

30 proposed new and amended standard jury instructions for criminal cases

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

- 3.15 – NONSTATE PRISON SANCTION WILL PRESENT A DANGER TO THE PUBLIC**
- 6.2 – ATTEMPTED FIRST DEGREE PREMEDITATED MURDER**
- 8.6 – STALKING**
- 8.7(a) – AGGRAVATED STALKING**
- 8.7(b) – AGGRAVATED STALKING (Injunction Entered)**
- 8.7(c) – AGGRAVATED STALKING (Victim under 16 years of age)**
- 8.7(d) – AGGRAVATED STALKING (Def. previously sentenced for sex offense)**
- 8.22 – WRITTEN [OR ELECTRONIC] THREAT TO [KILL] [DO BODILY INJURY]
[CONDUCT A MASS SHOOTING] [CONDUCT AN ACT OF TERRORISM]**
- 11.1 – SEXUAL BATTERY – VICTIM LESS THAN 12 YEARS OF AGE**
- 11.2 – SEXUAL BATTERY – VICTIM OVER 12 YEARS OF AGE – DEADLY WEAPON OR
GREAT FORCE**
- 11.3 – SEXUAL BATTERY – UNDER SPECIFIED CIRCUMSTANCES**
- 11.4 – SEXUAL BATTERY**
- 11.6 – ENGAGING IN AN ACT THAT CONSTITUTES SEXUAL BATTERY UPON OR
WITH A CHILD 12 YEARS OF AGE OR OLDER BUT YOUNGER THAN 18, ETC.**
- 11.6(a) – ENGAGING IN AN ACT [THAT CONSTITUTED SEXUAL BATTERY]
[INJURED THE SEXUAL ORGAN OF ANOTHER IN AN ATTEMPT TO COMMIT
SEXUAL BATTERY] ETC.**
- 11.9 – UNLAWFUL EXPOSURE OF SEXUAL ORGANS**
- 11.10(c) – LEWD AND LASCIVIOUS MOLESTATION**
- 11.10(d) – LEWD AND LASCIVIOUS CONDUCT**
- 11.10(e) – LEWD OR LASCIVIOUS EXHIBITION PRESENCE OF CHILD**
- 11.10(f) – LEWD OR LASCIVIOUS EXHIBITION OVER COMPUTR SERVICE**
- 12.4(a) – CRIMINAL MISCHIEF – [MEMORIAL] [HISTORIC PROPERTY]**
- 12.4(b) – [DESTROYING OR DEMOLISHING] [OR] [PULLING DOWN] [A
MEMORIAL] [HISTORIC PROPERTY]**
- 13.2 – POSSESSION OF A BURGLARY TOOL**
- 16.13 – FAILURE TO REPORT CHILD [ABUSE] [ABANDONMENT] [OR] [NEGLECT]**
- 21.4 – FALSE REPORT OF COMMISSION OF A CRIME**
- 25.6 – SALE, MANUFACTURE, DELIVER, ETC. A CONTROLLED SUBSTANCE IN
SPECIFIED LOCATIONS**
- 28.13 – REFUSAL TO SUBMIT TO TESTING – DUI**
- 28.13(a) – REFUSAL TO SUBMIT TO TESTING – BUI**
- 29.24 – HUMAN TRAFFICKING**
- 29.25 – HUMAN TRAFFICKING BY A [PARENT] [LEGAL GUARDIAN] [PERSON WITH
CUSTODY OR CONTROL] OF A MINOR**
- 29.27 – UNLAWFUL DISCLOSURE OF THE LOCATION OF A CERTIFIED DOMESTIC
VIOLENCE CENTER**

The committee invites all interested persons to comment on the proposals, reproduced in full below. Comments must be received by the committee in either electronic format or hard copy on or before November 30, 2021. 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.

3.15 NONSTATE PRISON SANCTION WILL PRESENT A DANGER TO THE PUBLIC

§ 775.082(10), Fla. Stat.

[You have] [A prior jury] found (defendant) guilty of (insert name(s) of crimes(s)).

You must now determine if the State proved beyond a reasonable doubt whether sentencing [him] [her] to a nonstate prison sanction will present a danger to the public.

"A nonstate prison sanction" means probation for up to _____ years, house arrest for up to two years, county jail for up to _____, or some combination of these alternatives for up to _____ years.

"Probation" would require the defendant to report to a probation officer as directed. The probation officer could visit [him] [her] at [his] [her] home unannounced. The defendant would be required to work at suitable employment if possible. [He] [She] would be ordered to live without violating the law, to not associate with persons engaged in criminal activity, and [he] [she] would not be allowed to possess a firearm. [[He] [She] could be ordered [to pay restitution] [and] [to submit to random drug testing by a probation officer].] Additionally, I could order other conditions of probation that I find to be appropriate. (Instruct on other conditions of probation in § 948.03, Fla. Stat. if requested.) A violation of any condition of probation, if proven by the State to a judge could result in a resentencing for [this] [these] crime[s].

House arrest requires that the defendant be confined to [his] [her] home except for approved travel such as travel to a job and to other approved activities such as food shopping and attending religious services. The conditions of probation that I previously mentioned would be applicable and I could order additional conditions of house arrest that I find to be appropriate. (Instruct on other conditions of community control in § 948.101, Fla. Stat. as requested.) A violation of any condition of

house arrest, if proven by the State to a judge, could result in a resentencing for [this] [these] crime[s].

Jones v. State, 71 So. 3d 173 (Fla. 1st DCA 2011); McCloud v. State, 55 So. 3d 643 (Fla. 5th DCA 2011).

“Danger to the public” need not require a history of violence and can be based on other types of harm such as economic harm.

(Defendant) has a constitutional right to a jury trial, a constitutional right to remain silent during the trial, and a constitutional right to remain silent even after the trial. The defendant is not required to present evidence or prove anything. If [he] [she] exercised a constitutional right, you are not allowed to consider that as part of your decision as to whether a nonstate prison sanction will present a danger to the public.

Give in all cases.

The defendant has entered a plea of not guilty to the State’s allegation. This means you must presume or believe that a nonstate prison sanction will not present a danger to the public unless it has been overcome by the evidence. To overcome that presumption, the State has the burden to prove beyond a reasonable doubt that a nonstate prison sanction will present a danger to the public.

The jury’s verdict must be unanimous, that is, all of you must agree to the same answer for the following question: Did the State prove beyond a reasonable doubt that a nonstate prison sanction will present a danger to the public?

A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to answer “No” to the question above if you have an abiding conviction that a nonstate prison sanction will present a danger to the public. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the State proved that a nonstate prison sanction will present a danger to the public or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the State has not met its burden and you must answer “No.”

A reasonable doubt may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the State’s allegation that a nonstate prison sanction

will present a danger to the public, your verdict must be “No.” If you have no reasonable doubt, you should answer “Yes.”

Comments

Absent a plea, a jury must make a dangerousness finding for a judge to impose any sentence above a nonstate prison sanction for an offense committed on or after July 1, 2009, which is a third degree felony, but not a forcible felony, and excluding any third degree felony violation related to burglary or trespass, and if total sentence points pursuant to the Criminal Punishment Code are 22 points or fewer. *Gaymon v. State*, 288 So. 3d 1087 (Fla. 2020).

If the jury votes in favor of dangerousness, § 775.082(10), Fla. Stat., still requires the trial judge to make his or her own written dangerousness findings.

This instruction was adopted on [month day,] 2021.

6.2 ATTEMPTED MURDER — FIRST DEGREE (PREMEDITATED)

§§ 782.04(1)(a) and 777.04, Fla. Stat.

In the absence of an express concession that the attempted homicide was not excusable or justified, the trial judge must also read Instruction 6.1, Introduction to Attempted Homicide.

To prove the crime of Attempted First Degree Premeditated Murder, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) did some act intended to cause the death of (victim) that went beyond just thinking or talking about it.**
- 2. (Defendant) acted with a premeditated design to kill (victim).**
- 3. The act would have resulted in the death of (victim) except that someone**

prevented (defendant) from killing (victim) or [he] [she] failed to do so.

A premeditated design to kill means that there was a conscious decision to kill. The decision must be present in the mind at the time the act was committed. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the act. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the act was committed.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the attempted killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the attempted killing.

Give only if there is evidence that the defendant acted in the heat of passion on legally adequate provocation.

An issue in this case is whether (defendant) did not act with a premeditated design to kill because [he] [she] acted in the heat of passion based on adequate provocation. In order to find that the defendant did not act with a premeditated design to kill because [he] [she] acted in the heat of passion based on adequate provocation:

- a. there must have been a sudden event that would have suspended the exercise of judgment in an ordinary reasonable person; and**
- b. a reasonable person would have lost normal self-control and would have been driven by a blind and unreasoning fury; and**
- c. there was not a reasonable amount of time for a reasonable person to cool off; and**
- d. a reasonable person would not have cooled off before committing the act that constituted the attempt to cause death; and**
- e. (defendant) was, in fact, so provoked and did not cool off before [he] [she] committed the act that constituted the attempt to cause the death of (victim).**

If you have a reasonable doubt about whether the defendant acted with a premeditated design to kill because [he] [she] acted in the heat of passion based on adequate provocation, you should not find [him] [her] guilty of Attempted First Degree Premeditated Murder.

Lesser Included Offenses

ATTEMPTED FIRST DEGREE (PREMEDITATED) MURDER — 782.04(1) and 777.04			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Attempted second degree (depraved mind) murder		782.04(2) and 777.04	6.4
Attempted manslaughter by act		782.07 and 777.04	6.6
Attempted aggravated battery (intentionally cause great bodily harm)		784.045(1)(a)1 and 777.04	8.4 and 5.1
Attempted battery (intentionally cause bodily harm)		784.03(1)(a)2 and 777.04	8.3 and 5.1
	Attempted felony murder	782.051(1)	6.3
	Attempted felony murder	782.051(2)	6.3
	Attempted felony murder	782.051(3)	6.3(a)
	Aggravated battery	784.045	8.4
	Felony battery	784.041(1)	8.5
	Aggravated Assault	784.021	8.2
	Battery	784.03	8.3
	Assault	784.011	8.1

Comments

See Instruction 5.1 for the affirmative defense of renunciation.

See Instruction 6.7 for the § 782.065, Fla. Stat., reclassification when the victim is a law enforcement officer, correctional officer, etc.

A charging document that tracks the language of the Attempted First-Degree Premeditated Murder statute does not charge Attempted Felony Murder. *See Weatherspoon v. State*, 214 So. 3d 578 (Fla. 2017).

This instruction was adopted in 1994 [636 So. 2d 502] and amended in 2014 [137 So. 3d 995], ~~and~~ 2018 [236 So. 3d 282], and on [Month day] 2022.

8.6 STALKING

§ 784.048(2), Fla. Stat.

To prove the crime of Stalking, the State must prove the following element beyond a reasonable doubt:

(Defendant) **willfully, maliciously, and repeatedly [followed] [harassed] [or] [cyberstalked]** (victim).

Definitions.

§ 784.048(1)(a), Fla. Stat.

“Harass” means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose.

§ 784.048(1)(b), Fla. Stat.

“Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests.

Patterson v. State, 512 So. 2d 1109 (Fla. 1st DCA 1987).

“Willfully” means knowingly, intentionally and purposely.

Give if applicable.

§ 784.048(1)(d), Fla. Stat.

“Cyberstalk” means [to engage in a course of conduct to communicate, or to cause to be communicated, directly or indirectly, words, images, or language by or through the use of electronic mail or electronic communication, directed at or pertaining to a specific person,] [or] [to access or attempt to access the online accounts or Internet-connected home electronic systems of another person without that person’s permission,] causing substantial emotional distress to that person and serving no legitimate purpose.

Lesser Included Offense

STALKING — 784.048(2)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comment

This instruction was approved in 1995 [657 So. 2d 1152] and amended in 2007 [953 So. 2d 495], 2013 [131 So. 3d 755], and 2020 [288 So. 3d 530], and 2021.

8.7(a) AGGRAVATED STALKING

§ 784.048(3), Fla. Stat.

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

1. (Defendant) **willfully, maliciously, and repeatedly** [followed] [harassed] [or] [cyberstalked] (victim); and
2. (Defendant) **made a credible threat to** (victim).

Definitions.

§ 784.048(1)(a), Fla. Stat.

“Harass” means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose.

§ 784.048(1)(b), Fla. Stat.

“Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests.

Patterson v. State, 512 So. 2d 1109 (Fla. 1st DCA 1987).

“Willfully” means knowingly, intentionally and purposely.

Give if applicable.

§ 784.048(1)(d), Fla. Stat.

“Cyberstalk” means [to engage in a course of conduct to communicate, or to cause to be communicated, directly or indirectly, words, images, or language by or through the use of electronic mail or electronic communication, directed at or pertaining to a specific person,] [or] [to access or attempt to access the online accounts or Internet-connected home electronic systems of another person without that person’s permission,] causing substantial emotional distress to that person and serving no legitimate purpose.

§ 784.048(1)(c), Fla. Stat.

“Credible threat” means a verbal or nonverbal threat, or a combination of the two, including threats delivered by electronic communication or implied by a pattern of conduct, which places the person who is the target of the threat in reasonable fear for his or her safety or the safety of his or her family members or individuals closely associated with the person, and which is made with the apparent ability to carry out the threat to cause such harm.

It is not necessary for the State to prove that the person making the threat had the actual intent to carry out the threat.

Give if applicable.

The present incarceration of the person making the threat is not a bar to prosecution.

Lesser Included Offenses

AGGRAVATED STALKING — 784.048(3)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Stalking		784.048(2)	8.6
	Attempt	777.04(1)	5.1
	Assault	784.011	8.1

	Improper exhibition of dangerous weapon	790.10	10.5
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Comment

This instruction was approved in 1995 [657 So. 2d 1152] and amended in 2007 [953 So. 2d 495], 2013 [131 So. 3d 755], and 2020 [288 So. 3d 530], and 2021.

8.7(b) AGGRAVATED STALKING

(Injunction Entered)

§ 784.048(4), Fla. Stat.

To prove the crime of Aggravated Stalking, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **knowingly, willfully, maliciously, and repeatedly [followed] [harassed] [or] [cyberstalked]** (victim).

Give 2a or 2b or both as applicable.

2. **At the time of the [following] [harassing] [cyberstalking],**
 - a. **an injunction for protection against [repeat] [sexual] [dating] [domestic] violence had been entered against (defendant) for the benefit of (victim).**
 - b. **a court had imposed a prohibition of conduct on (defendant) toward (victim) or (victim's property).**
3. (Defendant) **knew that the [injunction] [court-imposed prohibition of conduct] had been entered against [him] [her].**

Definitions.

§ 784.048(1)(a), Fla. Stat.

“Harass” means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose.

§ 784.048(1)(b), Fla. Stat.

“Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests.

Patterson v. State, 512 So. 2d 1109 (Fla. 1st DCA 1987).

“Willfully” means knowingly, intentionally and purposely.

Give if applicable.

§ 784.048(1)(d), Fla. Stat.

“Cyberstalk” means [to engage in a course of conduct to communicate, or to cause to be communicated, directly or indirectly, words, images, or language by or through the use of electronic mail or electronic communication, directed at or pertaining to a specific person,] [or] [to access or attempt to access the online accounts or Internet-connected home electronic systems of another person without that person’s permission,] causing substantial emotional distress to that person and serving no legitimate purpose.

Seese v. State, 955 So. 2d 1145 (Fla. 4th DCA 2007).

“Maliciously” means wrongfully, intentionally, and without legal justification or excuse.

Lesser Included Offenses

AGGRAVATED STALKING (Injunction Entered) — 784.048(4)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Stalking		784.048(2)	8.6
	Attempt	777.04(1)	5.1
	Violation of injunction for protection against domestic violence	741.31(4)	8.18
	Violation of injunction for protection against repeat, sexual, or dating violence	784.047	8.19
	Violation of injunction for protection against stalking or cyberstalking	784.0487(4)	8.24

Comment

This instruction was adopted in 1995 [657 So. 2d 1152] and was amended in 2007 [953 So. 2d 495], 2008 [995 So. 2d 476], 2013 [131 So. 3d 755], and 2020 288 So. 3d 530, and 2021.

8.7(c) AGGRAVATED STALKING

(Victim under 16 years of age)

§ 784.048(5), Fla. Stat.

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

1. (Defendant) **willfully, maliciously, and repeatedly [followed] [harassed] [or] [cyberstalked]** (victim); and,
2. **At the time of** (defendant's) actions, (victim) **was under 16 years of age.**

Definitions.

§ 784.048(1)(a), Fla. Stat.

“Harass” means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose.

§ 784.048(1)(b), Fla. Stat.

“Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests.

Patterson v. State, 512 So. 2d 1109 (Fla. 1st DCA 1987).

“Willfully” means knowingly, intentionally and purposely.

Give if applicable.

§ 784.048(1)(d), Fla. Stat.

“Cyberstalk” means [to engage in a course of conduct to communicate, or to cause to be communicated, directly or indirectly, words, images, or language by or through the use of electronic mail or electronic communication, directed at or pertaining to a specific person,] [or] [to access or attempt to access the online accounts or Internet-connected home electronic systems of another person without that person's permission,] causing substantial emotional distress to that person and serving no legitimate purpose.

Lesser Included Offenses

AGGRAVATED STALKING (Victim under 16 years of age) — 784.048(5)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Stalking		784.048(2)	8.6
	Attempt	777.04(1)	5.1
	Violation of injunction for protection against domestic violence	741.31(4)	8.18
	Violation of injunction for protection against repeat, sexual, or dating violence	784.047	8.19
	Violation of injunction for protection against stalking or cyberstalking	784.0487(4)	8.24

Comment

This instruction was adopted in 2000 [765 So. 2d 692] and amended in 2007 [953 So. 2d 495], 2013 [131 So. 3d 755], and 2020 [288 So. 3d 530], and 2021.

8.7(d) AGGRAVATED STALKING

(Defendant previously sentenced for sex offense

and was prohibited from contacting victim)

§ 784.048(7), Fla. Stat.

To prove the crime of Aggravated Stalking, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) was sentenced for [sexual battery] [violating Fla. Stat. 800.04] [violating Fla. Stat. 847.0135(5)].
2. As part of that sentencing, (defendant) was ordered to have no contact with (victim).
3. After the sentencing, (defendant) willfully, maliciously, and repeatedly [followed] [harassed] [or] [cyberstalked] (victim).

Definitions.

§ 784.048(1)(a), Fla. Stat.

“Harass” means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose.

§ 784.048(1)(b), Fla. Stat.

“Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests.

Patterson v. State, 512 So. 2d 1109 (Fla. 1st DCA 1987).

“Willfully” means knowingly, intentionally and purposely.

Give if applicable.

§ 784.048(1)(d), Fla. Stat.

“Cyberstalk” means [to engage in a course of conduct to communicate, or to cause to be communicated, directly or indirectly, words, images, or language by or through the use of electronic mail or electronic communication, directed at or pertaining to a specific person,] [or] [to access or attempt to access the online accounts or Internet-connected home electronic systems of another person without that person’s permission,] causing substantial emotional distress to that person and serving no legitimate purpose.

Seese v. State, 955 So. 2d 1145 (Fla. 4th DCA 2007).

“Maliciously” means wrongfully, intentionally, and without legal justification or excuse.

Lesser Included Offenses

AGGRAVATED STALKING (Defendant previously sentenced for sex offense and was prohibited from contacting victim) — 784.048(7)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Stalking		784.048(2)	8.6
	Attempt	777.04(1)	5.1
	Violation of injunction for protection against domestic violence	741.31(4)	8.18
	Violation of injunction for protection against repeat, sexual, or dating violence	784.047	8.19

	Violation of injunction for protection against stalking or cyberstalking	784.0487(4)	8.24
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Comment

This instruction was adopted in 2013 [131 So. 3d 755] and amended in 2020 [288 So. 3d 530], and 2021.

8.22 WRITTEN ~~[OR ELECTRONIC]~~ THREAT TO [KILL] [DO BODILY INJURY] [CONDUCT A MASS SHOOTING] [CONDUCT AN ACT OF TERRORISM]

§ 836.10, Fla. Stat.

To prove the crime of Written ~~[or Electronic]~~ Threat to [Kill] [Do Bodily Injury] [Conduct a Mass Shooting] [Conduct an Act of Terrorism], the State must prove the following three elements beyond a reasonable doubt:

**There are two ways to violate § 836.10, Fla. Stat. Give as applicable.*

1. ~~_____ (Defendant) [wrote] [composed] a[n] [letter] [electronic communication] [inscribed communication].~~
2. ~~The [letter] [electronic communication] [inscribed communication] contained a threat to [kill] [do bodily injury to] [(victim)] [any member of (victim's) family].~~
3. ~~_____ (Defendant) [sent] [procured the sending of] that [letter] [electronic communication] [inscribed communication] to (victim).~~

Give if applicable.

~~It is not necessary for the State to prove that the [letter] [electronic communication] [inscribed communication] had been signed.~~

Definitions. Give if applicable.

~~An "inscribed communication" is a communication that is written or printed.~~

~~To "procure" means to persuade, induce, prevail upon, or cause a person to do something.~~

**The second way to violate § 836.10, Fla. Stat. is set forth below.*

1. ~~_____ (Defendant) [made] [posted] [transmitted] a writing or other record.~~

- ~~2. The writing or other record contained a threat to conduct [a mass shooting] [or] [an act of terrorism].~~
- ~~3. (Defendant) [made] [posted] [transmitted] the writing or other record in a manner that allowed another person to view the threat.~~

~~A “record” includes an electronic record.~~

- 1. (Defendant) made a threat to [kill] [or] [do bodily harm to another person] [or] [conduct a mass shooting] [or] [conduct an act of terrorism] in a writing [or other record].**
- 2. (Defendant) [sent, posted, or transmitted] [or] [procured the sending, posting, or transmission of] that writing [or other record].**
- 3. (Defendant) did so in any manner in which it may be viewed by another person.**

Definitions. Give if applicable.

To “procure” means to persuade, induce, prevail upon, or cause a person to do something.

“Other record” includes an electronic record. The term “electronic record” means any record created, modified, archived, received, or distributed electronically which contains any combination of text, graphics, video, audio, or pictorial represented in digital form, but does not include a telephone call.

Lesser Included Offenses

WRITTEN [OR ELECTRONIC] THREAT TO [KILL] [DO BODILY INJURY] [CONDUCT A MASS SHOOTING] [CONDUCT AN ACT OF TERRORISM] – 836.10			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1
	Assault	784.011	8.1

Com

ments

The statute may raise First Amendment concerns. Trial judges and attorneys should consider *Elonis v. United States*, 135 S. Ct. 2001 (2015) and *Saidi v. State*, 845 So. 2d 1022 (Fla. 5th DCA 2003).

~~—The name of (victim) in the first set of elements 2 and 3 must be the same person.~~

~~—There is no statutory definition for the term “electronic communication.” In the absence of case law, trial judges will have to fashion their own definition, perhaps by looking at § 934.02(12), Fla. Stat. and § 668.602(7), Fla. Stat. The definition for inscribed communication comes from the dictionary definition of the word inscribed. The definition of procure comes from the manslaughter standard instruction.~~

~~*The act of posting a message on social media that threatened to “shoot up” a school did not constitute a violation of law under the clause of § 836.10, Fla. Stat., that prohibits the sending of threats to a specific victim because it was not sent directly to the victims. *J.A.W. v. State*, 210 So. 3d 142 (Fla. 2d DCA 2016). In response to *J.A.W.*, the Legislature created an alternative way to commit the crime by removing the requirement that the threat be sent to the person threatened.~~

This instruction was adopted in 2013 [131 So. 3d 720] and amended in 2018 [260 So. 3d 1024], and 2021.

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.**

- 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.**

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.

Lahey 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.

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.
Battery		784.03(1)(a)1.	8.3
	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)*

	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

~~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).

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], 2016 [190 So. 3d 1055], and on November 20, 2020, and on [month day,] 2022.

**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.

Lahey 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.

§ 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 12 YEARS OF AGE OR OLDER — GREAT FORCE OR DEADLY WEAPON — 794.011(3)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Battery		784.03(1)(a)1.	8.3
	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)*
	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

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.

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 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], on April 3, 2020, ~~and~~ on November 20, 2020, and on [Month day,] 2022.

11.3 SEXUAL BATTERY — UNDER SPECIFIED CIRCUMSTANCES

§§ 794.011(4)(a), (4)(b), and (4)(c), 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.**

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.

§ 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 TO LESS THAN 18— UNDER SPECIFIED CIRCUMSTANCES — 794.011(4)(a)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sexual Battery		794.011(5)(a)	11.4
Battery		784.03(1)(a)1.	8.3
	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 (Defendant and 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)*
	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
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**SEXUAL BATTERY — DEFENDANT AND VICTIM 18 OR OLDER —
UNDER SPECIFIED CIRCUMSTANCES — 794.011(4)(b)**

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sexual Battery		794.011(5)(b)	11.4
Battery		784.03(1)(a)1.	8.3
	Sexual battery under specified circumstances (Defendant younger than 18, victim 12 or older)	794.011(4)(c)	11.3
	Sexual battery (Defendant 18 or older, victim 12 or older but younger than 18)	794.011(5)(a)	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)*
	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

SEXUAL BATTERY — DEFENDANT LESS THAN 18; VICTIM 12 OR OLDER — UNDER SPECIFIED CIRCUMSTANCES — 794.011(4)(c)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sexual Battery		794.011(5)(c)	11.4
Battery		784.03(1)(a)1.	8.3
	Sexual battery under specified circumstances (Defendant 18 or older, victim 18 or older)	794.011(4)(b)	11.3
	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
	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)*
	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

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.

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

This instruction was adopted in 1981 and 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], 2016 [190 So. 3d 1055], on November 20, 2020, ~~and~~ on March 5, 2021, and on [Month day,] 2022.

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.**
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.

Lakey 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.
Battery		784.03(1)(a)1.	8.3
	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)*
	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

~~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.

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 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], 2016 [190 So. 3d 1055], and on November 20, 2020, and on [Month day,] 2022.

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.**

§ 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.

§ 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.
Battery		784.03(1)(a)1.	8.3
	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)*
	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

~~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.

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 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 amended in 1995 [657 So.2d 1152], 1997 [697 So.2d 84], 2008 [995 So. 2d 476], 2015 [156 So. 3d 1037], 2016 [190 So. 3d 355], and on November 20, 2020, and on [month day,] 2022.

11.6(a) ENGAGING IN AN ACT THAT [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 That [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.**
 - 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.**
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.

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

"An object" includes a finger.

"Union" means contact.

§ 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 THAT [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.
None			
	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)*
	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	8.3
	Assault	784.011	8.1

Comments

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.

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.

A special instruction may be necessary in cases involving “familial authority” because that term is not synonymous with familial relationship. A special instruction may be necessary in cases involving “custodial authority” to help define the scope of “custody.” Cases such as *Crocker v. State*, 752 So. 2d 615 (Fla. 2d DCA 1999), *Oliver v. State*, 977 So. 2d 673 (Fla. 5th DCA 2008), and *Hallberg v. State*, 649 So. 2d 1355 (Fla. 1994) may provide guidance for the special instructions.

This instruction was adopted in 2016 [190 So. 3d 1055] and amended on November 20, 2020, and on April 5, 2021, and on [month day], 2022.

11.9 UNLAWFUL EXPOSURE OF SEXUAL ORGANS

§ 800.03, Fla. Stat.

To prove the crime of Unlawful Exposure of Sexual Organs, the State must prove the following [four] [five] 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. (Defendant) **did so [in public] [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.**

If defendant is charged only with exposure of sexual organs in public, the State need not prove that someone was offended. However, for cases involving exposure of sexual organs on private premises or so near to be seen from the premises, the jury must be instructed on element #5. State v. Kees, 919 So. 2d 504 (Fla. 5th DCA 2005). If the trial involves exposure of sexual organs in public and exposure of sexual organs on or near private premises, trial judges will need to draft a special instruction.

5. **The exposure or exhibition of sexual organs caused offense to one or more persons viewing it.**

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

1. (Defendant) was naked.

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

3. (Defendant) intended [his] [her] nakedness to be in a vulgar, indecent, lewd, or lascivious manner.

4. The nakedness was in a vulgar, indecent, lewd, or lascivious manner.

Give in all cases.

Proof of mere nudity or exposure of a sexual organ is not sufficient 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: 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.

“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~~ August 2021, 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~~ August 2021, 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], 2010 [48 So. 3d 41], ~~and on November 20, 2020,~~ and on [month day,] 2021.

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.
None			
	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 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" 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).

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 on November 20, 2020, and on [month day,] 2022.

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.
None			
	Lewd or lascivious conduct; defendant less than 18	800.04(6)(c)	11.10(d)
	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” 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).

~~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 on November 20, 2020, and on [month day], 2022.

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.

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

"An object" includes a finger.

§ 827.071(e), Fla. Stat.

"Sodomasochistic 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.
None			
	Lewd or lascivious exhibition presence of child; defendant less than 18	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” for § 800.02, Fla. Stat., to be given as a 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 October 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], 2018 [257 So. 3d 370], ~~and~~ on November 20, 2020, and on [month day,] 2022.

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.
<u>None</u>			
	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" for § 800.02, Fla. Stat., to be given as a 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~~ on November 20, 2020, and on [month day,] 2022.

12.4(a) CRIMINAL MISCHIEF – [MEMORIAL] [HISTORIC PROPERTY]

§ 806.13(3), Fla. Stat.

To prove the crime of Criminal Mischief – [Memorial] [Historic Property], the State must prove the following four elements beyond a reasonable doubt:

- 1. (Defendant) defaced, injured, or damaged [a memorial] [historic property].**
- 2. The [memorial] [historic property] was defaced, injured, or damaged without the consent of the owner.**
- 3. The defacement, injury, or damage was done willfully and maliciously.**
- 4. The damage to the [memorial] [historic property] was greater than \$200.**

Definitions.

"Willfully" means intentionally, knowingly, and purposely.

"Maliciously" means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to the property of another person.

Give as applicable. § 806.135(1), Fla. Stat.

“Memorial” means a plaque, statue, marker, flag, banner, cenotaph, religious symbol, painting, seal, tombstone, structure name, or display that is constructed and located with the intent of being permanently displayed or perpetually maintained; is dedicated to a historical person, an entity, an event, or a series of events; and honors or recounts the military service of any past or present United States Armed Forces military personnel, or the past or present public service of a resident of the geographical area comprising the state or the United States.

“Historic Property” means any building, structure, site, or object that has been officially designated as a historic building, historic structure, historic site, or historic object through a federal, state, or local designation program.

Lesser Included Offenses

<u>CRIMINAL MISCHIEF [MEMORIAL] [HISTORIC PROPERTY] — 806.13(3)</u>			
<u>CATEGORY ONE</u>	<u>CATEGORY TWO</u>	<u>FLA. STAT.</u>	<u>INS. NO.</u>
<u>Criminal Mischief</u>		<u>806.13(1)(b)1</u>	<u>12.4</u>
	<u>Criminal Mischief</u>	<u>806.13(1)(b)3</u>	<u>12.4</u>
	<u>Criminal Mischief</u>	<u>806.13(1)(b)2</u>	<u>12.4</u>
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

Comment

This instruction was adopted on [Month day,] 2021.

**12.4(b) [DESTROYING OR DEMOLISHING] [OR] [PULLING DOWN] [A
MEMORIAL] [HISTORIC PROPERTY]
§ 806.135(2), Fla. Stat.**

To prove the crime of [Destroying or Demolishing] [or] [Pulling Down] [a Memorial] [Historic Property], the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) [destroyed or demolished] [or] [pulled down] [a memorial] [historic property].**
- 2. The [destruction or demolition] [or] [pulling down] of the [memorial] [historic property] was done willfully and maliciously.**

Definitions.

“Willfully” means intentionally, knowingly, and purposely.

“Maliciously” means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to the property of another person.

Give as applicable. § 806.135(1), Fla. Stat.

“Memorial” means a plaque, statue, marker, flag, banner, cenotaph, religious symbol, painting, seal, tombstone, structure name, or display that is constructed and located with the intent of being permanently displayed or perpetually maintained; is dedicated to a historical person, an entity, an event, or a series of events; and honors or recounts the military service of any past or present United States Armed Forces military personnel, or the past or present public service of a resident of the geographical area comprising the state or the United States.

“Historic Property” means any building, structure, site or object that has been officially designated as a historic building, historic structure, historic site, or historic object through a federal, state, or local designation program.

Affirmative defense. Give only if defendant meets his or her burden of production that he or she was authorized by the owner to destroy, demolish, or pull down the memorial or historic property. As of August 2021, there was no case law that decided who has the burden of persuasion for the affirmative defense and what that burden is (e.g., preponderance, clear and convincing, or beyond a reasonable doubt). In the absence of case law, trial judges will have to draft a special instruction on that issue.

It is a defense to the crime of [Destroying or Demolishing] [or] [Pulling Down] [a Memorial] [Historic Property] if (defendant) was authorized by the owner to [destroy or demolish] [or] [pull down] the [memorial] [historic property].

Lesser Included Offenses

<u>[DESTROYING OR DEMOLISHING] [OR] [PULLING DOWN] [A MEMORIAL] [HISTORIC PROPERTY] — 806.135(2)</u>			
<u>CATEGORY ONE</u>	<u>CATEGORY TWO</u>	<u>FLA. STAT.</u>	<u>INS. NO.</u>
<u>Criminal Mischief*</u>		<u>806.13(1)(b)1</u>	<u>12.4</u>
	<u>Criminal Mischief</u>	<u>806.13(1)(b)3</u>	<u>12.4</u>
	<u>Criminal Mischief</u>	<u>806.13(1)(b)2</u>	<u>12.4</u>
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

Comments

*If the memorial or historic property were destroyed or demolished, the Criminal Mischief in § 806.13(1)(b)1., Fla. Stat., would be a necessary lesser-included offense. However, a memorial or historic property could conceivably be pulled down without being damaged. In such a circumstance, the Criminal Mischief in § 806.13(1)(b)1., Fla. Stat., would not be a Category One lesser-included offense because that crime requires damage to the property.

This instruction was adopted on [Month day,] 2021.

13.2 POSSESSION OF A BURGLARY TOOLS

§ 810.06, Fla. Stat.

To prove the crime of Possession of a Burglary Tools, the State must prove the following ~~three~~ four elements beyond a reasonable doubt:

1. (Defendant) ~~intended to commit a burglary or trespass~~ **possessed a [tool] [machine] [implement].**

2. (Defendant) ~~had in [his] [her] possession a [tool] [machine] [implement] that [he] [she] intended to use, or allow to be used, in the commission of the burglary or trespass.~~ At the time of the possession, (defendant) intended to commit a burglary or a trespass [or intended that someone else commit a burglary or trespass].

3. (Defendant) ~~did some overt act toward the commission of a burglary or trespass.~~ At the time of the possession, (defendant) intended that the [tool] [machine] [implement] would be used to commit that burglary or trespass.

4. (Defendant) did some overt act toward committing the burglary or the trespass [or] [The person that (defendant) intended to commit the burglary or trespass did some overt act toward committing the burglary or the trespass].

To prove (defendant) “possessed a burglary tool,” the State must prove beyond a reasonable doubt that [he] [she] a) knew of the existence of the [tool] [machine] [implement] and b) intentionally exercised control over it.

Give if applicable.

Control can be exercised over a burglary tool whether it is carried on a person, near a person, or in a completely separate location. Mere proximity to a burglary tool does not establish that the person intentionally exercised control over it in the absence of additional evidence. Control can be established by proof that (defendant) had direct personal power to control the [tool] [machine] [implement] or the present ability to direct its control by another.

Joint possession. Give if applicable.

Possession of a burglary tool may be sole or joint, that is, two or more persons may possess a burglary tool.

Give if applicable.

Intent to commit (another offense included in the instructions) does not prove the intent required for this crime. For this crime, the State must prove the defendant intended that a burglary or a trespass be committed, not a different crime.

Lesser Included Offenses

No lesser included offenses have been identified for this offense. The crime of Attempted Possession of a Burglary Tool does not exist in Florida. See *State v. Thomas*, 362 So. 2d 1348 (Fla. 1978) (Possession of a Burglary Tool is not committed until the item is in the possession of a person who is using or attempting to use the object as a burglary tool).

Comments

Jurors should also be instructed on the elements of burglary or trespass (instructions #13.3 or #13.4) if one or both of those instructions is not given for another count. For burglary, it may also be appropriate to instruct jurors on the elements of the crime intended to be committed at the time of the entering of the structure/conveyance or while remaining therein.

“Trespass” as used in this statute includes offenses that may not include the word “trespass” in the statutory description. For purposes of this statute, trespass can “encompass any act of unlawful interference with property which is defined by statute as a criminal offense, regardless of whether or not the interference is designated as a ‘trespass.’” *Desin v. State*, 414 So. 2d 516, 518 (Fla. 1982). Thus, a special instruction explaining trespass may be necessary.

Common household objects, that may have a useful and lawful purpose, may be classified as “burglary tools” if they are used with intent to commit burglary. However, gloves that are used only to avoid leaving fingerprints are not “burglary tools” since they are not objects that facilitate a burglary. *Green v. State*, 604 So. 2d 471 (1992).

§ 810.06, Fla. Stat., contains “tool, machine, or implement.” In a case where a specific tool is charged and it is undisputed that the tool in question is a specific tool such as a screwdriver, it may be appropriate to substitute the case-specific tool.

This instruction was adopted in 1981 and amended in 1989 [543 So.2d 1205], 1995 [665 So.2d 212], and 2007 [953 So. 2d 495], and on [month day,]2021].

16.13 FAILURE TO REPORT CHILD [ABUSE] [ABANDONMENT] [OR] [NEGLECT]

§ 39.205(1), Fla. Stat.

To prove the crime of Failure to Report Child [Abuse] [Abandonment] [or] [Neglect], the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) knew or suspected child [abuse] [abandonment] [or] [neglect] occurred.**
- 2. (Defendant) knowingly and willfully [failed to report such information to the central abuse hotline of the Department of Children and Families] [or] [prevented another person from reporting such information to the central abuse hotline of the Department of Children and Families].**

Definitions. Give as applicable. Some words or phrases within these definitions are defined in § 39.01, Fla. Stat. or elsewhere and should be given if requested.

§ 39.01(2), Fla. Stat.

“Child abuse” means any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child’s physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions.

[Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child.]

[Abuse of a child includes the birth of a new child into a family during the course of an open dependency case when the parent or caregiver has been determined to lack the protective capacity to safely care for the children in the home and has not substantially complied with the case plan towards successful reunification or met the conditions for return of the children into the home.]

§ 39.01(1), Fla. Stat.

“Child abandonment” means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver, while being able, has made no significant contribution to the child’s care and maintenance or has failed to establish or maintain a substantial and positive relationship with the child, or both.

“Establish or maintain a substantial and positive relationship” includes, but is not limited to, frequent and regular contact with the child through frequent and regular visitation or frequent and regular communication to or with the child, and the exercise of parental rights and responsibilities. Marginal efforts and incidental or token visits or communications are not sufficient to establish or maintain a substantial and positive relationship with a child.

["Caregiver" means the parent, legal custodian, permanent guardian, adult household member, or other person responsible for a child's welfare. "Other person responsible for a child's welfare" includes the child's legal guardian or foster parent; an employee of any school, public or private child day care center, residential home, institution, facility, or agency; a law enforcement officer employed in any facility, service, or program for children that is operated or contracted by the Department of Juvenile Justice; or any other person legally responsible for the child's welfare in a residential setting; and also includes an adult sitter or relative entrusted with a child's care.]

[A man's acknowledgment of paternity of the child does not limit the period of time considered in determining whether the child was abandoned.]

[The absence of a parent, legal custodian, or caregiver responsible for a child's welfare, who is a servicemember, by reason of deployment or anticipated deployment as defined in 50 U.S.C. s. 3938(e), may not be considered or used as a factor in determining abandonment.]

[The incarceration, repeated incarceration, or extended incarceration of a parent, legal custodian, or caregiver responsible for a child's welfare may support a finding of abandonment.]

[The term does not include a surrendered newborn infant as described in s. 383.50, a "child in need of services" as defined in chapter 984, or a "family in need of services" as defined in chapter 984.]

§39.01(50), Fla. Stat.

"Child neglect" occurs when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment or a child is permitted to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired. The foregoing circumstances shall not be considered neglect if caused primarily by financial inability unless actual services for relief have been offered to and rejected by such person. Neglect of a child includes acts or omissions.

[A parent or legal custodian legitimately practicing religious beliefs in accordance with a recognized church or religious organization who thereby does not provide specific medical treatment for a child may not, for that reason alone, be considered a negligent parent or legal custodian; however, such an exception does not preclude a court from ordering the following services to be provided, when the health of the child so requires:

(a) Medical services from a licensed physician, dentist, optometrist, podiatric physician, or other qualified health care provider; or

(b) Treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization.]

§ 39.01(11), Fla. Stat.

“Child” means any unmarried person under the age of 18 years who has not been emancipated by order of the court.

“Willfully” means intentionally and purposely.

Lesser Included Offenses

No lesser included offenses have been identified.

Comments

§ 39.201(1), Fla. Stat., contains the requirements for mandatory reporting of known or suspected child abuse, abandonment, or neglect. Exceptions to mandatory reporting are in § 39.201(2), Fla. Stat.

This instruction was adopted on [month day,] 2021.

21.4 FALSE REPORT OF COMMISSION OF A CRIME

§ 817.49, Fla. Stat.

To prove the crime of False Report of Commission of a Crime, the State must prove the following four elements beyond a reasonable doubt:

- 1. (Defendant) willfully ~~[gave or provided]~~ ~~[caused to be given or provided]~~ [imparted] [conveyed] [or] [caused to be imparted or conveyed] false information or a report about the alleged commission of a crime under Florida law to (name of law enforcement officer or name of employee of a public safety agency).**
- 2. (Defendant) knew the information or report was false because [he] [she] knew that no such crime had actually been committed.**

3. (Name of law enforcement officer or name of employee of a public safety agency) **was a [law enforcement officer] [or] [an employee of a public safety agency].**
4. (Defendant) **knew** (name of law enforcement officer or name of employee of a public safety agency) **was a [law enforcement officer] [or] [an employee of a public safety agency].**

If requested, read elements of the crime that was falsely reported but do not instruct on the burden of proof for those elements.

The Court ~~now~~ instructs you that (insert name of crime) is a crime under Florida law.

Patterson v. State, 512 So. 2d 1109 (Fla. 1st DCA 1987).

“Willfully” means intentionally, knowingly, and purposely.

Give if applicable. § 817.49(2)(a), Fla. Stat.

“Public safety agency” means a law enforcement agency, professional or volunteer fire department, emergency medical service, ambulance service, or other public entity that dispatches or provides first responder services to respond to crimes, to assist victims of crimes, or to apprehend offenders.

Enhanced penalties. Give only if applicable. § 817.49(2)(b), Fla. Stat.

If you find (defendant) guilty of False Report of Commission of a Crime, you must further find whether the State proved beyond a reasonable doubt that:

- 1. The false report of a crime resulted in a response by a federal, state, district, municipal, or other public safety agency; and**
- 2. The response resulted in [death] [great bodily harm] [permanent disfigurement] [or] [permanent disability] to any person; and**
- 3. The [death] [great bodily harm] [permanent disfigurement] [or] [permanent disability] was the proximate result of lawful conduct arising out of the response to the false report.**

Give if applicable.

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

Jones v. Utica Mut. Ins. Co., 463 So.2d 1153 (Fla. 1985).

“Proximate result” means that there must be such a natural, direct and continuous sequence between the act and the injury that it can reasonably be said that but for the act, the injury would not have occurred.

Lesser Included Offenses

~~No lesser included offenses have been identified for this offense.~~

<u>FALSE REPORT OF COMMISSION OF A CRIME – DEATH IS PROXIMATE RESULT OF LAWFUL CONDUCT ARISING FROM RESPONSE TO THE FALSE REPORT — 817.49(2)(b)2.</u>			
<u>CATEGORY ONE</u>	<u>CATEGORY TWO</u>	<u>FLA. STAT.</u>	<u>INS. NO.</u>
<u>False Report of Commission of Crime – Great bodily harm, etc. is proximate result of lawful conduct arising from response to the false report</u>		<u>817.49(2)(b)1.</u>	<u>21.4</u>
<u>False Report Commission of a Crime</u>		<u>817.49(1)</u>	<u>21.4</u>
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

Comments

“Law enforcement officer” is not defined in chapter 817, Florida Statutes, or in case law interpreting and applying section 817.49. Trial judges may consult sections 790.001, 934.02, and 943.10 in deciding whether and how to define “law enforcement officer” for the jury.

This instruction was adopted in 1981 and amended in 2014 [143 So. 3d 893], and on [month day,] 2021.

25.6 SELL, MANUFACTURE, DELIVER, OR POSSESSION WITH INTENT TO SELL, MANUFACTURE OR DELIVER A CONTROLLED SUBSTANCE IN SPECIFIED LOCATIONS

§ 893.13(1)(c)–(f) and (h), Fla. Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) **is a controlled substance.**

To prove the crime of (crime charged), **the State must prove the following four elements beyond a reasonable doubt:**

1. (Defendant) **[sold] [manufactured] [delivered] [possessed with intent to [sell] [manufacture] [deliver]] a certain substance.**

Give as applicable. § 893.13(1)(c)–(f) and (h), Fla. Stat.

2. **The [sale] [manufacture] [delivery] [possession with intent to [sell] [manufacture] [deliver]] took place in, on, or within 1,000 feet of:**

[the real property comprising a child care facility];

[the real property comprising a public or private [elementary] [middle] [secondary] school between the hours of 6:00 a.m. and 12:00 midnight];

[the real property comprising [a state, county, or municipal park] [a community center] [a publicly-owned recreational facility];

[the real property comprising a public or private college, university, or other postsecondary educational institution];

[a physical place for worship at which a church or religious organization regularly conducts religious services];

[a convenience business];

[the real property comprising a public housing facility];

[the real property comprising an assisted living facility].

3. **The substance was** (specific substance alleged).
4. (Defendant) **had knowledge of the presence of the substance.**

Definitions. Give as applicable.

Sell.

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

Manufacture. § 893.02(15)(a), Fla. Stat.

“Manufacture” means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container.

Give if applicable.

The term “manufacture” does not include the preparation, compounding, packaging, or labeling of a controlled substance by:

- 1. A practitioner or pharmacist as an incident to his or her administering or delivering of a controlled substance in the course of his or her professional practice.**
- 2. A practitioner, or by his or her authorized agent under the practitioner’s supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis, and not for sale.**

Deliver. § 893.02(6), Fla. Stat.

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

Possession.

To prove (defendant) “possessed a substance,” the State must prove beyond a reasonable doubt that [he] [she] a) knew of the existence of the substance and b) intentionally exercised control over that substance.

Give if applicable.

Control can be exercised over a substance whether the substance is carried on a person, near a person, or in a completely separate location. Mere proximity to a substance does not establish that the person intentionally exercised control over the substance in the absence of additional evidence. Control can be established by proof that (defendant) had direct personal power to control the substance or the present ability to direct its control by another.

Joint possession. Give if applicable.

Possession of a substance may be sole or joint, that is, two or more persons may possess a substance.

Child care facility. § 402.302, Fla. Stat.

“Child care facility” means any child care center or arrangement which provides child care for more than five children unrelated to the operator and which receives a payment, fee, or grant for any of the children receiving care. It does not matter if the child care facility is operated for profit or as a nonprofit operation.

Child care facility; affirmative defense. § 893.13(1)(c), Fla. Stat., requires the owner or operator of a child care facility to post a sign that is not less than 2 square feet in size with a word legend identifying the facility as a licensed child care facility and that the sign be posted on the property of the facility in a conspicuous place where it is reasonably visible to the public. According to Brevil v. State, -- So. 3d – (Fla. 4th DCA 2021), the absence of such a sign is an affirmative defense. Therefore, the defendant must meet his or her burden of production of non-compliance with the statutory signage requirements. As of August 2021, there is no case law that establishes which party has the burden of persuasion for the affirmative defense and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt). Until there is a statutory change or case law, trial judges will need to draft a special instruction that addresses these issues.

Convenience business. § 812.171, Fla. Stat.

A “convenience business” means any place of business that is primarily engaged in the retail sale of groceries, or both groceries and gasoline, and that is open for business at any time between the hours of 11 p.m. and 5 a.m. The term does not include any of the following: a business that is primarily a restaurant, or one that always has at least five employees on the premises after 11 p.m. and before 5 a.m., or one that has at least 10,000 square feet of retail floor space. The term “convenience business” also does not include any business in which the owner or members of [his] [her] family work between the hours of 11 p.m. and 5 a.m.

Real property comprising a public housing facility. § 421.03(12), Fla. Stat.

The term “real property comprising a public housing facility” is defined as the real property of a public corporation created as a housing authority by statute.

Community Center. § 893.13(1)(c), Fla. Stat.

The term “community center” means a facility operated by a nonprofit community-based organization for the provision of recreational, social, or educational services to the public.

Assisted living facility. § 429.02(5), Fla. Stat.

“Assisted living facility” means any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, or other residential facility, whether operated for profit or not, which undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.

Affirmative defense: Lack of knowledge of illicit nature. Give if applicable. § 893.101(2) and (3), Fla. Stat.

Lack of knowledge of the illicit nature of a controlled substance is a defense to (crime charged). You may but are not required to infer that (defendant) was aware of the illicit nature of the controlled substance if you find that [he] [she] possessed the controlled substance.

Give if applicable. See McMillon v. State, 813 So. 2d 56 (Fla. 2002).

You may but are not required to infer that a person who sells a controlled substance knows of its illicit nature.

If you are convinced beyond a reasonable doubt that (defendant) knew of the illicit nature of the controlled substance, and all of the elements of the charge have been proved, you should find [him] [her] guilty of (crime charged).

If you have a reasonable doubt on the question of whether (defendant) knew of the illicit nature of the controlled substance, you should find [him] [her] not guilty of (crime charged).

Lesser Included Offenses

SELL, MANUFACTURE, DELIVER, OR POSSESSION WITH INTENT TO SELL, MANUFACTURE OR DELIVER A CONTROLLED SUBSTANCE IN SPECIFIED LOCATIONS — 893.13(1)(c)–(f) and (h)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
*Sale, Manufacture, or Delivery of a controlled substance, if Sale, Manufacture, or Delivery is charged		893.13(1)(a)	25.2
*Possession of a Controlled		893.13(6)	25.7

Substance, if Possession with Intent to Sell, Manufacture, or Deliver is charged			
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Comments

*The crime of Possession of a Controlled Substance is not a necessarily lesser-included crime of Manufacture of a Controlled Substance. *Anderson v. State*, 447 So. 2d 236 (Fla. 1st DCA 1983). Also, Possession of a Controlled Substance is not a necessary lesser-included offense of Sale of a Controlled Substance. *State v. McCloud*, 577 So. 2d 939 (Fla. 1991). It is unclear if the courts will determine that a person charged with Purchase or Delivery of a Controlled Substance is necessarily charged with Possession of a Controlled Substance.

Starting in 2014, the Legislature passed laws pertaining to “medical cannabis” or “low-THC cannabis,” which is excluded from the definition of “cannabis” in § 893.02(3), Fla. Stat.; is defined in § 381.986(1), Fla. Stat.; and must be manufactured, possessed, sold, purchased, delivered, distributed, or dispensed in conformance with § 381.986, Fla. Stat. A special instruction will be necessary in cases where a defendant relies on a cannabis-related prescription defense.

This instruction was adopted in 1981 and amended in 1989 [543 So. 2d 1205], 1997 [697 So. 2d 84], 2000 [765 So. 2d 692], 2007 [969 So. 2d 245], 2014 [153 So. 3d 192], 2016 [191 So. 3d 291], 2017 [216 So. 3d 497], and 2019 [272 So. 3d 243], and on [Month] [day,] 2021.

28.13 REFUSAL TO SUBMIT TO TESTING – DRIVING UNDER THE INFLUENCE

§ 316.1939, Fla. Stat.

To prove the crime of Refusal to Submit to Testing – Driving Under the Influence, the State must prove the following six elements beyond a reasonable doubt:

Give 1a and/or 1b as applicable.

- 1. A law enforcement officer had probable cause to believe (defendant) [drove] [was in actual physical control of] a motor vehicle in this state while**
 - a. under the influence of [an alcoholic beverage] [(a chemical substance listed in 877.111 Fla. Stat.)] [(a controlled substance listed in Chapter 893)] to the extent (Defendant’s) normal faculties were impaired.**
 - b. [his] [her] [breath] [blood] alcohol level was .08 or higher.**

Give 2a in cases where the defendant was arrested. Give 2b in cases where the defendant appeared for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test was impractical or impossible.

2. ~~a.~~ The law enforcement officer lawfully arrested (defendant) for Driving Under the Influence.
~~b. The law enforcement officer requested a blood test.~~
3. (Defendant) was informed that if [he] [she] refused to submit to a [chemical] [physical] test of [his] [her] [breath] ~~[blood]~~ [urine], [his] [her] privilege to operate a motor vehicle would be suspended for a period of one year, or, in the case of a second or subsequent refusal for a period of 18 months.
4. (Defendant) was informed that it is a misdemeanor to refuse to submit to a lawful test of [his] [her] [breath] ~~[blood]~~ [urine], if either [his] [her] driving privilege had been previously suspended, or if [he] [she] was previously fined under s. 327.35215, for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine].
5. (Defendant), after being so informed, refused to submit to a [chemical] [physical] test of [his] [her] [breath] ~~[blood]~~ [urine] when requested to do so by a [law enforcement officer] [correctional officer].
6. (Defendant's) driving privilege had been previously suspended or [he] [she] was previously fined under s. 327.35215 for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine].

BUI refusal

s. 327.35215 is the Florida statute that covers refusal to submit to testing after an arrest for Boating Under the Influence.

Inference. § 316.1939(3), Fla. Stat. Give if applicable.

You are permitted to conclude that (defendant's) driving privilege had been previously suspended for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine] if a record from the Department of Highway Safety and Motor Vehicles shows such a suspension.

Definitions.

§ 316.003(44) Fla. Stat. Some of these terms have their own statutory definitions, which should be given if necessary.

“Motor vehicle” means any self-propelled vehicle not operated upon rails or guideway[, but not including any bicycle, electric bicycle, motorized scooter, electric personal assistive mobility device, mobile carrier, personal delivery device, swamp buggy, or moped].

§ 316.003(103), Fla. Stat. Some of these terms have their own statutory definitions, which should be given if necessary.

“Vehicle” is every device, in, upon or by which any person or property is, or may be, transported or drawn upon a highway[, except personal delivery devices, mobile carriers, and devices used exclusively upon stationary rails or tracks].

“Probable cause” exists where the totality of circumstances, from the perspective of the law enforcement officer’s knowledge, training and experience, gave the officer reasonable grounds and a fair probability to believe that a crime had been committed.

Give if applicable. The option of “on a vehicle” pertains to vehicles such as motorcycles.

“Actual physical control” means the defendant must be physically in or on the motor vehicle and have the capability to operate the motor vehicle, regardless of whether [he] [she] is actually operating the vehicle at the time.

Lesser Included Offenses

REFUSAL TO SUBMIT TO TESTING – <u>DRIVING UNDER THE INFLUENCE</u> — 316.1939			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04	5.1

Comments

Where the lawfulness of the arrest is at issue, a special instruction will be necessary.

This instruction was adopted in 2007 [965 So. 2d 811] and amended in 2013 [131 So. 3d 692], 2019 [262 So. 3d 59], and on October 2, 2020, and on [MONTH] [DAY], 2021.

28.13(a) REFUSAL TO SUBMIT TO TESTING – BOATING UNDER THE INFLUENCE

§ 327.359, Fla. Stat.

To prove the crime of Refusal to Submit to Testing – Boating Under the Influence, the State must prove the following six elements beyond a reasonable doubt:

Give 1a and/or 1b as applicable.

1. A law enforcement officer had probable cause to believe (defendant) operated [or was in actual physical control of] a vessel in this state while
 - a. under the influence of [an alcoholic beverage] [(a chemical substance listed in 877.111 Fla. Stat.)] [(a controlled substance listed in Chapter 893)] to the extent [his] [her] normal faculties were impaired.
 - b. [his] [her] [breath] [blood] alcohol level was .08 or higher.
2. The law enforcement officer lawfully arrested (defendant) for Boating Under the Influence.
3. (Defendant) was informed that if [he] [she] refused to submit to a [chemical] [physical] test of [his] [her] [breath] [urine], [he] [she] would be subject to a fine of \$500.
4. (Defendant) was informed that it is a misdemeanor to refuse to submit to a lawful test of [his] [her] [breath] [urine], if either [he] [she] had been previously fined under s. 327.35215, or if [his] [her] driving privilege had been previously suspended, for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine].
5. (Defendant), after being so informed, refused to submit to a [chemical] [physical] test of [his] [her] [breath] [urine] when requested to do so by a [law enforcement officer] [correctional officer].
6. (Defendant) had been previously fined under s. 327.35215 or [his] [her] driving privilege had been previously suspended for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine].

BUI refusal

s. 327.35215 is the Florida statute that covers refusal to submit to testing after an arrest for Boating Under the Influence.

Inference. § 316.1939(3), Fla. Stat. Give if applicable.

You are permitted to conclude that (defendant's) driving privilege had been previously suspended for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine] if a record from the Department of Highway Safety and Motor Vehicles shows such a suspension.

Definitions.

§ 327.02(47) Fla. Stat. Some of these terms have their own definitions in § 327.02, Fla. Stat., which should be given if necessary. See State v. Davis, 110 So. 3d 27 (Fla. 2d DCA 2013)(holding that for a BUI prosecution, the state is not required to prove that the boat defendant was operating was subject to a license tax).

“Vessel” means a boat and includes every description of watercraft, barge, and airboat, other than a seaplane, on the water, used or capable of being used, as a means of transportation on water.

“Probable cause” exists where the totality of circumstances, from the perspective of the law enforcement officer’s knowledge, training and experience, gave the officer reasonable grounds and a fair probability to believe that a crime had been committed.

§ 327.02(34), Fla. Stat.

“Operate” means to be in charge of or in command of [or in actual physical control of] a vessel upon the waters of this state, or to exercise control over or to have responsibility for a vessel’s navigation or safety while the vessel is underway upon the waters of this state, or to control or steer a vessel being towed by another vessel upon the waters of the state.

Give if applicable

“Actual physical control” means the defendant must be physically in or on the vessel and have the capability to operate the vessel, regardless of whether [he] [she] is actually operating the vessel at the time.

Lesser Included Offense

<u>REFUSAL TO SUBMIT TO TESTING - BOATING UNDER THE INFLUENCE — 316.1939</u>			
<u>CATEGORY ONE</u>	<u>CATEGORY TWO</u>	<u>FLA. STAT.</u>	<u>INS. NO.</u>
<u>None</u>			
	<u>Attempt</u>	<u>777.04</u>	<u>5.1</u>

Comments

Where the lawfulness of the arrest is at issue, a special instruction will be necessary.

This instruction was adopted on [MONTH] [DAY], 2021.

29.24 HUMAN TRAFFICKING

§ 787.06(3), Fla. Stat.

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

1. (Defendant) knowingly, or in reckless disregard of the facts, [engaged in] [attempted to engage in] [benefited financially by receiving something of value from participation in a venture that subjected a person to] human trafficking.

Give as applicable.

2. § 787.06(3)(a)1, Fla. Stat.

The human trafficking was for the labor or services of [a child] [or] [an adult believed by (defendant) to be a child].

§ 787.06(3)(a)2, Fla. Stat.

The human trafficking involved (defendant's) use of coercion for the labor or services of an adult.

§ 787.06(3)(b), Fla. Stat.

The human trafficking involved (defendant's) use of coercion for commercial sexual activity of an adult.

§ 787.06(3)(c)1, Fla. Stat.

The human trafficking was for the labor or services of [a child] [or] [an adult believed by (defendant) to be a child], who was an unauthorized alien.

§ 787.06(3)(c)2, Fla. Stat.

The human trafficking involved (defendant's) use of coercion for the labor or services of an adult who was an unauthorized alien.

§ 787.06(3)(d), Fla. Stat.

The human trafficking involved (defendant's) use of coercion for commercial sexual activity of an adult who was an unauthorized alien.

§ 787.06(3)(e)1, Fla. Stat.

The human trafficking was for the labor or services of [a child] [or] [an adult believed by (defendant) to be a child], by the transfer or transport of the [child] [or] [person believed to be a child], from outside Florida to within this state.

§ 787.06(3)(e)2, Fla. Stat.

The human trafficking involved (defendant's) use of coercion for the labor or services of an adult by the transfer or transport of the adult from outside Florida to within this state.

§ 787.06(3)(f)1, Fla. Stat.

The human trafficking was for commercial sexual activity of [a child] [or] [an adult believed by (defendant) to be a child], by the transfer or transport of the [child] [or] [person believed to be a child], from outside Florida to within this state.

§ 787.06(3)(f)2, Fla. Stat.

The human trafficking involved (defendant's) use of coercion for commercial sexual activity of an adult by the transfer or transport of the adult from outside Florida to within this state.

§ 787.06(3)(g), Fla. Stat.

The human trafficking was for commercial sexual activity in which [a child] [or] [an adult believed by (defendant) to be a child] [a person who is mentally defective or mentally incapacitated] was involved.

Reclassification. § 787.06(8), Fla. Stat. Give if applicable.

If you found (defendant) guilty of Human Trafficking, you must further determine whether the State proved beyond a reasonable doubt that during the commission of the Human Trafficking, [he] [she] caused [great bodily harm] [or] [permanent disability] [or] [permanent disfigurement to [another person] [(victim)].

Definitions.

Give in all cases.

§ 787.06(2)(d), Fla. Stat.

“Human trafficking” means [transporting] [soliciting] [recruiting] [harboring] [providing] [enticing] [maintaining] [purchasing] [patronizing] [procuring] [or] [obtaining] another person for the purpose of exploitation of that person.

“Child” means a person ~~under the age of~~ younger than 18 years of age.

“Adult” means a person 18 years of age or older.

Give if applicable.

Wheeler v. State, 203 So. 3d 1007 (Fla. 4th DCA 2016).

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

§ 787.06(2)(a), Fla. Stat.

“Coercion” means:

- 1. Using or threatening to use physical force against any person;**
- 2. Restraining, isolating, or confining or threatening to restrain, isolate, or confine any person without lawful authority and against her or his will;**
- 3. Using lending or other credit methods to establish a debt by any person when labor or services are pledged as a security for the debt, if the value of the labor or services as reasonably assessed is not applied toward the liquidation of the debt, the length and nature of the labor or services are not respectively limited and defined;**

4. **Destroying, concealing, removing, confiscating, withholding, or possessing any actual or purported passport, visa, or other immigration document, or any other actual or purported government identification document, of any person;**
5. **Causing or threatening to cause financial harm to any person;**
6. **Enticing or luring any person by fraud or deceit; or**
7. **Providing a controlled substance as outlined in Schedule [I] [II] of Florida Statute 893.03 to any person for the purpose of exploitation of that person.**

(Name of controlled substance) is a **Schedule [I] [II] drug within Florida Statute 893.03.**

Give as applicable.

§ 787.06(2)(b), Fla. Stat.

“Commercial sexual activity” means:

- a. (name of chapter 796 crime). (Name of chapter 796 crime) **is defined as** *(insert definition of Chapter 796 crime).*
- b. **an attempt to commit** (name of chapter 796 crime). **An attempt to commit** (name of chapter 796 crime) **is defined as** *(insert definition of attempt in Instruction 5.1 and then define the Chapter 796 crime).*
- c. **sexually explicit performances. “Sexually explicit performance” means an act or show, whether public or private, that is live, photographed, recorded, or videotaped and intended to arouse or satisfy the sexual desires or appeal to the prurient interest.**

d. the production of pornography.

§ 787.06(2)(c), Fla. Stat. Insert definition of loan sharking from §687.071 Fla. Stat. Insert explanation of the statute of frauds from §725.01 Fla. Stat.

“Financial harm” includes [extortionate extension of credit] [loan sharking] [employment contracts that violate the statute of frauds].

§ 787.06(2)(e), Fla. Stat.

“Labor” means work of economic or financial value.

§ 787.06(2)(f), Fla. Stat.

“Maintain” means in relation to labor or services, to secure or make possible continued performance thereof, regardless of any initial agreement on the part of a victim to perform such type service.

§ 787.06(2)(g), Fla. Stat.

“Obtain” means, in relation to labor, commercial sexual activity, or services, to receive, take possession of, or take custody of another person or to secure performance thereof.

§ 787.06(2)(h), Fla. Stat.

“Services” means any act committed at the behest of, under the supervision of, or for the benefit of another. [The term includes, but is not limited to [forced marriage] [servitude] [the removal of organs].]

§ 787.06(2)(j), Fla. Stat. See 8 U.S.C. s. 1324a(h)(3).

“Unauthorized alien” means an alien who is not authorized under federal law to be employed in the United States.

§ 787.06(2)(k), Fla. Stat.

“Venture” means any group of two or more individuals associated in fact, whether or not a legal entity.

§ 787.06(3)(g), 794.011(1), 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.

“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.

Give if requested. § 787.06(9), 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. “Bona fide” means genuine.

Give if requested. § 787.06(11), Fla. Stat.

(Victim’s) lack of chastity or the willingness or consent of (victim) is not a defense if [he] [she] was under 18 years of age at the time of the offense.

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

A conviction under § 787.06(3)(f)1, Florida Statutes, (human trafficking via commercial sexual activity of a child by transport or transfer into Florida) is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life. However, a conviction under § 787.06(3)(g), Florida Statutes, (human trafficking via commercial sexual activity where a child was involved but

without a finding that the child was transported from outside the state) is a life felony.

This instruction was adopted in 2013 [131 So. 3d 692] and amended in 2015 [176 So. 3d 938], 2016 [200 So. 3d 754], ~~and~~ 2019 [267 So. 3d 980], and [month day,] 2021.

**29.25 HUMAN TRAFFICKING BY A [PARENT] [LEGAL GUARDIAN]
[PERSON WITH CUSTODY OR CONTROL] OF A MINOR**

§ 787.06(4), Fla. Stat.

To prove the crime of Human Trafficking By a [Parent] [Legal Guardian] [Person With Custody or Control] of a Minor, the State must prove the following four elements beyond a reasonable doubt:

- 1. (Defendant) [was a parent] [was a legal guardian] [had custody or control] of (victim).**
- 2. (Defendant) [sold or otherwise transferred custody or control of (victim)] [offered to sell or offered to otherwise transfer custody of (victim)].**
- 3. (Defendant) did so [knowing] [or] [in reckless disregard of the fact] that as a consequence of the sale or transfer, (victim) would be subjected to human trafficking.**
- 4. At the time, (victim) was under the age of 18 years.**

Definitions.

Give in all cases.

§ 787.06(2)(d), Fla. Stat.

“Human trafficking” means [transporting] [soliciting] [recruiting] [harboring] [providing] [enticing] [maintaining] [purchasing] [patronizing] [procuring] [or] [obtaining] another person for the purpose of exploitation of that person.

§ 787.06(2)(f), Fla. Stat.

“Maintain” means in relation to labor or services, to secure or make possible continued performance thereof, regardless of any initial agreement on the part of a victim to perform such type service.

§ 787.06(2)(g), Fla. Stat.

“Obtain” means, in relation to labor, commercial sexual activity, or services, to receive, take possession of, or take custody of another person or to secure performance thereof.

§ 787.06(2)(b), Fla. Stat.

“Commercial sexual activity” means:

- a. (name of chapter 796 crime). (Name of chapter 796 crime) is defined as (insert definition of Chapter 796 crime).
- b. **an attempt to commit (name of chapter 796 crime). An attempt to commit (name of chapter 796 crime) is defined as (insert definition of attempt in Instruction 5.1 and then define the Chapter 796 crime).**
- c. **sexually explicit performances. “Sexually explicit performance” means an act or show, whether public or private, that is live, photographed, recorded, or videotaped and intended to arouse or satisfy the sexual desires or appeal to the prurient interest.**
- d. **the production of pornography.**

Give if requested. § 787.06(11), Fla. Stat.

(Victim’s) lack of chastity or the willingness or consent of (victim) is not a defense if [he] [she] was under 18 years of age at the time of the offense.

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comment

This instruction was adopted in 2013 [131 So. 3d 692] and amended in 2015 [176 So. 3d 938], ~~and~~ 2018 [242 So. 3d 347], and on [month day,] 2021.

29.27 UNLAWFUL DISCLOSURE OF THE LOCATION OF A CERTIFIED DOMESTIC VIOLENCE CENTER

§ 39.9057, Fla. Stat.

To prove the crime of Unlawful Disclosure of the Location of a Certified Domestic Violence Center, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) [disclosed] [or] [published, disseminated, or disclosed any descriptive information or image that may identify] the location of a domestic violence center.**
- 2. (Defendant) did so maliciously.**
- 3. At the time, the domestic violence center was certified by the Department of Children and Families pursuant to § 39.905, Florida Statutes.**

As of August 2021, neither the legislature nor the appellate courts had determined whether the statute requires the state to prove legal malice or actual malice. In the absence of legislative or judicial clarification, trial judges should choose one of the following:

Legal malice.

“Maliciously” means intentionally, wrongfully and without any lawful justification or excuse.

Actual malice.

“Maliciously” means with ill will, hatred, spite, or an evil intent.

Reclassification.

The first degree misdemeanor in § 39.9057, Fla. Stat., becomes a third degree felony upon a second or subsequent conviction. As of August 2021, it was unclear whether a conviction required an adjudication of guilt. It was also unclear whether the reclassification requires the state to prove the prior to the factfinder under the beyond a reasonable doubt standard or whether the prior can be considered a recidivist factor that can be proven to the sentencing judge under the preponderance of the evidence standard. If viewed as an element, give the following:

Now that you have found the defendant guilty of Unlawful Disclosure of the Location of a Certified Domestic Violence Center, you must further determine whether the State has proven beyond a reasonable doubt whether

the defendant was previously convicted of Unlawful Disclosure of the Location of a Certified Domestic Violence Center.

Lesser Included Offense

<u>UNLAWFUL DISCLOSURE OF THE LOCATION OF A CERTIFIED DOMESTIC VIOLENCE CENTER — 39.9057</u>			
<u>CATEGORY ONE</u>	<u>CATEGORY TWO</u>	<u>FLA. STAT.</u>	<u>INS. NO.</u>
<u>None</u>			
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

Comment

This instruction was approved on [month day,] 2021.