to engage in such act.

Give if applicable. § 794.011(1)(h), Fla. Stat.

However, any act done for bona fide medical purposes is not a sexual battery.

§ 794.021, Fla. Stat.

Ignorance of (victim's) age, (victim's) misrepresentation of his or her age, or a defendant's bona fide belief of (victim's) age is not a defense to the crime charged.

Give if applicable.

"Bona fide" means genuine.

Definitions. Give if applicable.

Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

"An object" includes a finger.

"Union" means contact.

Give if requested. § 794.022, Fla. Stat.

(Victim's) lack of chastity is not a defense to the crime charged.

~~§ 794.021, Fla. Stat.~~

~~Ignorance of (victim's) age, (victim's) misrepresentation of his or her age, or a defendant's bona fide belief of (victim's) age is not a defense to the crime charged.~~

§ 775.0862, Fla. Stat.

Enhancement for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Engaging in an Act Which Constitutes Sexual Battery Upon or With a Child 12 Years of Age or Older but Younger than 18 Years of Age by a Person in a Familial or Custodial Authority, you must also determine whether the State has proved beyond a reasonable doubt that (defendant) was an authority figure at a school and (victim) was a student at the same school.

“Authority figure” means a person 18 years of age or older who is employed by, volunteering at, or under contract with a school.

“School” means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, [or other public school level authorized under the rules of the State Board of Education]. The term “school” does not include facilities dedicated exclusively to the education of adults. *If needed, insert appropriate definitions from § 775.0862(1)(b), Fla. Stat., for “private school” or “voluntary prekindergarten education program” or “early learning program” or “public school as described in § 402.3025(1)” or “the Florida School for the Deaf and the Blind” or the “Florida Virtual School” or the “K-8 Virtual School.”*

“Student” means a person younger than 18 years of age who is enrolled at a school.

Lesser-Included Offenses

ENGAGING IN AN ACT WHICH CONSTITUTES SEXUAL BATTERY UPON OR WITH A CHILD 12 YEARS OF AGE OR OLDER BUT YOUNGER THAN 18 YEARS OF AGE BY PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY — 794.011(8)(b)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sexual battery (Defendant 18 or older, victim 12 or older but younger than 18)		794.011(5)(a)	11.4
Sexual battery (Defendant 18 or older, victim 18 or older)		794.011(5)(b)	11.4
Sexual battery (Defendant younger than 18, victim 12 or older)		794.011(5)(c)	11.4
Lewd or lascivious battery (Victim 12 or older but younger than 16)		800.04(4)(a)1.	11.10(a)
Lewd or lascivious battery (Victim younger than 16)*		800.04(4)(a)2.*	11.10(b)*
Battery		784.03(1)(a)1.	8.3
	<u>Sexual battery (Defendant 18 or older, victim 12 or older but younger than 18)</u>	<u>794.011(5)(a)</u>	<u>11.4</u>
	<u>Sexual battery (Defendant 18 or older, victim 18 or older)</u>	<u>794.011(5)(b)</u>	<u>11.4</u>
	<u>Sexual battery (Defendant younger than 18, victim 12 or older)</u>	<u>794.011(5)(c)</u>	<u>11.4</u>
	Attempt	777.04(1)	5.1

	Aggravated battery	784.045(1)(a)	8.4
	Felony battery	784.041(1)	8.5
	Aggravated assault	784.021(1)(a)	8.2
	Battery	784.03(1)(a)2.	8.3
	Assault	784.011	8.1

Comments

~~If the ages of either the defendant or the alleged victim are not in dispute, the parties may agree to pare down the necessary lesser included offenses.~~

In *Allen v. State*, 298 So. 3d 704 (Fla. 1st DCA 2020); review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020), the court stated “the offense of sexual battery cannot constitute a necessarily lesser included offense of capital sexual battery” as each crime has different requirements as to the victim’s age.

*It is unclear whether the “encouraging, forcing, or enticing any person less than 16 years of age to engage in ... any other act involving sexual activity” part of Lewd or Lascivious Battery in § 800.04(4)(a)2., Fla. Stat., is a necessary lesser-included offense of § 794.011(8)(b), Fla. Stat. If so, the judge should instruct only on “sexual activity” and not on “sodomasochistic abuse, sexual bestiality, or prostitution,” unless those acts are included in the charging document.

~~There are also sex-related crimes that could be Category 2 offenses depending on the charging document and the evidence.~~

See Instruction 11.16 or 11.16(a) if the State charged that the defendant qualified as a Dangerous Sexual Felony Offender, pursuant to § 794.0115, Fla. Stat.

In the event ~~that~~ multiple perpetrators is charged and proven, a special instruction is necessary. See § 794.023, Fla. Stat.

The 2014 legislature added a sentencing multiplier to § 921.0024(1)(b), Fla. Stat., for sexual battery crimes involving a defendant 18 years of age or older and a victim younger than 18 years of age. If the State charges and intends to use this sentencing multiplier, a special instruction will be necessary for the jury to make an additional finding regarding the defendant's age.

This instruction was adopted 1987 [508 So.2d 1221] and was amended in 1995 [657 So.2d 1152], 1997 [697 So.2d 84], 2008 [995 So. 2d 476], 2015 [156 So. 3d 1037], ~~and 2016 [190 So. 3d 355],~~ and 2020.

11.6(a) ENGAGING IN AN ACT WHICH [CONSTITUTED SEXUAL BATTERY] [INJURED THE SEXUAL ORGAN OF ANOTHER IN AN ATTEMPT TO COMMIT SEXUAL BATTERY] BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY UPON A PERSON LESS THAN 12 YEARS OF AGE

§ 794.011(8)(c), Fla. Stat.

To prove the crime of Engaging in an Act Which [Constituted Sexual Battery] [Injured the Sexual Organ of Another in an Attempt to Commit Sexual Battery] by a Person in Familial or Custodial Authority upon a Person Less Than 12 Years of Age, the State must prove the following four elements beyond a reasonable doubt:

Give 1a, 1b, 1c, and/or 1d as applicable.

1. a. (Defendant) engaged in an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].
- b. (Defendant) engaged in an act [upon] [with] (victim) in which the [anus] [vagina] of [(victim)] [(defendant)] was penetrated by an object. *The definition of "an object" includes a finger.*
- c. (Defendant) engaged in an act which injured the sexual organ of (victim) in an attempt to commit an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] would have penetrated or would have had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].

- d. (Defendant) engaged in an act which injured the sexual organ of (victim) in an attempt to commit an act upon (victim) in which the [anus] [vagina] of (victim) would be penetrated by an object. *The definition of "an object" includes a finger.*
2. At the time of the offense, (defendant) was in a position of familial or custodial authority to (victim).
3. At the time of the offense, (victim) was less than 12 years of age.

Give 4a or 4b as applicable.

4. a. At the time of the offense, (defendant) was 18 years of age or older.
- b. At the time of the offense, (defendant) was less than 18 years of age.

Give if applicable.

§ 794.011(1)(h), Fla. Stat.

However, any act done for bona fide medical purposes is not a sexual battery.

§ 794.021, Fla. Stat.

Ignorance of (victim's) age, (victim's) misrepresentation of his or her age, or a defendant's bona fide belief of (victim's) age is not a defense to the crime charged.

Give if applicable.

"Bona fide" means genuine.

Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

“An object” includes a finger.

“Union” means contact.

§ 794.021, Fla. Stat.

~~Ignorance of (victim’s) age, (victim’s) misrepresentation of his or her age, or a defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.~~

§ 794.011(8), Fla. Stat.

Consent of (victim) is not a defense to the crime charged.

§ 794.022, Fla. Stat.

(Victim’s) lack of chastity is not a defense to the crime charged.

Lesser-Included Offenses

ENGAGING IN AN ACT WHICH [CONSTITUTED SEXUAL BATTERY] [INJURED THE SEXUAL ORGAN OF ANOTHER] BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY UPON A PERSON LESS THAN 12 YEARS OF AGE; DEFENDANT 18 OR OLDER – 794.011(8)(c)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sexual battery (Defendant 18 or older, victim younger than 12)		794.011(2)(a)	11.1
Sexual battery (Defendant younger than 18, victim younger than 12)		794.011(2)(b)	11.1
Engaging in an act which constituted sexual battery (Victim younger than 12, defendant younger than 18)		794.011(8)(c)	11.6(a)
Sexual battery (Defendant 18 or older, victim 12 or older but younger than 18)		794.011(5)(a)	11.4
Sexual battery (Defendant 18 or older, victim 18 or older)		794.011(5)(b)	11.4
Sexual battery (Defendant younger than 18, victim 12 or older)		794.011(5)(c)	11.4
Lewd or lascivious battery (Victim 12 or older but less than 16)		800.04(4)(a)1.	11.10(a)
Lewd or lascivious battery (Victim less than 16)*		800.04(4)(a)2.*	11.10(b)*
Battery		784.03(1)(a)1.	8.3

	<u>Sexual battery (Defendant 18 or older, victim younger than 12)</u>	<u>794.011(2)(a)</u>	<u>11.1</u>
	<u>Sexual battery (Defendant younger than 18, victim younger than 12)</u>	<u>794.011(2)(b)</u>	<u>11.1</u>
	<u>Engaging in an act which constituted sexual battery</u> <u>(Victim younger than 12, defendant younger than 18)</u>	<u>794.011(8)(c)</u>	<u>11.6(a)</u>
	<u>Sexual battery (Defendant 18 or older, victim 12 or older but younger than 18)</u>	<u>794.011(5)(a)</u>	<u>11.4</u>
	<u>Sexual battery (Defendant 18 or older, victim 18 or older)</u>	<u>794.011(5)(b)</u>	<u>11.4</u>
	<u>Sexual battery (Defendant younger than 18, victim 12 or older)</u>	<u>794.011(5)(c)</u>	<u>11.4</u>
	<u>Lewd or lascivious battery (Victim 12 or older but less than 16)</u>	<u>800.04(4)(a)1.</u>	<u>11.10(a)</u>
	<u>Lewd or lascivious battery (Victim less than 16)*</u>	<u>800.04(4)(a)2.*</u>	<u>11.10(b)*</u>
	Attempt	777.04(1)	5.1
	Aggravated battery	784.045(1)(a)	8.4
	Felony battery	784.041(1)	8.5
	Aggravated assault	784.021(1)(a)	8.2
	Battery	784.03(1)(a)2.	8.3
	Assault	784.011	8.1

Comments

If the ages of either the defendant or the alleged victim are not in dispute, the parties may agree to pare down the necessary lesser-included offenses.

In *Allen v. State*, 298 So. 3d 704 (Fla. 1st DCA 2020); review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020), the court stated “the offense of sexual battery cannot constitute a necessarily lesser included offense of capital sexual battery” as each crime has different requirements as to the victim’s age.

*It is unclear whether the “encouraging, forcing, or enticing any person less than 16 years of age to engage in ... any other act involving sexual activity” part of Lewd or Lascivious Battery in § 800.04(4)(a)2., Fla. Stat., is a necessary lesser-included offense of § 794.011(8)(c), Fla. Stat. If so, the judge should instruct only on “sexual activity” and not on “sodomasochistic abuse, sexual bestiality, or prostitution,” unless those acts are included in the charging document.

~~There are also sex-related crimes that could be Category 2 offenses depending on the charging document and the evidence.~~

See Instruction 11.16 or 11.16(a) if the State charged that the defendant qualified as a Dangerous Sexual Felony Offender, pursuant to § 794.0115, Fla. Stat.

This instruction was adopted in 2016 [190 So. 3d 1055] and amended in 2020.

11.9 UNLAWFUL EXPOSURE OF SEXUAL ORGANS

~~(IN A VULGAR OR INDECENT MANNER)~~

§ 800.03, Fla. Stat.

To prove the crime of Unlawful Exposure of Sexual Organs ~~[Indecent Exposure]~~ ~~[or]~~ ~~[Nakedness]~~, the State must prove the following four elements beyond a reasonable doubt:

Give if defendant is charged under § 800.03(1)(a), Fla. Stat.

1. (Defendant) ~~[exposed or exhibited [his] [her] sexual organs].~~

Give if defendant is charged under § 800.03(1)(b), Fla. Stat.

(Defendant) ~~was naked~~.

Give if defendant is charged under § 800.03(1)(a), Fla. Stat.

2. ~~[He] [She] [did so] [was naked]~~ (Defendant) **did so [in a public place] [on the private premises of another] [so near the private premises of another as to be seen from those private premises].**

Give if defendant is charged under § 800.03(1)(b), Fla. Stat.

When (defendant) was naked, [he] [she] was in public.

3. (Defendant) **intended the [exposure or exhibition of [his] [her] sexual organs] [or] [nakedness] to be in a vulgar, indecent, lewd, or lascivious manner.**
4. **The [exposure or exhibition of the sexual organs] [or] [nakedness] was in a vulgar, indecent, lewd, or lascivious manner.**

Proof of mere nudity or exposure of a sexual organ is not sufficient to sustain a conviction for you to find the defendant guilty.

Definitions.

As used in regard to this offense the words “vulgar,” “indecent,” “lewd,” and “lascivious” mean the same thing. ~~They mean:~~ a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

Acts are not vulgar, indecent, lewd, or lascivious unless such acts cause offense to one or more persons viewing those acts or unless the acts substantially intrude upon the rights of others.

Optional Definition.

A “~~public place~~” is **“In public” means in any place intended or designed to be frequented or resorted to by the public.**

Lesser Included Offenses

EXPOSURE OF SEXUAL ORGANS — 800.03			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Unnatural and lascivious act	800.02	11.8

Comments

A first violation of this statute is a first-degree misdemeanor. A second or subsequent violation becomes a third-degree felony. As of October 2020, it is unclear whether the fact of a prior violation will be viewed as an element of the felony or as a recidivist factor for the judge to determine at sentencing.

If treated as an element, it is error to inform the jury of a prior violation. Therefore, if the information or indictment contains an allegation of one or more prior Unlawful Exposure of Sexual Organs violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty, the historical fact of a prior Unlawful Exposure of Sexual Organs violation shall be determined beyond a reasonable doubt in a bifurcated proceeding. See *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

A mother’s breast feeding of her baby or an individual being naked at any place provided or set apart for that purpose is not a violation of this statute. See § 800.03(3), Fla. Stat.

As of October 2020, the term “in public” 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 public.” 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 common areas of grounds and buildings owned, leased by, operated, or maintained by public authority.

This instruction was adopted in 1981 and amended in 1997 [697 So. 2d 84], and 2010 [48 So. 3d 41], and 2020.

11.10(c) LEWD OR LASCIVIOUS MOLESTATION

§ 800.04(5), Fla. Stat.

To prove the crime of Lewd or Lascivious Molestation, the State must prove the following three elements beyond a reasonable doubt:

Give 1a and/or 1b as applicable.

1. (Defendant),
 - a. in a lewd or lascivious manner, intentionally touched the [breasts] [genitals] [genital area] [buttocks] [clothing covering the breasts] [clothing covering the genitals] [clothing covering the genital area] [clothing covering the buttocks] of (victim).
 - b. in a lewd or lascivious manner, intentionally [forced] [enticed] (victim) to touch the [breasts] [genitals] [genital area] [buttocks] [clothing covering the breasts] [clothing covering the genitals] [clothing covering the genital area] [clothing covering the buttocks] of (defendant).

Give 2a or 2b as applicable.

2. At the time of the offense, (victim)
 - a. was 12 years of age or older but less than 16 years of age.
 - b. was less than 12 years of age.

Give 3a or 3b as applicable.

3. At the time of the offense, (defendant)
 - a. was 18 years of age or older.
 - b. was less than 18 years of age.

Definition.

The words "lewd" and "lascivious" mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

Give if applicable.

§ 800.04(2), Fla. Stat.

Neither (victim's) lack of chastity nor (victim's) consent is a defense to the crime charged.

§ 800.04(3), Fla. Stat.

The defendant's ignorance of (victim's) age, (victim's) misrepresentation of [his] [her] age, or the defendant's bona fide belief of (victim's) age is not a defense to the crime charged.

Give if applicable.

"Bona fide" means genuine.

Give if applicable. § 775.0862, Fla. Stat.

Reclassification for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Lewd or Lascivious Molestation, you must also determine whether the State has proved beyond a reasonable doubt that (defendant) was an authority figure at a school and (victim) was a student at the same school.

"Authority figure" means a person 18 years of age or older who is employed by, volunteering at, or under contract with a school.

"School" means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, [or other public school level authorized under the rules of the State Board of Education]. The term "school" does not include facilities dedicated exclusively to the education of adults. *If needed, insert appropriate definitions from § 775.0862(1)(b), Fla. Stat. for "private school" or "voluntary prekindergarten education program" or "early learning program" or "public school as described in s. 402.3025(1)" or "the Florida School for the Deaf and the Blind" or the "Florida Virtual School" or the "K-8 Virtual School."*

“Student” means a person younger than 18 years of age who is enrolled at a school.

Lesser Included Offenses

LEWD OR LASCIVIOUS MOLESTATION; DEFENDANT 18 OR OVER; VICTIM LESS THAN 12 — 800.04(5)(b)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Lewd or Lascivious Molestation; Defendant 18 or over; Victim 12 or over but less than 16 None		800.04(5)(c)2	11.10(c)
Lewd or Lascivious Molestation; Defendant less than 18; Victim less than 12	Lewd or Lascivious Molestation; Defendant 18 or over; Victim 12 or over but less than 16	800.04(5)(c)2	11.10(c)
Lewd or Lascivious Molestation; Defendant less than 18; Victim 12 or over but less than 16	Lewd or Lascivious Molestation; Defendant less than 18; Victim less than 12	800.04(5)(c)1	11.10(c)
	Lewd or Lascivious Molestation; Defendant less than 18; Victim 12 or over but less than 16	800.04(5)(d)	11.10(c)
	Attempt	777.04(1)	5.1
	Aggravated battery	784.045(1)	8.4
	Felony battery	784.041(1)	8.5
	Aggravated assault	784.021(1)(a)	8.2
	Battery	784.03	8.3
	Assault	784.011	8.1
	Unnatural and lascivious act*	800.02*	11.8*

Comments

*The courts do not require the State to allege the defendant's act was "unnatural" or "against the laws of nature" in order for § 800.02, Fla. Stat., to be given as a lesser-included offense. If the sexual activity involved penile-vaginal sexual intercourse (or contact), § 800.02, Fla. Stat. should *not* be given as a lesser-included offense. However, if the sexual activity involved something other than penile-vaginal sexual intercourse (or contact), § 800.02, Fla. Stat. should be given as a lesser-included offense. See *State v. Knighton*, 235 So. 3d 312 (Fla. 2018).

~~If the ages of either the defendant or the alleged victim are not in dispute, the parties may agree to pare down the necessary lesser-included offenses.~~

In 2014, the legislature created a lewd and lascivious molestation classified as a first degree felony depending on the ages of the defendant and victim and whether the defendant had a prior conviction for an enumerated crime. If this enhancement is charged, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) may require the jury to make additional findings regarding the prior qualifying conviction and/or the age of the victim involved. See § 800.04(5)(e), Fla. Stat.

See *Allen v. State*, 298 So. 3d 704 (Fla. 1st DCA 2020), review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020) regarding lesser included offenses related to age.

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2013 [109 So. 3d 721], 2015 [163 So. 3d 4], 2018 [257 So. 3d 370], and 2020.

11.10(d) LEWD OR LASCIVIOUS CONDUCT

§ 800.04(6), Fla. Stat.

To prove the crime of Lewd or Lascivious Conduct, the State must prove the following three elements beyond a reasonable doubt:

Give 1a and/or 1b as applicable.

1. (Defendant)
 - a. **intentionally touched (victim) in a lewd or lascivious manner.**
 - b. **solicited (victim) to commit a lewd or lascivious act.**
2. **At the time of the offense, (victim) was under the age of 16 years.**

Give 3a or 3b as applicable.

3. a. **At the time of the offense, (defendant) was 18 years of age or older.**
- b. **At the time offense, (defendant) was less than 18 years of age.**

Definitions.

The words “lewd” and “lascivious” mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

Give if applicable.

§ 777.04(2), Fla. Stat.

To “solicit” means to command, encourage, hire, or request another person to engage in specific conduct.

§ 800.04(2), Fla. Stat.

Neither (victim’s) lack of chastity nor (victim’s) consent is a defense to the crime charged.

§ 800.04(3), Fla. Stat.

The defendant’s ignorance of (victim’s) age, (victim’s) misrepresentation of [his] [her] age, or the defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Give if applicable.

“Bona fide” means genuine.

§ 775.0862, Fla. Stat.

Reclassification for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Lewd or Lascivious Conduct, you must also determine whether the State has proved beyond a reasonable doubt that (defendant) was an authority figure at a school and (victim) was a student at the same school.

“Authority figure” means a person 18 years of age or older who is employed by, volunteering at, or under contract with a school.

“School” means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, [or other public school level authorized under the rules of the State Board of Education]. The term “school” does not include facilities dedicated exclusively to the education of adults. *If needed, insert appropriate definitions from § 775.0862(1)(b), Fla. Stat. for “private school” or “voluntary prekindergarten education program” or “early learning program” or “public school as described in s. 402.3025(1)” or “the Florida School for the Deaf and the Blind” or the “Florida Virtual School” or the “K-8 Virtual School.”*

“Student” means a person younger than 18 years of age who is enrolled at a school.

Lesser Included Offenses

LEWD OR LASCIVIOUS CONDUCT, DEFENDANT 18 OR OLDER – 800.04(6)(b)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Lewd or lascivious conduct; defendant less than 18 <u>None</u>		800.04(6)(c)	11.10(d)
	<u>Lewd or lascivious conduct; defendant less than 18</u>	<u>800.04(6)(c)</u>	<u>11.10(d)</u>
	Attempt	777.04(1)	5.1
	Felony battery	784.041(1)	8.5
	Aggravated assault	784.021(1)(a)	8.2
	Battery	784.03	8.3
	Assault	784.011	8.1
	Unnatural and lascivious act (if element 1a is charged)*	800.02*	11.8*

Comments

*The courts do not require the State to allege the defendant’s act was “unnatural” or “against the laws of nature” in order for § 800.02, Fla. Stat., to be given as a lesser-included offense. If the sexual activity involved penile-vaginal sexual intercourse (or contact), § 800.02, Fla. Stat. should *not* be given as a lesser-included offense. However, if the sexual activity involved something other than penile-vaginal sexual intercourse (or contact), § 800.02, Fla. Stat. should be given as a lesser-included offense. See *State v. Knighton*, 235 So. 3d 312 (Fla. 2018).

~~If the age of the defendant is not in dispute, the parties may agree to not give the necessary lesser-included offense.~~

See Allen v. State, 298 So. 3d 704 (Fla. 1st DCA 2020), review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020) regarding lesser included offenses related to age.

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2015 [163 So. 3d 478], 2018 [257 So. 3d 370], and 2020.

11.10(e) LEWD OR LASCIVIOUS EXHIBITION PRESENCE OF CHILD

§ 800.04(7)(a), Fla. Stat.

To prove the crime of Lewd or Lascivious Exhibition, the State must prove the following four elements beyond a reasonable doubt:

Give 1a and/or 1b and/or 1c as applicable.

1. (Defendant)
 - a. **intentionally masturbated.**
 - b. **intentionally exposed [his] [her] genitals in a lewd or lascivious manner.**
 - c. **committed [a sexual act] [sodomasochistic abuse] [sexual bestiality] [simulation of any act involving sexual activity] that did not involve actual physical or sexual contact with (victim).**
2. **The act was committed in the presence of (victim).**
3. **At the time of the offense, (victim) was under the age of 16 years.**

Give 4a or 4b as applicable.

4. a. **At the time of the offense, (defendant) was 18 years of age or older.**
 - b. **At the time of the offense, (defendant) was less than 18 years of age.**

Definitions.

Give if applicable.

The words “lewd” and “lascivious” mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

§ 800.04(1)(a), Fla. Stat.

“Sexual activity” means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

Lahey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

“An object” includes a finger.

§ 827.071(e), Fla. Stat.

“Sadomasochistic abuse” means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself.

§ 827.071(g), Fla. Stat.

“Sexual bestiality” means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other.

§ 800.04, Fla. Stat. See State v. Werner, 609 So. 2d 585 (Fla. 1992).

“In the presence of” means that (victim) saw, heard, or otherwise sensed that the act was taking place.

§ 800.04(2), Fla. Stat.

Neither (victim’s) lack of chastity nor (victim’s) consent is a defense to the crime charged.

§ 800.04(3), Fla. Stat.

The defendant’s ignorance of (victim’s) age, (victim’s) misrepresentation of his or her age, or the defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Give if applicable.

“Bona fide” means genuine.

§ 775.0862, Fla. Stat.

Reclassification for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Lewd or Lascivious Exhibition in the Presence of a Child, you must also determine whether the State has proved beyond a reasonable doubt that (defendant) was an authority figure at a school and (victim) was a student at the same school.

“Authority figure” means a person 18 years of age or older who is employed by, volunteering at, or under contract with a school.

“School” means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, [or other public school level authorized under the rules of the State Board of Education]. The term “school” does not include facilities dedicated exclusively to the education of adults. *If needed, insert appropriate definitions from § 775.0862(1)(b), Fla. Stat. for “private school” or “voluntary prekindergarten education program” or “early learning program” or “public school as described in s. 402.3025(1)” or “the Florida School for the Deaf and the Blind” or the “Florida Virtual School” or the “K-8 Virtual School.”*

“Student” means a person younger than 18 years of age who is enrolled at a school.

Lesser Included Offenses

LEWD OR LASCIVIOUS EXHIBITION PRESENCE OF CHILD; DEFENDANT 18 OR OLDER — 800.04(7)(a) and (7)(b)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Lewd or lascivious exhibition presence of child; defendant less than 18 <u>None</u>		800.04(7)(c)	11.10(e)
	<u>Lewd or lascivious exhibition presence of child; defendant less than 18</u>	800.04(7)(c)	11.10(e)
	Attempt	777.04(1)	5.1
	Exposure of Sexual Organs	800.03	11.9
	Unnatural and lascivious act*	800.02*	11.8*

Comments

*The courts do not require the State to allege the defendant’s act was “unnatural” or “against the laws of nature” in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

~~If the age of the defendant is not in dispute, the parties may agree to not give the necessary lesser-included offense.~~

There are statutory definitions of “sodomasochistic abuse” and “sexual bestiality” in § 847.001, Fla. Stat., that differ from the statutory definitions in § 827.071, Fla. Stat. As of ~~June 2018~~September 2020, there is no case law that decides which definition applies for a violation of § 800.04(7)(a), Fla. Stat.

See Allen v. State, 298 So. 3d 704 (Fla. 1st DCA 2020), review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020) regarding lesser included offenses related to age.

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2015 [163 So. 3d 478], ~~and 2018~~ [257 So. 3d 370], and 2020.

11.10(f) LEWD OR LASCIVIOUS EXHIBITION OVER COMPUTER SERVICE

§ 847.0135(5), Fla. Stat.

To prove the crime of Lewd or Lascivious Exhibition over a Computer Online Service, the State must prove the following four elements beyond a reasonable doubt:

Give 1a, 1b, and/or 1c as applicable.

- 1. a. (Defendant) intentionally masturbated.**
- b. (Defendant) intentionally exposed [his] [her] genitals in a lewd or lascivious manner.**
- c. (Defendant) committed [a sexual act] [sodomasochistic abuse] [sexual bestiality] [simulation of any act involving sexual activity] that did not involve actual physical or sexual contact with (victim).**

2. The act was committed live over a [computer on-line service] [internet service] [local bulletin board service].

3. At the time of the offense, (victim) was under the age of 16 years

or

(Defendant) [knew] [should have known] [had reason to believe] that the transmission was viewed on a computer or television monitor by a person in this state who was under the age of 16 years at the time of the offense.

Give 4a or 4b as applicable.

4. a. At the time of the offense, (defendant) was 18 years of age or older.

b. At the time of the offense, (defendant) was less than 18 years of age.

Definitions.

The words “lewd” and “lascivious” mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

§ 800.04(1)(a), Fla. Stat.

“Sexual activity” means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

The definition of “an object” includes a finger.

§ 847.001(13), Fla. Stat.

“Sadomasochistic abuse” means flagellation or torture by or upon a person or animal, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction, or satisfaction brought about as a result of sadistic violence, from inflicting harm on another or receiving such harm oneself.

§ 847.001(15), Fla. Stat.

“Sexual bestiality” means any sexual act, actual or simulated, between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other.

§ 800.04(2), Fla. Stat.

Neither (victim’s) lack of chastity nor (victim’s) consent is a defense to the crime charged.

§ 800.04(3), Fla. Stat.

The defendant’s ignorance of the (victim’s) age, (victim’s) misrepresentation of [his] [her] age, or the defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Give if applicable.

“Bona fide” means genuine.

The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense is not a defense to the crime charged.

Lesser Included Offenses

LEWD OR LASCIVIOUS EXHIBITION OVER COMPUTER SERVICE, DEFENDANT 18 YEARS OF AGE OR OLDER — 847.0135(5)(b)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Lewd or Lascivious Exhibition over Computer Service, Defendant less than 18 years of age None		847.0135(5)(c)	11.10(f)
	Lewd or Lascivious Exhibition over Computer Service, Defendant less than 18 years of age	847.0135(5)(c)	11.10(f)
	Unnatural and lascivious act*	800.02*	11.8*
	Attempt	777.04(1)	5.1

Comments

*The courts do not require the State to allege the defendant’s act was “unnatural” or “against the laws of nature” in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

If the age of the defendant is not in dispute, the parties may agree to not give the necessary lesser-included offense.

See Allen v. State, 298 So. 3d 704 (Fla. 1st DCA 2020), review granted, No. SC20-1053, 2020 WL 4590313 (Fla. 2020) regarding lesser included offenses related to age.

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2015 [176 So. 3d 938], 2018 [257 So. 3d 370], and 2020.

29.1 DISORDERLY INTOXICATION

§ 856.011, Fla. Stat.

To prove the crime of Disorderly Intoxication, the State must prove the following two elements beyond a reasonable doubt:

Give a or b as applicable.

- a. {1. (Defendant) was intoxicated, and
 2. [He] [She] endangered the safety of another [person] [property].}
- b. {1. (Defendant) was intoxicated or drank any alcoholic beverage in a [public place] [in or upon a public conveyance] and
 2. [He] [She] caused a public disturbance.}

Definition.

“Intoxication” means more than merely being under the influence of an alcoholic beverage. Intoxication means that the defendant must have been so affected from the drinking of an alcoholic beverage as to have lost or been deprived of the normal control of either [his] [her] body or [his] [her] mental faculties, or both. Intoxication is synonymous with “drunk.”

Optional Definition.

A “public place” is ~~a place where the public has a right to be and to go~~ any place intended or designed to be frequented or resorted to by the public.

~~The defendant's admission that [he] [she] drank an alcoholic beverage is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] was under the influence of an alcoholic beverage but this admission may be taken into consideration along with other evidence.~~

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

As of September 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 amended in 2020.