

Proposed amendments to 53 Standard Jury Instructions in 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:

- 8.22 – WRITTEN [OR ELECTRONIC] THREAT TO [KILL] [DO BODILY INJURY] [CONDUCT A MASS SHOOTING] CONDUCT AN ACT OF TERRORISM]**
- 8.30 – HARSSING OR OBSCENE TELEPHONE CALLS**
- 11.1 – SEXUAL BATTERY – VICTIM LESS THAN 12**
- 11.2 – SEXUAL BATTERY – VICTIM 12 OR OLDER – GREAT FORCE/DEADLY WEAPON**
- 11.3 – SEXUAL BATTERY – UNDERSPECIFIED CIRCUMSTANCES**
- 11.4 – SEXUAL BATTERY**
- 11.5 – SOLICIATATION OF A CHILD TO ENGAGE IN AN ACT THAT CONSTITUTES SEXUAL BATTERY BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY**
- 11.6 – ENGAGING IN AN ACT THAT CONSTITUTES SEXUAL BATTERY UPON A CHILD 12 OR OVER BUT YOUNGER THAN 18 BY A PERSON IN CUSTODIA OR FAMILIAL AUTHORITY**
- 11.6(a) – ENGAGING IN AN ACT THAT [CONSTITUTES SEXUAL BATTERY] [INJURED THE SEX ORGAN OF ANOTHER IN AN ATTEMPT TO COMMIT SEXUAL BATTERY] BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY UPON A PERSON LESS THAN 12**
- 11.7 – UNLAWFUL SEXUAL ACTIVITY WITH CERTAIN MINORS**
- 11.7(a) – INDECENT, LEWD, OR LASCIVIOUS TOUCHING OF CERTAIN MINORS**
- 11.10(a) – LEWD OR LASCIVIOUS BATTERY (ENGAGING)**
- 11.10(b) – LEWD OR LASCIVIOUS BATTERY (ENCOURAGING)**
- 11.10(c) – LEWD OR LASCIVIOUS MOLESTATION**
- 11.10(d) – LEWD OR LASCIVIOUS CONDUCT**
- 11.10(e) – LEWD OR LASCIVIOUS EXHIBITION**
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- 11.10(g) – LEWD OR LASCIVIOUS EXHIBITION BY A DETAINEE IN PRESENCE OF AN EMPLOYEE OF A FACILITY**
- 11.11- LEWD OR LASCIVIOUS OFFENSES UPON/IN PRESENCE OF ELDERLY/DISABLED PERSON**
- 11.17(a) – SOLICITING A CHILD FOR UNLAWFUL SEXUAL CONDUCT USING COMPUTER SERVICE/DEVICE**
- 11.17(b) – SOLICITING A PARENT OF A CHILD FOR UNLAWFUL SEXUAL CONDUCT USING COMPUTER SERVICE/DEVICE**
- 11.17(c) – TRAVELING TO MEET A MINOR**
- 11.17(d) – TRAVELING TO MEET A MINOR FACILITATED BY A PARENT**
- 11.18 - SEXUAL MISCONDUCT BY A PSYCHOTHERAPIST**
- 11.20 – TRANSMISSION OF CHILD PORNOGRAPHY BY ELECTRONIC DEVICE/EQUIPMENT**
- 11.21 - TRANSMISSION OF MATERIAL HARMFUL TO MINORS BY ELECTRONIC EQUIPMENT/DEVICE**
- 11.22 - GIVING OBSCENE MATERIAL TO A MINOR**
- 11.23 – PROMOTION OF AN ALTERED SEXUAL DEPICTION**
- 11.24 - THEFT OF A SEXUALLY EXPLICIT IMAGE WITH INTENT TO PROMOTE**
- 11.25 – UNAUTHORIZED POSSESSION OF A SEXUALLY EXPLICIT IMAGE WITH**

INTENT TO PROMOTE

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- 23.1 – MAINTAINING A PLACE OF PROSTITUTION, LEWDNESS, OR ASSIGNATION**
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- 23.6 – SOLICITING FOR PROSTITUTION, LEWDNESS, OR ASSIGNATION**
- 23.7 – ENTERING FOR THE PURPOSE OF PROSTITUTION, LEWDNESS, OR ASSIGNATION**
- 25.6 – SALE, MANUFACTURE, DELIVER, OR POSSESSION WITH INTENT TO SELL, MANUFACTURE, OR DELIVER A CONTROLLED SUBSTANCE IN SPECIFIED LOCATIONS**
- 28.5(a) – [RACING ON A HIGHWAY] [STREET TAKEOVERS] [STUNT DRIVING]**
- 28.11(a) – DRIVING WHILE DESIGNATED AS A HABITUAL TRAFFIC OFFENDER**
- 29.13(c) - SEXUAL ACTIVITY WITH AN ANIMAL**
- 29.19 – ABUSE OF A DEAD HUMAN BODY**

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, 2022. 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.

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:

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.

Give if applicable. § 775.30(1), Fla. Stat. The judge may need to instruct on certain criminal laws that are violent acts or acts dangerous to human life, or a violation of § 815.06, Fla. Stat. (Instructions #12.6-12.8).

“Terrorism” means an activity that:

(a) involves:

- 1. a violent act or an act dangerous to human life which is a violation of the criminal laws of this state or of the United States; or**
- 2. A violation of s. 815.06;**

and

(b) is intended to:

- 1. intimidate, injure, or coerce a civilian population;**
- 2. influence the policy of a government by intimidation or coercion; or**
- 3. affect the conduct of government through destruction of property, assassination, murder, kidnapping, or aircraft piracy.**

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

Comments

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).

This instruction was adopted in 2013 [131 So. 3d 720] and amended in 2018 [260 So. 3d 1024], and on December 15, 2021, and on month day, 2022.

8.30 [HARASSING] [OR] [OBSCENE] TELEPHONE CALL[S]
[or]
KNOWINGLY PERMITTING [HARASSING] [OR] [OBSCENE]
TELEPHONE CALL[S]
§ 365.16(1) and (2), Fla. Stat.

To prove the crime of (name of crime), the State must prove the following [two] [three] elements beyond a reasonable doubt:

Give as applicable.

§ 365.16(1)(a), Fla. Stat.

- 1. (Defendant) made a telephone call to a location at which the person receiving the call had a reasonable expectation of privacy.**
- 2. During the call, (defendant) made a comment, request, suggestion, or proposal that was obscene, lewd, lascivious, filthy, vulgar, or indecent.**
- 3. At the time, (defendant's) call or language was intended by [him] [her] to abuse, threaten, or harass any person at the called number.**

§ 365.16(1)(b), Fla. Stat.

- 1. (Defendant) made a telephone call, whether or not conversation ensued.**
- 2. During the call, (defendant) did not disclose [his] [her] identity.**
- 3. At the time, (defendant) had the intent to abuse, threaten, or harass any person at the called number.**

§ 365.16(1)(c), Fla. Stat.

- 1. (Defendant) made or caused the telephone of another to repeatedly or continuously ring.**
- 2. At the time, (defendant) had the intent to harass any person at the called number.**

§ 365.16(1)(d), Fla. Stat.

- 1. (Defendant) made repeated telephone calls during which conversation ensued.**

2. (Defendant) **made the calls solely to harass any person at the called number.**

§ 365.16(2), Fla. Stat.

1. (Defendant) **knowingly permitted any telephone under [his] [her] control to be used by another person.**
2. (Defendant) **did so knowing that the telephone was being or would be used to:**

Give as applicable.

- a. **make a telephone call to a location at which the person receiving the call had a reasonable expectation of privacy during which the caller makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent with the intent to abuse, threaten, or harass any person at the called number.**
- b. **make a telephone call, whether or not conversation ensues, without disclosing his or her identity, with the intent to threaten or harass any person at the called number.**
- c. **make or cause the telephone of another to repeatedly or continuously ring with the intent to harass any person at the called number.**
- d. **make repeated telephone calls, during which conversation ensues, solely to harass any person at the called number.**

Definitions. Give as applicable.

§ 365.161(1), Fla. Stat.

“Obscene” means a communication which:

1. **The average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interests;**
2. **Describes, in a patently offensive way, deviate sexual intercourse, sadomasochistic abuse, sexual battery, sexual bestiality, sexual conduct, or sexual excitement; and**
3. **Taken as a whole, lacks serious literary, artistic, political, or scientific value.**

“Deviate Sexual Intercourse” means sexual conduct between persons consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

“Sadomasochistic abuse” means flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained for

the purpose of deriving sexual satisfaction or satisfaction brought about as a result of sadistic violence, from inflicting harm on another or receiving such harm oneself.

“Sexual Battery” means oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another, by any other object.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

“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 female genitals of the other.

“Sexual Conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse or any act or conduct that constitutes sexual battery.

“Sexual excitement” means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

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

Lesser Included Offense

HARASSING OR OBSCENE TELEPHONE CALLS OR KNOWINGLY PERMITTING HARASSING OR OBSCENE TELEPHONE CALLS — 365.16(1) AND (2)

<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>

Comments

As of September 2022, it was unclear whether the definition of “harass” in the stalking statute applies to this statute.

This instruction was adopted on month day, 2022.

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]~~ [female genitals] [mouth] of the [(victim)] [(defendant)].
 - b. (Defendant) committed an act [upon] [with] (victim) in which the [anus] ~~[vagina]~~ [female genitals] of [(victim)] [(defendant)] [was] [were] 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]~~ [female genitals] [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]~~ [female genitals] 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)~~(a)~~, Fla. Stat.

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

§ 794.021, Fla. Stat.

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

Give if applicable.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

§ 794.011(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

“Bona fide” means genuine.

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

*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.

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

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], on November 20, 2020, and on December 15, 2021, 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] [Actual 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]~~ [female genitals] [mouth] of the [(victim)] [(defendant)].

- b. (Defendant) committed an act [upon] [with] (victim) in which the [anus] ~~[vagina]~~ [female genitals] of [(victim)] [(defendant)] [was] [were] penetrated by an object.

Give 2a or 2b or both as applicable.

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

Definitions.

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

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

Give if applicable.

§ 794.022(4), Fla. Stat.

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

§ 794.011(1)(c), Fla. Stat.

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

§ 794.011(1)(b), Fla. Stat.

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

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

§ 794.011(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

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

*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.”

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

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, on November 20, 2020, ~~and~~ on December 15, 2021, 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 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]~~ [female genitals] [mouth] of the [(victim)] [(defendant)].
- b. (Defendant) committed an act [upon] [with] (victim) in which the [anus] ~~[vagina]~~ [female genitals] of [(victim)] [(defendant)] [was] [were] 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)(e), 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.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

§ 794.011(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

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)(f), 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

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

*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.

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

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, on March 5, 2021, ~~and~~ on December 15, 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 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]~~ [female genitals] [mouth] of the [(victim)] [(defendant)].**
 - b. (Defendant) **committed an act [upon] [with] (victim) in which the [anus] ~~[vagina]~~ [female genitals] of [(victim)] [(defendant)] [was] [were] 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)(e), 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.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

§ 794.011(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

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.

§ 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

*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.

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

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], on November 20, 2020, and on December 15, 2021, and on month day, 2022.

11.5 SOLICITATION OF A CHILD TO ENGAGE IN AN ACT THAT CONSTITUTES SEXUAL BATTERY BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY

§ 794.011(8)(a), Fla. Stat.

To prove the crime of Solicitation of a Child to Engage in an Act that Constitutes Sexual Battery by a Person in Familial or Custodial Authority, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) solicited (victim) to engage in a sexual battery.**
- 2. At the time of the offense, (victim) was less 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]~~ [female genitals] [mouth] of the [(victim)] [(defendant)];
- or
- b. the [anus] ~~[vagina]~~ [female genitals] of [(victim)] [(defendant)] [was] [were] penetrated by an object. ~~The definition of “an object” includes a finger.~~

It is not necessary that a sexual battery actually take place for the crime of Solicitation to be completed.

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

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

§ 794.011(8), Fla. Stat.

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

Definitions.

§ 777.04(2), Fla. Stat.

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

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

§ 794.011(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if requested. § 794.022, Fla. Stat.

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

§ 794.021, Fla. Stat.

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

Give if applicable.

“Bona fide” means genuine.

§ 775.0862, Fla. Stat.

Enhancement for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Solicitation of a Child to Engage in an Act that Constitutes Sexual Battery by a Person in 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

SOLICITATION OF A CHILD TO ENGAGE IN AN ACT THAT CONSTITUTES SEXUAL BATTERY BY PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY — 794.011(8)(a)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Lewd or lascivious battery*		800.04(4)(a)2.*	11.10(b)*

Comments

*When instructing on the lesser-included offense of Lewd or Lascivious Battery, the judge should not instruct on the option of forcing a person to engage in any sexual act nor should the judge instruct about the acts of sadomasochistic abuse, sexual bestiality, or prostitution unless charged. More specifically, if the state’s charging document tracks § 794.011(8)(a), Fla. Stat., the only part of Lewd or Lascivious Battery that is a necessary lesser-included offense is “encouraging or enticing a person less than 16 years old to engage in sexual activity.”

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 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.

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1987 [508 So. 2d 1221] and was amended in 1995 [657 So. 2d 1152], 1997 [697 So. 2d 84], 2015 [156 So. 3d 1037], and 2016 [190 So. 3d 1055], and on month day, 2022.

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 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 That 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 that constituted Sexual Battery.
2. At the time ~~of the offense~~, (victim) was 12 years of age or older but younger 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]~~ [female genitals] [mouth] of the [(victim)] [(defendant)]:

or

- b. the [anus] ~~[vagina]~~ [female genitals] of [(victim)] [(defendant)] [was] [were] penetrated by an object.

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

However, any act done for bona fide medical purposes is not a Sexual Battery.

§ 794.011(8), Fla. Stat.

It is not a defense that (victim) was willing or consented to engage in an act that 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.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

"Union" means contact.

Give if applicable.

§ 794.011(1), Fla. Stat.

"Female genitals" includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

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 That 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 THAT 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.
None			
	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	8.3
	Assault	784.011	8.1

Comments

*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.

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.

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as affirmative defenses or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

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], on November 20, 2020, on April 5, 2021, ~~and~~ on December 15, 2021, 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~~female genitals] [mouth] of the [(victim)] [(defendant)].
- b. (Defendant) engaged in an act [upon] [with] (victim) in which the [anus] [~~vagina~~female genitals] of [(victim)] [(defendant)] [was] [were] penetrated by an object.
- c. (Defendant) engaged in an act ~~which that~~ 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~~female genitals] [mouth] of the [(victim)] [(defendant)].
- d. (Defendant) engaged in an act ~~which that~~ injured the sexual organ of (victim) in an attempt to commit an act upon (victim) in which the [anus] [~~vagina~~female genitals] 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.

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

"An object" includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

"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

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
	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

*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.

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defenses or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2016 [190 So. 3d 1055] and amended on November 20, 2020, on April 5, 2021, ~~and~~ on December 15, 2021, and on month day, 2022.

11.7 UNLAWFUL SEXUAL ACTIVITY WITH CERTAIN MINORS

§ 794.05, Fla. Stat.

To prove the crime of Unlawful Sexual Activity with a Certain Minors, the State must prove the following three elements beyond a reasonable doubt:

~~Give 1a and/or 1b depending on the allegations and the evidence.~~

1.
 - a. (Defendant) ~~committed an act with (victim) in which the sexual organ of the~~ ~~[(defendant)] [(victim)] penetrated or had union with the [anus] [vagina]~~ ~~[mouth] of [(victim)] [(defendant)] engaged in sexual activity with (victim).~~
 - b. ~~(Defendant) committed an act with (victim) in which the [anus] [vagina] of~~ ~~[(victim)] [(defendant)] was penetrated by an object.~~
2. At the time, (defendant) was 24 years of age or older.
3. At the time, (victim) was 16 or 17 years of age.

§ 794.05(2), Fla. Stat.

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

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

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

The definition of “an object” includes a finger.

Give if applicable.

§ 794.05(1), Fla. Stat.

Sexual activity does not include an act done for a bona fide medical purpose.

Give if requested. § 794.05(3), Fla. Stat.

(Victim’s) ~~lack of chastity is not a defense and~~ prior sexual conduct is not relevant to the crime charged.

Give if requested. Feliciano v. State, 937 So. 2d 818 (Fla. 1st DCA 2006); § 794.021, 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 Unlawful Sexual Activity With a Certain Minors, 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

UNLAWFUL SEXUAL ACTIVITY WITH CERTAIN MINORS — 794.05			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Unnatural and Lascivious Act*	800.02*	11.8*
	Attempt	777.04(1)	5.1

Comments

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

~~If removal of the disabilities of nonage is raised as an issue pursuant to § 794.05(2), Fla. Stat., the jury should be instructed with respect to § 743.01 et seq.~~ This statute does not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under chapter 743. See § 794.05(3), Fla. Stat.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of

persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1998 [723 So. 2d 123] and amended in 2015 [163 So. 3d 478], and 2018 [257 So. 3d 370], and on month day, 2022.

11.7(a) INDECENT, LEWD, OR LASCIVIOUS TOUCHING OF CERTAIN MINORS

§ 794.051, Fla. Stat.

To prove the crime of Indecent, Lewd, or Lascivious Touching of Certain Minors, the State must prove the following three elements beyond a reasonable doubt:

Give 1a or 1b or both as applicable.

1. (Defendant)

a. intentionally touched the [breast] [genitals] [genital area] [buttocks] [clothing covering the [breast] [genitals] [genital area] [buttocks]] of (victim) in a lewd or lascivious manner.

b. [forced] [or] [enticed] (victim) to touch [his] [her] [breast] [genitals] [genital area] [buttocks] [clothing covering [his] [her] [breast] [genitals] [genital area] [buttocks]] in a lewd or lascivious manner.

2. At the time, (defendant) was 24 years of age or older.

3. At the time, (victim) was 16 or 17 years of age.

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 requested. § 794.022, Fla. Stat.

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

Give if requested. § 794.021, Fla. Stat; Feliciano v. State, 937 So. 2d 818 (Fla. 1st DCA 2006).

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.

Bona fide means genuine.

Lesser Included Offenses

INDECENT, LEWD, OR LASCIVIOUS TOUCHING OF CERTAIN MINORS — 794.051

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
<u>None</u>			
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>
	<u>Battery</u>	<u>784.03</u>	<u>8.3</u>
	<u>Assault</u>	<u>784.011</u>	<u>8.1</u>
	<u>Unnatural and lascivious act*</u>	<u>800.02*</u>	<u>11.8*</u>

Comments

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

This crime does not apply to a person 16 or 17 years of age who has had the disability of nonage removed under chapter 743. See 794.051(2), Fla. Stat.

This instruction was adopted on month day, 2022.

11.10(a) LEWD OR LASCIVIOUS BATTERY (ENGAGING IN SEXUAL ACTIVITY)
§ 800.04(4)(a)1, Fla. Stat.

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

Give 1a and/or 1b as applicable.

1. (Defendant) **engaged in sexual activity with** (victim).
 - a. ~~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 [(victim)] [(defendant)].~~

b. ~~committed an act [upon] [with] (victim) in which the [anus] [vagina] of [(victim)] [(defendant)] was penetrated by an object.~~

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

Definitions. Give if applicable.

§ 800.04(1), Fla. Stat.

“Sexual activity” means the oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object.

§ 800.04(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

§ 800.04(1)(a), Fla. Stat.

However, any act done for bona fide medical purposes is not a lewd or lascivious battery.

§ 800.04(2), Fla. Stat.

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

§ 800.04(1), Fla. Stat.

“Consent” means intelligent, knowing, and voluntary consent, and does not include submission by coercion.

§ 800.04(1), Fla. Stat.

“Coercion” means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance.

§ 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. § 800.04(8), Fla. Stat.

A mother’s breastfeeding of her baby does not under any circumstance constitute a Lewd or Lascivious Battery.

§ 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 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 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 BATTERY (ENGAGING IN SEXUAL ACTIVITY) — 800.04(4)(a)1			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Aggravated battery	784.045(1)	8.4
	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*	800.02*	11.8*

Comments

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

In 2014, the legislature created a lewd and lascivious battery classified as a first degree felony if the defendant was 18 years of age or older at the time of the crime and had a prior conviction for an enumerated crime. See § 800.04(4)(c), Fla. Stat. If this ~~enhancement~~ higher degree is charged, a special instruction will be required because it is likely that Apprendi v. New Jersey, 530 U.S. 466 (2000) requires the jury to make at least one additional finding regarding the defendant's age. As of September 2022, it was unclear whether the existence of a prior conviction is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior conviction. Therefore, if the information or indictment contains an allegation of one or more prior convictions, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior conviction is treated as an element, the historical fact of a prior conviction should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. State v. Harbaugh, 754 So. 2d 691 (Fla. 2000).

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother's breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2007 [969 So. 2d 245] and amended in 2015 [163 So. 3d 478], ~~and~~ 2018 [257 So. 3d 370], and on month day, 2022.

11.10(b) LEWD OR LASCIVIOUS BATTERY (ENCOURAGING, FORCING OR ENTICING)

§ 800.04(4)(a)2, Fla. Stat.

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

1. (Defendant) **[encouraged] [forced] [or] [enticed]** (victim) to engage in **[any act involving sexual activity] [sodomasochistic abuse] [sexual bestiality] [prostitution] ~~or~~ [any act involving sexual activity]**.
2. **At the time of the offense,** (victim) **was less than 16 years of age.**

Definitions.

Give if applicable.

§ 800.04(1)(a), Fla. Stat.

“Sexual activity” means the oral, anal, or vaginal female genital penetration by, or union with, the sexual organ of another or the anal or vaginal female genital 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.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

§ 827.071(e), Fla. Stat.

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

§ 827.071(g), Fla. Stat.

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

§ 796.07(1)(e), Fla. Stat.

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses. “Sexual activity” means oral, anal, or female genital penetration by, or union with, the sexual organ of another; anal or female genital penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation.

§ 800.04(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

§ 800.04(2), Fla. Stat.

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

§ 800.04(1)(b), Fla. Stat.

“Consent” means intelligent, knowing, and voluntary consent, and does not include submission by coercion.

§ 800.04(1)(e), Fla. Stat.

“Coercion” means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance.

§ 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. § 800.04(8), Fla. Stat.

A mother’s breastfeeding of her baby does not under any circumstance constitute a Lewd or Lascivious Battery.

§ 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 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 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 BATTERY (ENCOURAGING, FORCING OR ENTICING) — 800.04(4)(a)2

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
Soliciting for prostitution (only if prostitution is charged)		796.07(2)(f)	23.6
	Aggravated battery	784.045(1)	8.4
	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*	800.02*	11.8*

Comments

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

In 2014, the legislature created a Lewd and Lascivious Battery classified as a first degree felony if the defendant was 18 years of age or older at the time of the crime and had a prior conviction for an enumerated crime. See § 800.04(4)(c), Fla. Stat. If this enhancement is charged, a special instruction will be required because it is likely that Apprendi v. New Jersey, 530 U.S. 466 (2000) requires the jury to make at least one additional finding regarding the defendant's age. As of September 2022, it was unclear whether the existence of a prior conviction is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior conviction. Therefore, if the information or indictment contains an allegation of one or more prior convictions, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior conviction is treated as an element, the historical fact of a prior conviction should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. State v. Harbaugh, 754 So. 2d 691 (Fla. 2000).

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother's breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

There are statutory definitions of "sodomasochistic abuse" and "sexual bestiality" in § 847.001, Fla. Stat., that differ from the statutory definitions in § 827.071, Fla. Stat. As of ~~June 2018~~ September 2022, there is no case law that decides which definition applies for a violation of § 800.04(4)(a)2, Fla. Stat.

This instruction was adopted in 2007 [969 So. 2d 245] and amended in 2015 [163 So. 3d 478], and 2018 [257 So. 3d 370], and on month day, 2022.

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 or both 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(1), Fla. Stat.

“Consent” means intelligent, knowing, and voluntary consent, and does not include submission by coercion.

§ 800.04(1), Fla. Stat.

“Coercion” means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance.

§ 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. § 800.04(8), Fla. Stat.

A mother’s breastfeeding of her baby does not under any circumstance constitute a Lewd or Lascivious Molestation.

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 likely requires 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. As of September 2022, it was unclear whether the existence of a prior conviction is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior conviction. Therefore, if the information or indictment contains an allegation of one or more prior convictions, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior conviction is treated as an element, the historical fact of a prior conviction should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

As of September 2022, it was unclear whether a mother's breastfeeding of her baby should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

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], on November 20, 2020, and on December 15, 2021, 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 or both 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.

2. 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(1), Fla. Stat.

“Consent” means intelligent, knowing, and voluntary consent, and does not include submission by coercion.

§ 800.04(1), Fla. Stat.

“Coercion” means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance.

§ 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. § 800.04(8), Fla. Stat.

A mother’s breastfeeding of her baby does not under any circumstance constitute a Lewd or Lascivious Conduct.

§ 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).

As of September 2022, it was unclear whether a mother’s breastfeeding of her baby should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2015 [163 So. 3d 478], 2018 [257 So. 3d 370], on November 20, 2020, and on December 15, 2021, 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 1e 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] [the 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~~ vagina female genital penetration by, or union with, the sexual organ of another or the anal or ~~vaginal~~ vagina female genital 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(gh), 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~~ vagina female genitals of the other.

§ 800.04(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

§ 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(1), Fla. Stat.

“Consent” means intelligent, knowing, and voluntary consent, and does not include submission by coercion.

§ 800.04(1), Fla. Stat.

“Coercion” means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance.

§ 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.

Give if applicable. § 800.04(8), Fla. Stat.

A mother’s breastfeeding of her baby does not under any circumstance constitute a Lewd or Lascivious Exhibition.

§ 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.
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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~~ September 2022, there is no case law that decides which definition applies for a violation of § 800.04(7)(a), Fla. Stat.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2015 [163 So. 3d 478], 2018 [257 So. 3d 370], on November 20, 2020, ~~and~~ on December 15, 2021, 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~~]~~[or should have known]~~~~[or 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. Give as 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~~ female genital penetration by, or union with, the sexual organ of another or the anal or ~~vaginal~~ female genital 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.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

"Union" means contact.

§ 847.001(6), Fla. Stat.

"Female genitals" includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

§ 847.001(13), Fla. Stat.

"Somasochistic 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~~ female genitals of the other.

§ 847.001(22), Fla. Stat.

“Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

§ 847.001(19), Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother's breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

§ 847.001, Fla. Stat.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

§ 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.
None			
	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

*As of September 2022, it was unclear whether the Chapter 800 definition of “sexual activity” could be used for this Chapter 847 crime.

**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.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2015 [176 So. 3d 938], 2018 [257 So. 3d 370], on November 20, 2020, and on December 15, 2021, and on month day, 2022.

**11.10(g) LEWD OR LASCIVIOUS EXHIBITION BY A DETAINEE IN THE
PRESENCE OF AN EMPLOYEE OF A FACILITY**
§ 800.09, Fla. Stat.

To prove the crime of Lewd or Lascivious Exhibition by a Detainee in the Presence of an Employee of a Facility, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) was detained in a [state correctional institution] [private correctional facility] [county detention facility].
2. While detained, (defendant) intentionally

Give as applicable.

- a. masturbated.
 - b. exposed [his] [her] genitals in a lewd or lascivious manner.
 - c. committed [a sexual act] [sodomasochistic abuse] [sexual bestiality] [the simulation of any act involving sexual activity] that did not involve actual physical or sexual contact with a victim.
3. (Defendant’s) act was intentionally committed in the presence of a person [he] [she] knew or reasonably should have known was an employee of the [institution] [facility].

Definitions. Give as applicable.

§ 944.02(8), Fla. Stat.

A “state correctional institution” is any prison, road camp, prison industry, prison forestry camp, or any prison camp or prison farm or other correctional facility, temporary or permanent, in which

prisoners are housed, worked, or maintained, under the custody and jurisdiction of the Department of Corrections.

§ 944.710(3), Fla. Stat.

A “private correctional facility” is any facility, which is not operated by the Department of Corrections, for the incarceration of adults or juveniles who have been sentenced by a court and committed to the custody of the Department of Corrections.

§ 951.23(1)(a), Fla. Stat.

A “county detention facility” is a county jail, a county stockade, a county work camp, a county residential probation center, and any other place except a municipal detention facility used by a county or county officer for the detention of persons charged with or convicted of either a felony or a misdemeanor.

§ 800.09(1)(a), Fla. Stat.

“Employee” means [any person employed by or performing contractual services for a public or private entity operating a state correctional institution or a private correctional facility] [any person employed by or performing contractual services for the corporation operating the prison industry enhancement programs [or the correctional work programs under part II of chapter 946]] [any person employed at or performing contractual services for a county detention facility] [any person who is a parole examiner with the Florida Commission on Offender Review].

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~~ female genital penetration by, or union with, the sexual organ of another or the anal or ~~vaginal~~ female genital penetration of another by any other object[]; however, sexual activity does not include an act done for a bona fide medical purpose].

Give if applicable.

“Bona fide” means genuine.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

§ 847.001, Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

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

The definition of “an object” includes a finger.

§ 847.001(13), Fla. Stat.

“Sodomasochistic 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~~ female genitals of the other.

§ 847.001, Fla. Stat.

“Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

§ 847.001, Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother's breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

§ 847.001, Fla. Stat.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

See *State v. Werner*, 609 So. 2d 585 (Fla. 1992).

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

Lesser Included Offenses

LEWD OR LASCIVIOUS EXHIBITION BY A DETAINEE IN THE PRESENCE OF AN EMPLOYEE OF A FACILITY — 800.09

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	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.

*As of September 2022, it was unclear whether the Chapter 800 definition of “sexual activity” could be used for this Chapter 847 crime.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

There are statutory definitions of “sodomasochistic abuse” and “sexual bestiality” in § 827.071, Fla. Stat., that differ from the statutory definitions in § 847.001, Fla. Stat. As of September 2019/2022, there is no case law that decides which definition applies for a violation of § 800.09, Fla. Stat.

This instruction was adopted in 2013 [131 So. 3d 720] and amended in 2015 [176 So. 3d 938], 2018 [257 So. 3d 370], and 2020 [288 So. 3d 540], and month day, 2022.

**11.11 LEWD OR LASCIVIOUS OFFENSES [BATTERY] [MOLESTATION]
[EXHIBITION] COMMITTED UPON OR IN THE PRESENCE OF
AN ELDERLY PERSON OR DISABLED PERSON**
§ 825.1025, Fla. Stat.

To prove the crime of [Lewd or Lascivious Battery] [Lewd or Lascivious Molestation] [Lewd or Lascivious Exhibition] upon or in the Presence of an [Elderly Person] [Disabled Person], the State must prove the following three elements beyond a reasonable doubt:

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

1. a. (Defendant) committed lewd and lascivious battery by encouraging, forcing, or enticing (victim) to engage in [sodomasochistic abuse] [sexual bestiality] [prostitution] [any act involving sexual activity].
 - b. (Defendant) committed lewd and lascivious molestation of (victim) by intentionally touching, in a lewd and lascivious manner, [his] [her] [breasts] [genitals] [genital area] [buttocks] [clothing covering [his] [her] [breasts] [genitals] [genital area] [buttocks]].
 - c. (Defendant) committed lewd and lascivious exhibition to (victim) by intentionally [masturbating] [exposing [his] [her] genitals in a lascivious manner] [committing any other lewd or lascivious act not involving physical or sexual contact with (victim) including but not limited to [sodomasochistic abuse] [sexual bestiality] [the simulation of any act involving sexual activity]].
2. At the time, (victim) was [an elderly] [a disabled] person.

The bracketed portion of element #3 pertains only to element 1c.

3. At the time of the offense, (defendant) knew or reasonably should have known that (victim) lacked the capacity to consent or failed to give consent [to have the act committed in [his] [her] presence].

Definitions. Give as 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.

§ 825.101(3), Fla. Stat.

“Disabled adult” means a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person’s ability to perform the normal activities of daily living.

§ 825.101(4), Fla. Stat.

“Elderly person” means a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person’s care or protection is impaired.

§ 825.101(7), Fla. Stat.

“Lacks capacity to consent” means an impairment by reason of mental illness, developmental disability, organic brain disorder, physical illness or disability, chronic use of drugs, chronic intoxication, short-term memory loss, or other cause, that causes an elderly person or disabled adult to lack sufficient understanding or capacity to make or communicate reasonable decisions concerning the elderly person’s or disabled adult’s person or property.

§ 847.001(13), Fla. Stat.

“Somasochistic 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. “Sadism” means sexual gratification achieved through, or the association of sexual activity with, the infliction of physical pain, suffering, humiliation, torture, or death upon another person or an animal.

§ 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~~ female genitals of the other.

§ 796.07(1)(a), Fla. Stat.

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

§ 825.1025(1), Fla. Stat.

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

§ 825.1025(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

“Bona fide” means genuine.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

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 Battery] [Lewd or Lascivious Molestation] [Lewd or Lascivious Exhibition] upon or in the Presence of an [Elderly] [Disabled] Person, 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

11.11 LEWD OR LASCIVIOUS OFFENSES COMMITTED UPON OR IN THE PRESENCE OF AN ELDERLY PERSON OR DISABLED PERSON – 825.1025

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1
	Assault	784.011	8.1
	Battery	784.03	8.3
	Exposure of sexual organs	800.03	11.9
	Unnatural and lascivious act*	800.02*	11.8*

Comments

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

§ 825.1025, Fla. Stat., protects a “disabled person” (age unspecific) while § 825.101, Fla. Stat., defines a “disabled adult” (18 years of age or older). The discrepancy between the two terms has yet to be clarified.

There are statutory definitions of “sodomasochistic abuse” and “sexual bestiality” in § 847.001, Fla. Stat., that differ from the statutory definitions in § 827.071, Fla. Stat. As of ~~June 2018~~ September 2022, there is no case law that decides which definition applies for a violation of § 825.1025, Fla. Stat.

As of September 2022, it was unclear whether an act done for a bona fide medical purpose should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2007 [965 So. 2d 811] and amended in 2010 [48 So. 3d 41], 2015 [163 So. 3d 478], and 2018 [257 So. 3d 370], and on month day, 2022.

11.17(a) SOLICITING A [CHILD] [PERSON BELIEVED BY THE DEFENDANT TO BE A CHILD] FOR UNLAWFUL SEXUAL CONDUCT USING COMPUTER SERVICES OR DEVICES

§ 847.0135(3)(a), Fla. Stat.

To prove the crime of Soliciting a [Child] [Person Believed by the Defendant to be a Child] for Unlawful Sexual Conduct Using Computer Services or Devices, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **knowingly used a[n] [computer on-line service] [Internet service] [local bulletin board service] [device capable of electronic data storage or transmission] to contact** (victim).
2. (Victim) **was a child or a person believed by the defendant to be a child.**
3. **During that contact,** (defendant) [seduced] [solicited] [lured] [enticed] [attempted to seduce] [solicit] [lure] [entice]] (victim) **to [commit (any illegal act as charged in the indictment or information under chapter 794, 800, or 827)] [or] [engage in (other unlawful sexual conduct with a child or with a person believed by the defendant to be a child)].**

The mere fact that an undercover operative or law enforcement officer was involved in the detection and investigation of this offense shall not constitute a defense from prosecution.

Enhanced penalty. Give if applicable.

If you find (defendant) guilty of Soliciting a Child for Unlawful Sexual Conduct Using Computer Services or Devices, you must also determine whether the State proved beyond a reasonable doubt that during the contact, (defendant) misrepresented [his] [her] age to [(victim)] [the person believed by the defendant to be a child].

Definitions.

A “child” means any person, whose identity is known or unknown, less younger than 18 years of age.

Give the following definitions if applicable. Additional definitions can be added as applicable depending on the nature of the alleged illegal conduct. See § 847.001, Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

“Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

“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 upon another or receiving such harm oneself.

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

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

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

“An object” includes a finger.

“Bona fide” means genuine.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

“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~~ female genitals of the other.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable. § 775.0862, Fla. Stat.

Enhancement for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Soliciting a [Child] [Person Believed by the Defendant to be a Child] for Unlawful Sexual Conduct Using Computer Services or Devices, 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

SOLICITING A [CHILD] [PERSON BELIEVED BY THE DEFENDANT TO BE A CHILD] FOR UNLAWFUL SEXUAL CONDUCT USING COMPUTER SERVICES OR DEVICES — 847.0135(3)(a)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Unlawful use of two-way communications device	934.215	29.26

Comments

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of

persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2009 [6 So. 3d 574] and amended in 2013 [122 So. 3d 263], 2015 [163 So. 3d 478], and 2017 [228 So. 3d 87], and on month day, 2022.

11.17(b) SOLICITING A PARENT, LEGAL GUARDIAN, OR CUSTODIAN OF A CHILD FOR UNLAWFUL SEXUAL CONDUCT USING COMPUTER SERVICES OR DEVICES

§ 847.0135(3)(b), Fla. Stat.

To prove the crime of Soliciting a Parent, Legal Guardian, or Custodian of a Child for Unlawful Sexual Conduct Using Computer Services or Devices, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) knowingly used a[n] [computer on-line service] [Internet service] [local bulletin board service] [device capable of electronic data storage or transmission] to contact a [parent of a child] [legal guardian of a child] [custodian of a child] [person the defendant believed to be a [parent] [legal guardian] [custodian of] a child].
2. During that contact, (defendant) [solicited] [lured] [enticed] [attempted to [solicit] [lure] [entice]] a [parent of a child] [legal guardian of a child] [custodian of a child] [person believed by the defendant to be a [parent] [legal guardian] [custodian of] a child] to consent to the participation of the child in (any illegal act as charged in the indictment or information under chapter 794, 800, 827, or other unlawful sexual conduct).

The mere fact that an undercover operative or law enforcement officer was involved in the detection and investigation of this offense shall not constitute a defense from prosecution.

Enhanced penalty. Give if applicable.

If you find (defendant) guilty of Soliciting a Parent of a Child for Unlawful Sexual Conduct Using Computer Services or Devices, you must also determine whether the State proved beyond a reasonable doubt that during the contact, (defendant) misrepresented [his] [her] age to the [parent] [legal guardian] [custodian] [person believed by the defendant to be a [parent] [legal guardian] [custodian]].

Definitions.

A “child” means any person, whose identity is known or unknown, less younger than 18 years of age.

Give the following definitions if applicable. Additional definitions can be added as applicable depending on the nature of the alleged illegal conduct. See § 847.001, Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

“Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

“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 upon another or receiving such harm oneself.

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

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

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

“An object” includes a finger.

“Bona fide” means genuine.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

“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~~ female genitals of the other.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable. § 775.0862, Fla. Stat.

Enhancement for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Soliciting a Parent of a Child for Unlawful Sexual Conduct Using Computer Services or Devices, 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

SOLICITING A PARENT, LEGAL GUARDIAN, OR CUSTODIAN OF A CHILD FOR UNLAWFUL SEXUAL CONDUCT USING COMPUTER SERVICES OR DEVICES — 847.0135(3)(b)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Unlawful use of two-way communications device	934.215	29.26

Comment

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2009 [6 So. 3d 574] and amended in 2013 [122 So. 3d 263], 2015 [163 So. 3d 478], and 2017 [228 So. 3d 87], and month day, 2022.

11.17(c) TRAVELING TO MEET A MINOR

§ 847.0135(4)(a), Fla. Stat.

To prove the crime of Traveling to Meet a Minor, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) used a[n] [computer on-line service] [Internet service] [local bulletin board service] [device capable of electronic data storage or transmission] to [seduce] [solicit] [lure] [entice] [attempt to [seduce] [solicit] [lure] [entice]] a [child] [person believed by the defendant to be a child] to engage in [(insert illegal act in chapter 794, 800, or 827 as alleged in the charging instrument)] [unlawful sexual conduct].
2. (Defendant) then [traveled] [attempted to travel] [caused another to travel] [attempted to cause another to travel] [within this state] [to this state] [from this state] for the purpose of [(insert violation of chapter 794, 800, or 827 as alleged in the

charging instrument)] [unlawful sexual conduct] with a [child] [person believed by the defendant to be a child].

The mere fact that an undercover operative or law enforcement officer was involved in the detection and investigation of this offense shall not constitute a defense from prosecution.

Definitions.

A “child” means any person, whose identity is known or unknown, ~~less~~ younger than 18 years of age.

Give the following definitions if applicable. Additional definitions can be added as applicable depending on the nature of the alleged illegal conduct. See § 847.001, Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

“Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

“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 upon another or receiving such harm oneself.

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

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

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

“An object” includes a finger.

“Bona fide” means genuine.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

“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~~ female genitals of the other.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable. § 775.0862, Fla. Stat.

Enhancement for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Traveling to Meet a Minor, 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

TRAVELING TO MEET A MINOR — 847.0135(4)(a)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Soliciting a [Child] [Person Believed by the Defendant to be a Child] for Unlawful Sexual Conduct Using Computer Services or Devices		847.0135(3)(a)	11.17(a)
	Unlawful use of two-way communications device	934.215	29.26

Comments

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2009 [6 So. 3d 574] and amended in 2013 [122 So. 3d 263], 2016 [195 So. 3d 356], and 2017 [228 So. 3d 87], and month day, 2022.

11.17(d) TRAVELING TO MEET A MINOR FACILITATED BY PARENT, LEGAL GUARDIAN, OR CUSTODIAN
 § 847.0135(4)(b), Fla. Stat.

To prove the crime of Traveling to Meet a Minor Facilitated by Parent, Legal Guardian, or Custodian, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) used a[n] [computer on-line service] [Internet service] [local bulletin board service] [device capable of electronic data storage or transmission] to [solicit] [lure] [entice] [attempt to [solicit] [lure] [entice]] a [parent] [legal guardian] [custodian] [person believed by the defendant to be a [parent] [legal guardian] [custodian]] of a child to consent for the [child] [person believed by the defendant to be a child] to participate in [(insert violation of chapter 794, 800, or 827 as alleged in the charging instrument)] [sexual conduct].

2. (Defendant) then [traveled] [attempted to travel] [caused another to travel] [attempted to cause another to travel] [within this state] [to this state] [from this state] for the purpose of engaging in any illegal act described in [(insert violation of chapter 794, 800, or 827 as alleged in the charging instrument)] [other unlawful sexual conduct] with a child or a person believed by the defendant to be a child.

The mere fact that an undercover operative or law enforcement officer was involved in the detection and investigation of this offense shall not constitute a defense from prosecution.

Definitions.

A “child” means any person, whose identity is known or unknown, ~~less~~ younger than 18 years of age.

Give the following definitions if applicable. Additional definitions can be added as applicable depending on the nature of the alleged illegal conduct. See § 847.001, Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

“Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

“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 upon another or receiving such harm oneself.

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

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

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

“An object” includes a finger.

“Bona fide” means genuine.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

“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~~ female genitals of the other.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable. § 775.0862, Fla. Stat.

Enhancement for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Traveling to Meet a Minor Facilitated by Parent, Legal Guardian, or Custodian, 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

TRAVELING TO MEET A MINOR FACILITATED BY PARENT, LEGAL GUARDIAN, OR CUSTODIAN — 847.0135(4)(b)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Soliciting a Parent of a Child for Unlawful Sexual Conduct Using Computer Services or Devices		847.0135(3)(b)	11.17(b)
	Unlawful use of two-way communications device	934.215	29.26

Comments

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2009 [6 So. 3d 574] and amended in 2013 [122 So. 3d 263], 2016 [195 So. 3d 356], and 2017 [228 So. 3d 87], and month day, 2022.

11.18 SEXUAL MISCONDUCT BY A PSYCHOTHERAPIST

§ 491.0112, Fla. Stat.

To prove the crime of Sexual Misconduct by a Psychotherapist, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) committed sexual misconduct with (victim).
2. At the time, (defendant) was a psychotherapist.

Give 3a or 3b as applicable.

3. a. At the time, (victim) was a client of (defendant).
 - b. (Victim) was a former client of (defendant) and the professional relationship was terminated primarily for the purpose of engaging in sexual contact.

§ 491.0112(3), Fla. Stat.

It is not a defense that (victim) consented to any act that constitutes sexual misconduct.

Enhancement. Give if applicable. § 491.0112(2), Fla. Stat.

If you find the defendant guilty of Sexual Misconduct by a Psychotherapist, you must then determine whether the State has proven beyond a reasonable doubt that the crime was committed by means of therapeutic deception.

§ 491.0112(4)(b), Fla. Stat.

“Therapeutic deception” means a representation to the client that sexual contact by the psychotherapist is consistent with or part of the treatment of the client.

Definitions. § 491.0112(4)(a), Fla. Stat.

“Psychotherapist” means any person licensed in Florida pursuant to Chapter 458 (medicine), Chapter 459 (osteopathic medicine), Part I of Chapter 464 (nursing), Chapter 490 (psychology), or Chapter 491 (clinical counseling or psychotherapy services); or any other person who provides or purports to provide treatment, diagnosis, assessment, evaluation, or counseling of mental or emotional illness, symptom, or condition.

§ 491.0112(4)(d), Fla. Stat.

“Client” means a person to whom the services of a psychotherapist are provided.

§ 491.0112(4)(e), Fla. Stat.

“Sexual misconduct” means the oral, anal, or ~~vagina~~female genital penetration of another by, or contact with, the sexual organ of another or the anal or ~~vagina~~female genital penetration of another by any object.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Lesser Included Offenses

SEXUAL MISCONDUCT BY A PSYCHOTHERAPIST — 491.0112

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			

	Unnatural and lascivious act*	800.02*	11.8*
	Attempt	777.04(1)	5.1

Comments

A second or subsequent offense bumps this crime up to a second-degree felony. As of September 2022, it was unclear whether the existence of a prior is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior. Therefore, if the information or indictment contains an allegation of one or more priors, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior is treated as an element, the historical fact of a prior should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. State v. Harbaugh, 754 So. 2d 691 (Fla. 2000).

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

This instruction was adopted in 2014 [146 So. 3d 1110] and amended in 2018 [257 So. 3d 370], and month day, 2022.

11.20 TRANSMISSION OF CHILD PORNOGRAPHY BY ELECTRONIC DEVICE OR EQUIPMENT

§ 847.0137(2) and (3), Fla. Stat.

To prove the crime of Transmission of Child Pornography by Electronic Device or Equipment, the State must prove the following two elements beyond a reasonable doubt:

Give 1a or 1b as applicable.

§ 847.0137(2), Fla. Stat.

1. a. (Defendant), **when in the State of Florida, transmitted child pornography to another person.**

§ 847.0137(3), Fla. Stat.

- b. (Defendant), **when not in the State of Florida, transmitted child pornography to any person who was in the State of Florida.**

2. (Defendant) **knew or reasonably should have known that [he] [she] transmitted child pornography.**

Definitions. Give as applicable.

§ 847.0137(1)(~~b~~), Fla. Stat.

“Transmit” means the act of sending and causing to be delivered, including the act of providing access for receiving and causing to be delivered, any image, information, or data from one or more persons or places to one or more other persons or places over or through any medium, including the internet or an interconnected network, by use of any electronic equipment or device.

§ 847.001(3), Fla. Stat.

“Child pornography” means:

(a) any image depicting a minor engaged in sexual conduct; or

(b) any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engage in sexual conduct.

§ 847.0137(1)(a)001, Fla. Stat.

“Minor” means any person ~~less~~ younger than 18 years of age.

§ 847.001, Fla. Stat.

“Identifiable minor” means a person:

(a) who was a minor at the time the image was created, altered, adapted, or modified, or whose image as a minor was used in the creating, altering, adapting, or modifying of the image; and

(b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.

The term may not be construed to require proof of the actual identity of the identifiable minor.

§ 847.001(16), Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

§ 847.001(19), Fla. Stat.

“Simulated” means the explicit depiction of conduct described in the definition of “sexual conduct” which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

§ 847.001(5), Fla. Stat.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

§ 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~~ female genitals of the other.

§ 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(14), Fla. Stat.; ~~Lahey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).~~

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

§ 847.001, Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

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

“An object” includes a finger.

“Bona fide” means genuine.

Give if applicable. § 775.0862, Fla. Stat.

Enhancement for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Transmission of Child Pornography by Electronic Device or Equipment, 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

TRANSMISSION OF CHILD PORNOGRAPHY BY ELECTRONIC DEVICE OR EQUIPMENT – 847.0137(2) AND (3)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2015 [163 So. 3d 478] and amended on month day, 2022.

11.21 TRANSMISSION OF MATERIAL HARMFUL TO MINORS BY ELECTRONIC DEVICE OR EQUIPMENT

§ 847.0138(2), Fla. Stat.

To prove the crime of Transmission of Material Harmful to Minors by Electronic Device or Equipment, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) knowingly sent an image, information or data that [he] [she] knew or believed to be “harmful to minors.”
2. (Defendant) sent the image, information or data to a specific individual who was either actually known by [him] [her] to be a minor or believed by [him] [her] to be a minor.
3. (Defendant) sent the image, information or data via electronic mail.

Definitions. Give as applicable.

§ 847.001(6), Fla. Stat.

An image, information, or data that is “harmful to minors” means any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- a. Predominately appeals to a prurient, shameful, or morbid interest;
- b. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- c. Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

~~A mother's breastfeeding of her baby is not under any circumstance "harmful to minors."~~

Prurient Interest.

A "prurient interest" in sex is a shameful or morbid interest in sex, nudity, or excretion. Material does not appeal to a prurient interest if the average person today can view the material candidly, openly, and with a normal interest in sex.

"Morbid interest" means diseased, dwelling on the gruesome, or sick.

Give if applicable.

A mother's breastfeeding of her baby is not under any circumstance "harmful to minors."

§ 847.001(8), Fla. Stat.

"Minor" means any person, whose identity is known or unknown, ~~less~~ younger than 18 years of age.

§ 847.001(9), Fla. Stat.

"Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. [A mother's breastfeeding of her baby does not under any circumstance constitute "nudity," irrespective of whether or not the nipple is covered during or incidental to feeding.]

§ 847.001(16), Fla. Stat.

"Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."]

§ 847.001(19), Fla. Stat.

"Simulated" means the explicit depiction of conduct described in the definition of "sexual conduct" which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

§ 847.001(5), Fla. Stat.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

§ 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~~ female genitals of the other.

§ 847.001(13), Fla. Stat.

“Sodomasochistic 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(14), Fla. Stat.

“**Sexual Battery**” means oral, anal, or ~~vaginal~~ female genital penetration by, or union with, the sexual organ of another or the anal or ~~vaginal~~ female genital penetration of another by ~~a finger or any other object~~[; however, “sexual battery” does not include an act done for a bona fide medical purpose].

§ 847.001, Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

“Bona fide” means genuine.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

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

“An object” includes a finger.

§ 847.001(17), Fla. Stat.

“Sexual excitement” means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

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 Transmission of Material Harmful to Minors by Electronic Device or Equipment, 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

TRANSMISSION OF MATERIAL HARMFUL TO MINORS BY ELECTRONIC DEVICE OR EQUIPMENT — 847.0138(2)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Unlawful Use of a Two-way Communication Device		934.215	29.26
	Attempt	777.04(1)	5.1

Comments

§ 847.0138, Fla. Stat., does not define “electronic mail.” The courts have determined “electronic mail” includes a text message sent from a cell phone and instant messaging. *See Allen v. State*, 82 So. 3d 118 (Fla. 4th DCA 2012); *Duclos-Lasnier v. State*, 192 So. 3d 1234 (Fla. 2d DCA 2016). “Electronic mail” does not, however, include subscription-based transmissions such as list servers. *See* § 847.0138, Fla. Stat. A trial court may wish to provide the jury with a special instruction defining “electronic mail.”

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2015 [163 So. 3d 478] and amended in 2018 [257 So. 3d 370], 2020 [290 So. 3d 864], and on January 29, 2021, and on month day, 2022.

11.22 GIVING OBSCENE MATERIAL TO A MINOR

§ 847.0133, Fla. Stat.

To prove the crime of Giving Obscene Material to a Minor, the State must prove the following element beyond a reasonable doubt:

(Defendant) knowingly [sold] [rented] [loaned] [gave away] [distributed] [transmitted] [showed] obscene material to a person under the age of 18 years.

Definitions.

§ 847.012(1), Fla. Stat.

“Knowingly” means having the general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- a. The character and content of any material described in this section which is reasonably susceptible of examination by the defendant; and
- b. The age of the minor.

§ 847.0133(1), Fla. Stat.

“Obscene Material” means any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose.

§ 847.001(10), Fla. Stat.

“Obscene” means the status of material which:

- a. The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- b. Depicts or describes, in a patently offensive way, sexual conduct; and
- c. Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Give if applicable. § 847.001, Fla. Stat.

A mother’s breastfeeding of her baby is not under any circumstance “obscene.”

§ 847.001(16), Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

Give if applicable.

§ 847.001(5), Fla. Stat.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

§ 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(14), Fla. Stat.

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

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

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

The definition of “an object” includes a finger.

“Bona fide” means genuine.

§ 847.001, Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

§ 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~~ female genitals of the other.

§ 847.001(19), Fla. Stat.

“Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

~~*§ 847.001(10), Fla. Stat.*~~

~~A mother’s breastfeeding of her baby is not under any circumstance “obscene.”~~

Lesser Included Offense

GIVING OBSCENE MATERIAL TO A MINOR — 847.0133

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother's breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2016 [199 So. 3d 234] and amended on month day, 2022.

11.23 PROMOTION OF AN ALTERED SEXUAL DEPICTION

§ 836.13, Fla. Stat.

To prove the crime of Promotion of an Altered Sexual Depiction, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) willfully and maliciously promoted an altered sexual depiction of an identifiable person.**
- 2. (Defendant) did so without the consent of the identifiable person(s) depicted.**
- 3. At the time, (defendant) knew or reasonably should have known the depiction was an altered sexual depiction.**

Definitions.

"Willfully" means knowingly, intentionally, and purposely.

As of September 2022, the courts had not determined whether this statute requires actual malice or legal malice. The explanation of the two can be found in Seese v. State, 955 So. 2d 1145 (Fla. 4th DCA 2007). In the absence of clarification, trial judges must choose one of the following:

"Maliciously" means intentionally and without any lawful justification.

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

"Promoted" means to issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, advertise, or offer or agree to do the same.

"Altered Sexual Depiction" means any visual depiction that, as a result of any type of digital, electronic, mechanical, or other modification, alteration, or adaptation, depicts a realistic version of an identifiable person: (1) with the nude body parts of another person as the nude body parts of the identifiable person; (2) with computer-generated nude body parts as the nude body parts of the identifiable person; or (3) engaging in sexual conduct in which the identifiable person did not engage.

"Visual Depiction" includes, but is not limited to, a photograph, picture, image, motion picture, film, video, or other visual representation.

“Identifiable person” means that a person is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.

“Nude Body Parts” means the human male or female genitals, pubic area, or buttocks with less than fully opaque covering; or the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. [The term “nude body parts does not under any circumstances include a mother’s breastfeeding her baby.]

Many of these terms have their own definition. Give those definitions as appropriate.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

Give if appropriate.

The presence of a disclaimer within an altered sexual depiction which notifies a viewer that the person or persons depicted did not consent to, or participate in, the creation or promotion of the material, or that the person or persons depicted did not actually perform the actions portrayed, is not a defense to the crime of Promotion of an Altered Sexual Depiction.

Lesser Included Offense

PROMOTION OF AN ALTERED SEXUAL DEPICTION — 836.13

<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>

Comments

§ 836.13(6), Fla. Stat., contains exemptions from the criminal penalties in this statute. It is likely those exemptions would be treated as an affirmative defense. Regardless of whether the defense would need to prove the exemption applies or the State would need to prove the exemption does not apply, a special instruction will be necessary if the exemption is at issue.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative

defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted on month, day, 2022.

11.24 THEFT OF A SEXUALLY EXPLICIT IMAGE WITH INTENT TO PROMOTE
§ 836.14(2), Fla. Stat.

To prove the crime of Theft of a Sexually Explicit Image with Intent to Promote, the State must prove the following three elements beyond a reasonable doubt. The first two elements are a definition of Theft.

- 4. (Defendant) knowingly and unlawfully obtained or endeavored to obtain a sexually explicit image, the property of (victim).**
- 5. (Defendant) did so with the intent to either temporarily or permanently deprive (victim) of [his] [her] right to the image or to appropriate the image to [his] [her] own use or to the use of any person not entitled to it.**
- 6. At the time (defendant) committed the theft, [he] [she] had the intent to promote the sexually explicit image.**

Definitions.

“Sexually explicit image” means any image depicting an identifiable person portraying nudity or engaged in sexual conduct.

“Identifiable person” means that a person is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature. It is not necessary for the State to prove the identity of the person depicted in the image.

“Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. [A mother’s breastfeeding of her baby does not under any circumstance constitute “nudity,” irrespective of whether or not the nipple is covered during or incidental to feeding.]

Many of these terms have their own definition. Give those definitions as appropriate.

“Sexual Conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

“Promote” means to issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, advertise, or offer or agree to do the same.

Lesser Included Offense

**THEFT OF A SEXUALLY EXPLICIT IMAGE WITH INTENT TO PROMOTE —
836.14(2)**

<u>CATEGORY ONE</u>	<u>CATEGORY TWO</u>	<u>FLA. STAT.</u>	<u>INS. NO.</u>
<u>None</u>			
	<u>Petit Theft</u>	<u>812.014(3)(a)</u>	<u>14.1</u>
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

Comments

§ 836.14(7), Fla. Stat., contains certain exemptions from the criminal penalties in this statute. It is likely those exemptions would be treated as an affirmative defense. Regardless of whether the defense would need to prove the exemption applies or the State would need to prove the exemption does not apply, a special instruction will be necessary if the exemption is at issue.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted on month day, 2022.

**11.25 UNAUTHORIZED POSSESSION OF A SEXUALLY EXPLICIT IMAGE WITH
THE INTENT TO PROMOTE**

§ 836.14(3), Fla. Stat.

To prove the crime of Unauthorized Possession of a Sexually Explicit Image with the Intent to Promote, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) willfully possessed a sexually explicit image**
- 2. At the time, (defendant) intended to promote the sexually explicit image for pecuniary or other financial gain.**

3. At the time, (defendant) knew or should have known the sexually explicit image had been obtained by theft.

“Willfully” means knowingly, intentionally, and purposely.

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

Give if applicable.

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

Joint possession. Give if applicable.

Possession of a sexually explicit image may be sole or joint, that is, two or more persons may possess an image.

“Sexually explicit image” means any image depicting an identifiable person portraying nudity or engaged in sexual conduct.

“Identifiable person” means a person is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.

“Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. [A mother’s breastfeeding of her baby does not under any circumstance constitute “nudity,” irrespective of whether or not the nipple is covered during or incidental to feeding.]

Many of these terms have their own definition. Give those definitions as appropriate.

“Sexual Conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

“Promote” means to issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, advertise, or offer or agree to do the same.

“Pecuniary Gain” means the receipt of, or the anticipation of receipt of, anything of value, whether monetary or in goods or services. The term pecuniary gain includes both monetary and barter transactions.

“Theft” is committed when a person knowingly obtains or uses, or endeavors to obtain or use, the property of another with the intent to, either temporarily or permanently deprive the other person of a right to, or benefit from, the property or to appropriate the property of another to his own use or to the use of any person not entitled to the use of the property.

Lesser Included Offense

<u>UNAUTHORIZED POSSESSION OF A SEXUALLY EXPLICIT IMAGE WITH THE INTENT TO PROMOTE — 836.14(3)</u>			
<u>CATEGORY ONE</u>	<u>CATEGORY TWO</u>	<u>FLA. STAT.</u>	<u>INS. NO.</u>
<u>None</u>			
	<u>Petit Theft</u>	<u>812.014(3)(a)</u>	<u>14.1</u>
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

Comments

§ 836.14(7), Fla. Stat., contains certain exemptions from the criminal penalties in this statute. It is likely those exemptions would be treated as an affirmative defense. Regardless of whether the defense would need to prove the exemption applies or the State would need to prove the exemption does not apply, a special instruction will be necessary if the exemption is at issue.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted on month, day, 2022.
11.26 UNAUTHORIZED PROMOTION OF A SEXUALLY EXPLICIT IMAGE
§ 836.14(4), Fla. Stat.

To prove the crime of Unauthorized Promotion of a Sexually Explicit Image, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) willfully promoted a sexually explicit image through the use of [print media] [or] [an Internet website or other electronic**

means].

2. (Defendant) promoted the sexually explicit image without the consent of the person(s) depicted in the image
3. (Defendant) did so for the purpose of pecuniary or other financial gain.

Definitions.

“Willfully” means knowingly, intentionally, and purposely.

“Promoted” means to issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, advertise, or offer or agree to do the same.

“Sexually explicit image” means any image depicting an identifiable person portraying nudity or engaged in sexual conduct.

“Identifiable person” means a person is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature. It is not necessary for the State to prove the identity of the person depicted in the image.

“Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. [A mother’s breastfeeding of her baby does not under any circumstance constitute “nudity,” irrespective of whether or not the nipple is covered during or incidental to feeding.]

Many of these terms have their own definition. Give those definitions as appropriate.

“Sexual Conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

“Pecuniary Gain” means the receipt of, or the anticipation of receipt of, anything of value, whether monetary or in goods or services. Thus, the term pecuniary gain includes both monetary and barter transactions.

Lesser Included Offense

UNAUTHORIZED PROMOTION OF A SEXUALLY EXPLICIT IMAGE— 836.14(4)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
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<u>None</u>			
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

Comments

§ 836.14(7), Fla. Stat., contains certain exemptions from the criminal penalties in this statute. It is likely those exemptions would be treated as an affirmative defense. Regardless of whether the defense would need to prove the exemption applies or the State would need to prove the exemption does not apply, a special instruction will be necessary if the exemption is at issue.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother's breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted on month, day, 2022.

13.1 BURGLARY § 810.02, Fla. Stat.

Give if the information or indictment charges entering with the intent to commit an offense:

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

1. (Defendant) **entered a [structure] [conveyance] owned by or in the possession of** (person alleged).
2. **At the time of entering the [structure] [conveyance], (defendant) had the intent to commit [(the crime alleged)] [an offense other than burglary or trespass] in that [structure] [conveyance].**

The offense intended cannot be trespass or burglary. If requested, the jury should be instructed on the elements of the offense(s) intended.

Affirmative defenses. Give only if defendant meets his or her burden of production that he or she had an invitation or license to enter, or that the premises were open to the public. State v. Hicks, 421 So. 2d 510 (Fla. 1982) and State v. Waters, 436 So. 2d 66 (Fla. 1983). Failure to instruct on consent constitutes fundamental error where consent is the sole or primary defense. Faulk v. State, 222 So. 3d 621 (Fla. 1st DCA 2017) and Harrison v. State, 229 So. 3d 830 (Fla. 4th DCA 2017).

It is a defense to the crime of Burglary if [(defendant) was [licensed] [or] [invited] to enter the [structure] [conveyance]] [the premises were open to the

public at the time of the entering]. The State has the burden of proving beyond a reasonable doubt that [(defendant) was not [licensed] [or] [invited] to enter the [structure] [conveyance]] [the premises were not open to the public at the time of the entering].

Give if applicable. Trick, fraud, or deceit. Johnson v. State, 921 So. 2d 490, 508 (Fla. 2005).

If the [license] [invitation] to enter was obtained by (defendant's) trick or fraud or deceit, then the [license] [invitation] to enter was not valid.

Give if applicable. Area not open to the public. Dakes v. State, 545 So. 2d 939 (Fla. 3d DCA 1989).

If (defendant) entered premises that were open to the public, but then entered an area of the premises that [he] [she] knew or should have known was not open to the public, (defendant) committed a burglary if [he] [she] entered that non-public area with the intent to commit [(the crime alleged)] [an offense other than burglary or trespass] in that non-public area.

Give if applicable. Limited scope of consent. State v. Sawko, 624 So. 2d 751 (Fla. 5th DCA 1993).

If a defendant exceeded the scope of [his] [her] [license] [invitation] with respect to the time of the entering, the place that [he] [she] entered, or the purpose of [his] [her] entering, then the [license] [invitation] was not valid.

Give if applicable. § 810.07, Fla. Stat.

You may infer that (defendant) had the intent to commit a crime inside a [structure] [conveyance] if the [entering] [attempted entering] of the [structure] [conveyance] was done stealthily and without the consent of the owner or occupant.

Give if applicable.

The entry necessary need not be the whole body of the defendant. It is sufficient if the defendant, with the intent to commit a crime, extends any part of [his] [her] body into the [structure] [conveyance].

Give if the information or indictment charges remaining with the intent to commit an offense:

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

1. (Defendant) **had permission or consent to enter a [structure] [conveyance] owned by or in the possession of** (person alleged).
2. (Defendant), **after entering the [structure] [conveyance], remained therein**

Give 2a, 2b, or 2c, or any combination of the three as applicable.

- a. **surreptitiously and with the intent to commit** [(the crime alleged)] **[an offense other than burglary or trespass] inside the [structure] [conveyance].**
- b. **after permission to remain had been withdrawn and with the intent to commit** [(the crime alleged)] **[an offense other than burglary or trespass] inside the [structure] [conveyance].**
- c. ~~**with the intent to commit or attempt to commit a [forcible felony] [(the forcible felony alleged)] inside the [structure] [conveyance].**~~

The offense intended cannot be trespass or burglary. Forcible felonies are listed in § 776.08 Fla. Stat. If requested, the jury should be instructed on the elements of the offense(s) or forcible felony/felonies intended.

Proof of intent.

The intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case.

Even though an unlawful [entering] [remaining in] a [structure] [conveyance] is proved, if the evidence does not establish that it was done with the intent to commit [(the crime alleged)] [an offense other than burglary or trespass], the defendant must be found not guilty of burglary.

Proof of possession of stolen property.

Proof of possession by an accused of property recently stolen by means of a burglary, unless satisfactorily explained, may justify a conviction of burglary if the circumstances of the burglary and of the possession of the stolen property convince you beyond a reasonable doubt that the defendant committed the burglary.

Definitions; give as applicable.

§ 810.011(1), Fla. Stat. *Dubose v. State*, 210 So. 3d 641 (Fla. 2017).

“Structure” means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure. [The enclosure need not be continuous as it may have an ungated opening for entering and exiting.]

§ 810.011(3), Fla. Stat.

“Conveyance” means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft or sleeping car; and to enter a conveyance includes taking apart any portion of the conveyance.

Give if applicable. Higher Degrees of Burglary enhancements:

With an assault.

If you find (defendant) guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the burglary, (defendant) assaulted any person. An assault is an intentional and unlawful threat, either by word or act, to do violence to another, at a time when the defendant appeared to have the ability to carry out the threat and [his] [her] act created a well-founded fear in the other person that the violence was about to take place.

With a battery.

If you find (defendant) guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the burglary, (defendant) battered any person. A battery is an actual and intentional touching or striking of another person against that person’s will or the intentional causing of bodily harm to another person.

While armed.

If you find (defendant) guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the burglary, (defendant) was armed or armed [himself] [herself] within the [structure] [conveyance] with [explosives] [a dangerous weapon].

Definitions. Give as applicable. § 790.001(5), Fla. Stat. See exceptions in § 790.001(5)(a)–(d), Fla. Stat.

“Explosive” means any chemical compound or mixture that has the property of yielding readily to combustion or oxidation upon application of heat, flame, or shock, including but not limited to dynamite, nitroglycerin, trinitrotoluene, or ammonium nitrate when combined with other ingredients to form an explosive mixture, blasting caps, and detonators.

State v. Rodriguez, 402 So. 2d 86 (Fla. 3d DCA 1981). Give if applicable and requested.

For an object that was designed and constructed to cause death or great bodily harm if used in its ordinary and usual manner, it is not necessary for the State to prove that the defendant was willing to use the object in furtherance of the burglary in order for an object to constitute a “dangerous weapon.”

Give if applicable.

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

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

Give if applicable. Hardee v. State, 534 So. 2d 706 (Fla. 1988).

If you find a firearm to be a “dangerous weapon,” then to “arm” oneself during the course of a burglary includes possessing a firearm, whether loaded with ammunition or not, at any time during the course of committing the burglary.

Structure or conveyance is a dwelling.

If you find (defendant) guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether the [structure] [conveyance] [entered] [remained in] was a dwelling.

Definition. Give as applicable. Dubose v. State, 210 So. 3d 641 (Fla. 2017).

“Dwelling” means a building [or conveyance] of any kind, whether such building [or conveyance] is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the enclosed space of ground and outbuildings immediately surrounding it. [The enclosure need not be continuous as it may have an ungated opening for entering and exiting.] For purposes of burglary, a “dwelling” includes an attached porch or attached garage.

Human being in structure or conveyance.

If you find (defendant) guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the burglary, there was another human being in the [structure] [conveyance], at the time [he] [she] [entered] [remained in] the [structure] [conveyance].

Offense intended is theft of a controlled substance.

If you find (defendant) **guilty of burglary**, you must also determine whether the State has proved beyond a reasonable doubt that the offense intended to be committed therein was theft of a controlled substance. Pursuant to Florida law, *(name of controlled substance)* is a controlled substance. A theft occurs when a person knowingly and unlawfully obtains or uses or endeavors to obtain or use the property of the victim and does so with the intent to, either temporarily or permanently, deprive the victim of his or her right to the property or any benefit from it or to appropriate the property of the victim to his or her own use or to the use of any person not entitled to it.

Traveling from county of residence into another county with intent to commit a burglary and with purpose to thwart law enforcement efforts to track stolen property. § 843.22, Fla. Stat.

If you find (defendant) **guilty of [Burglary] [Attempted Burglary] [Solicitation to Commit Burglary] [Conspiracy to Commit Burglary]**, you must also determine whether the State proved beyond a reasonable doubt that:

1. (Defendant) ~~had a county of residence within~~ resided in Florida; and
2. (Defendant) **travelled any distance with the intent to commit a burglary in a county in Florida other than [his] [her] the Florida county of residence where [he] [she] resided.**; and
3. ~~The purpose of (defendant's) travel was to thwart law enforcement attempts to track items stolen in the burglary.~~

~~“County of residence” means the county within this state in which a person resides.~~

Evidence of a person's county of residence includes, but is not limited to:

1. The address on a person's driver license or state identification card;
2. Records of real property or mobile home ownership;
3. Records of a lease agreement for residential property;
4. The county in which a person's motor vehicle is registered;
5. The county in which a person is enrolled in an educational institution;
6. The county in which a person is employed.

Dwelling or structure with use of motor vehicle or damage.

If you find (defendant) **guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the burglary, (defendant) entered a [dwelling] [structure] and**

- 1. used a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense, and thereby damaged the [dwelling] [structure].**

or

- 2. caused damage to the [dwelling] [structure] [property within the [dwelling] [structure]], in excess of \$1,000.**

Authorized emergency vehicle.

If you find (defendant) **guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether the conveyance [entered] [remained in] was an authorized emergency vehicle.**

Definition. See § 316.003(1), Fla. Stat.

An “authorized emergency vehicle” is a vehicle of the fire department (fire patrol), police vehicles, and such ambulances and emergency vehicles of municipal departments, public service corporations operated by private corporations, the Department of Environmental Protection, the Department of Health, the Department of Transportation, and the Department of Corrections as are designated or authorized by their respective department or the chief of police of an incorporated city or any sheriff of a county.

State of emergency. Also use to increase scoresheet points one level higher. See § 810.02(3)(f), Fla. Stat.

The definitions of structure, dwelling, and conveyance are different for counties where a state of emergency has been declared under chapter 252. See § 810.011(1), (2), and (3), Fla. Stat.

If you find (defendant) **guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether**

- 1. the burglary was committed within a county that was subject to a state of emergency that had been declared by the governor under chapter 252, the “State Emergency Management Act,”**

and

2. the perpetration of the burglary was facilitated by conditions arising from the emergency.

Definition.

The term “conditions arising from the emergency” means civil unrest, power outages, curfews, voluntary or mandatory evacuations, or a reduction in the presence of or response time for first responders or homeland security personnel.

§ 810.011(4), Fla. Stat.

An act is committed “in the course of committing” if it occurs in the attempt to commit the offense or in flight after the attempt or commission.

Lesser Included Offenses

BURGLARY WITH ASSAULT OR BATTERY OR WHILE ARMED OR WITH USE OF MOTOR VEHICLE OR PROPERTY DAMAGE — 810.02(2)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Burglary		810.02(4)	13.1
	Aggravated battery	784.045	8.4
	Persons Engaged in Criminal Offense Having Firearm	790.07(2)	10.3
	Battery	784.03	8.3
	Aggravated assault	784.021	8.2
	Persons Engaged in Criminal Offense Having Weapon	790.07(1)	10.3
	Assault	784.011	8.1
	Attempt	777.04(1)	5.1
	Burglary	810.02(3)	13.1
	Trespass	810.08(2)(a)	13.3
	Trespass	810.08(2)(b)	13.3
	Trespass	810.08(2)(c)	13.3
	Criminal Mischief	806.13	12.4

It may be better for the jury to make special findings regarding enhancements higher degrees of Burglary instead of listing all of the necessary lesser-included offenses of the highest form of Burglary charged. See *Sanders v. State*, 944 So. 2d 203 (Fla. 2006) (Pariente, J., concurring).

BURGLARY OF DWELLING; BURGLARY OF STRUCTURE OR CONVEYANCE WITH HUMAN BEING INSIDE; BURGLARY OF AN AUTHORIZED EMERGENCY VEHICLE* — 810.02(3)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Burglary		810.02(4)	13.1
	Attempt	777.04(1)	5.1
	Trespass	810.08(2)(a)	13.3
	Trespass	810.08(2)(b)	13.3
	Trespass	810.08(2)(c)	13.3
It may be better for the jury to make special findings regarding <u>enhancements higher degrees of Burglary</u> instead of listing all of the necessary lesser-included offenses of the highest form of Burglary charged. <i>See Sanders v. State</i> , 944 So. 2d 203 (Fla. 2006) (Pariente, J., concurring).			

BURGLARY — 810.02(4)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1
	Trespass	810.08(2)(a)	13.3
	Trespass	810.08(2)(b)	13.3
	Trespass	810.08(2)(c)	13.3
	Criminal Mischief	806.13	12.4
It may be better for the jury to make special findings regarding <u>enhancements higher degrees of Burglary</u> instead of listing all of the necessary lesser-included offenses of the highest form of Burglary charged. <i>See Sanders v. State</i> , 944 So. 2d 203 (Fla. 2006) (Pariente, J., concurring).			

Comments

As of ~~November 2019~~ September 2022, the courts had not determined which definition of “motor vehicle” applies to the burglary statute.

When the compounded offense of burglary with an assault or burglary with a battery is charged, the jury can convict on two lesser-included offenses. *See Gian-Grasso v. State*, 899 So. 2d 392 (Fla. 4th DCA 2005).

A special instruction will be necessary in cases where the dangerous 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 1985 [477 So. 2d 985], 1997 [697 So. 2d 84], 2003 [850 So. 2d 1272], 2007 [962 So. 2d 310], 2008 [986 So.

2d 563], 2013 [109 So. 3d 721], 2015 [176 So. 3d 938], 2017 [217 So. 3d 965], 2018 [257 So. 3d 925], and on April 3, 2020, and on [month day,] 2022.

13.7 RESIDENTIAL PICKETING OR PROTESTING

§ 810.15(2), Fla. Stat.

To prove the crime of Residential Picketing or Protesting, the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) picketed or protested before or about the dwelling of (victim).**

- 2. (Defendant) did so with the intent to harass or disturb (same victim as in element #1) in [his] [her] dwelling.**

§ 810.15(1), Fla. Stat.

“Dwelling” means a building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families.

§ 810.011(1), Fla. Stat. Dubose v. State, 210 So. 3d 641 (Fla. 2017).

“Structure” means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure. [The enclosure need not be continuous as it may have an ungated opening for entering and exiting.]

Lesser Included Offense

RESIDENTIAL PICKETING OR PROTESTING — 810.15(2)

<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 adopted on month day, 2022.

14.4 RETAIL THEFT

(Defendant acting alone* F-3)

§ 812.015(8)(c), (e), and (f) ~~and (9)~~, Fla. Stat.

To prove the crime of Retail Theft, the State must initially prove the following ~~threetwo~~ elements beyond a reasonable doubt.:

The combination of these two elements will be described below as an “act of retail theft.”

1. (Defendant) **knowingly:**

Give one or more as applicable.

- a. **took possession of or carried away [merchandise] [property] [money] [negotiable documents].**
 - b. **altered or removed a [label] [universal product code] [price tag] from merchandise.**
 - c. **transferred merchandise from one container to another.**
 - d. **removed a shopping cart.**
2. (Defendant) **did so with the intent to deprive ~~the~~ merchant of possession, use, benefit, or full retail value of the [merchandise] [property] [money] [negotiable documents] [shopping cart].**
3. ~~The value of the [merchandise] [property] [money] [negotiable documents] [shopping cart] was \$750 or more.~~

Then, the State must also prove [the following element] [one or more of the following elements] beyond a reasonable doubt:

Give as applicable.

§ 812.015(8)(c), Fla. Stat.

1. **(Defendant) committed an act of retail theft from more than one location within a 30-day period and the total value of each individual act of retail theft when added together is \$750 or more.**

§ 812.015(8)(e), Fla. Stat.

2. (Defendant) committed an act of retail theft through the purchase of merchandise in a package or box that contained merchandise other than, or in addition to, the merchandise purported to be contained in the package or box, and the value of the merchandise was \$750 or more.

§ 812.015(8)(f), Fla. Stat. (Value is not relevant).

3. (Defendant)

- a. committed five or more acts of retail theft within a 30-day period; and**
- b. two or more of the acts of retail thefts occurred at different physical merchant locations; and**
- c. in committing such acts of retail thefts, (defendant) obtained or used 10 or more items of merchandise when the items obtained or used from all such acts of retail thefts are added together.**

Give only if applicable.

§ 812.015(8)(a) and (8)(c), Fla. Stat.

~~If you find that the defendant committed multiple acts of retail theft, from the same location or from more than one location, the amount of each individual retail theft within a 30-day period is aggregated to determine the value of the property stolen.~~

Theft of an Instrument.

In the case of a written instrument that does not have a readily ascertainable market value, such as a check, draft, or promissory note, the value is the amount due or collectible.

In the case of any other instrument that creates, releases, discharges or otherwise affects any valuable legal right, privilege, or obligation, the value is the greatest amount of economic loss that the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

Definitions.

§ 812.015(1)(a), Fla. Stat.

“Merchandise” means any personal property, capable of manual delivery, displayed, held or offered for retail sale by a merchant.

§ 812.015(1)(b), Fla. Stat.

“Merchant” means an owner or operator, or the agent, consignee, employee, lessee, or officer of an owner or operator, of any premises or apparatus used for retail purchase or sale of any merchandise.

§ 812.015(1)(c), Fla. Stat.**

“Value of merchandise” means the sale price of the merchandise at the time it was stolen or otherwise removed, depriving the owner of her or his lawful right to ownership and sale of said item.

Optional Definitions. Shaw v. State, 510 So. 2d 349 (Fla. 2d DCA 1987).

“Knowingly” means with actual knowledge and understanding of the facts or the truth.

“Knowingly” means an act done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Lesser Included Offenses

RETAIL THEFT*** — 812.015(8)(c), (e), and (f) and (9)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Grand theft***	Grand theft***	812.014(2)(c)	14.1
Petit theft — first degree***	Petit theft — first degree***	812.014(2)(e)	14.1
Petit theft — second degree***		812.014(3)(a)	14.1
	Attempt	777.04	5.1

Comments

*This instruction covers the third-degree felony of Retail Theft in § 812.015(8)(c), (e), and (f), Fla. Stat., when the defendant was acting alone. The Retail Theft statute also covers circumstances when re the defendant commits a third-degree felony and was not acting alone. See other parts of § 812.015(8) and (9), Fla. Stat. A special instruction will be required in cases where it is alleged the defendant was acting in concert with another person or was conspiring with another person to commit retail theft.

**Under the Retail Theft statute, the “value” of the property is the price stated on the price tag affixed to the item at the time it was stolen. *F.T. v. State*, 146 So. 3d

1270 (Fla. 3d DCA 2014). This determination of “value” may be different than “value” as defined in the theft statute.

***Theft of a shopping cart (valued at less than \$750) is a first-degree misdemeanor under §§ 506.513, 506.518, Fla. Stats.

There is no misdemeanor Retail Theft ~~crime~~. There is, however, a second-degree felony ~~crime~~ of Retail Theft for a person who commits Retail Theft and has a prior conviction for Retail Theft. See § 812.015(9)(a), Fla. Stat. As of April 2020 ~~September 2022~~, there was no case law that determined whether the jury must find the existence of the prior conviction in a bifurcated proceeding or whether that finding may be made by the sentencing judge. There was also no case law that decided whether a “conviction” includes a withhold of adjudication.

~~As of April 2020, it was unclear whether a defendant is guilty of a second-degree felony if he or she commits a retail theft by acting alone where the value of the property is in excess of \$3,000. The retail theft statute could be interpreted in a way that the second-degree felony crime in § 812.015(9)(b), Fla. Stat., occurs only if the defendant individually coordinated the activities of one or more persons in committing the retail theft.~~

This instruction was adopted in 1981 and amended in 2017 [231 So. 3d 384], ~~in~~ on May 22, 2020, and on month day, 2022.

14.4(a) RETAIL THEFT

(Defendant acting alone* F-2)

§ 812.015(9)(d), Fla. Stat.

To prove the crime of Retail Theft, the State must initially prove the following two elements beyond a reasonable doubt.

The combination of these two elements will be described below as an “act of retail theft.”

1. (Defendant) knowingly

Give one or more as applicable.

a. took possession of or carried away [merchandise] [property] [money] [negotiable documents].

b. altered or removed a [label] [universal product code] [price tag] from merchandise.

- c. transferred merchandise from one container to another.**
 - d. removed a shopping cart.**
- 2. (Defendant) did so with the intent to deprive a merchant of possession, use, benefit, or full retail value of the [merchandise] [property] [money] [negotiable documents] [shopping cart].**

Then, the State must also prove the following four elements beyond a reasonable doubt:

- 1. (Defendant) committed five or more acts of retail theft.**
- 2. (Defendant) did so within a 30-day period.**
- 3. Two or more of the acts of retail thefts occurred at different physical retail merchant locations.**
- 4. In committing the acts of retail thefts, (defendant) obtained or used 20 or more items of merchandise when the items obtained or used from all such acts of retail theft are added together.**

Definitions.

§ 812.015(1)(a), Fla. Stat.

“Merchandise” means any personal property, capable of manual delivery, displayed, held or offered for retail sale by a merchant.

§ 812.015(1)(b), Fla. Stat.

“Merchant” means an owner or operator, or the agent, consignee, employee, lessee, or officer of an owner or operator, of any premises or apparatus used for retail purchase or sale of any merchandise.

Optional Definitions. Shaw v. State, 510 So. 2d 349 (Fla. 2d DCA 1987).

“Knowingly” means with actual knowledge and understanding of the facts or the truth.

“Knowingly” means an act done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Lesser Included Offenses

RETAIL THEFT** — 812.015(9)(d)			
<u>CATEGORY ONE</u>	<u>CATEGORY TWO</u>	<u>FLA. STAT.</u>	<u>INS. NO.</u>
<u>Retail Theft</u>		<u>812.015(f)</u>	<u>14.4</u>
	<u>Retail theft</u>	<u>812.015(c) & (e)</u>	<u>14.4</u>
	<u>Grand theft***</u>	<u>812.014(2)(c)</u>	<u>14.1</u>
	<u>Petit theft*** – first degree</u>	<u>812.014(2)(e)</u>	<u>14.1</u>
<u>Petit theft — second degree***</u>		<u>812.014(3)(a)</u>	<u>14.1</u>
	<u>Attempt</u>	<u>777.04</u>	<u>5.1</u>

Comments

*This instruction covers the second-degree felony of Retail Theft in § 812.015(9)(d), Fla. Stat., when the defendant was acting alone. The Retail Theft statute also covers circumstances when the defendant commits a second-degree felony and was not acting alone. See other parts of § 812.015(9), Fla. Stat. A special instruction will be required in cases where it is alleged the defendant was acting in concert with another person or was conspiring with another person to commit Retail Theft.

**There is no misdemeanor Retail Theft. There is, however, another second-degree felony of Retail Theft for a person who commits Retail Theft and has a prior conviction for Retail Theft. See § 812.015(9)(a), Fla. Stat. As of September 2022, there was no case law that determined whether the jury must find the existence of the prior conviction in a bifurcated proceeding or whether that finding may be made by the sentencing judge. There was also no case law that decided whether a “conviction” includes a withhold of adjudication.

***Theft of a shopping cart (valued at less than \$750) is a first-degree misdemeanor under §§ 506.513, 506.518, Fla. Stats.

This instruction was adopted in 1981 and amended in 2017 [231 So. 3d 384], on May 22, 2020, and on month day, 2022.

16.7 USE OF A CHILD IN A SEXUAL PERFORMANCE

§ 827.071(2), Fla. Stat.

To prove the crime of Use of a Child in a Sexual Performance, the State must prove the following three elements beyond a reasonable doubt:

Give 1a or 1b or both as applicable.

1.
 - a. _____ (Defendant) **[employed] [authorized] [induced]** (victim) **to engage in a sexual performance.**
 - b. _____ (Defendant), **being a [parent] [legal guardian] [custodian of (victim)], consented to (victim's) participation in a sexual performance.**
2. (Defendant) **knew the character and content of the performance.**
3. **At the time, (victim) was ~~less than 18 years of age~~ a child.**

Definitions.

“Sexual performance” means any performance or part thereof which includes sexual conduct by a child ~~of less than 18 years of age.~~

“Performance” means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

“Child” means any person, whose identity is known or unknown, younger than 18 years of age.

Give if applicable.

A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”

Give as applicable.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

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

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

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

“Bona fide” means genuine.

“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~~ female genitals of the other.

“Simulated” means the explicit depiction of “sexual conduct,” as defined above, which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

Comments

Instruction #16.8 may be used if the State alleged only that a parent, guardian or custodian of a child consented to the child’s participation in a sexual performance.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2008 [995 So. 2d 489] and amended on month day, 2022.

16.8 USE OF A CHILD IN A SEXUAL PERFORMANCE WITH CONSENT OF PARENT, LEGAL GUARDIAN, OR CUSTODIAN § 827.071(2), Fla. Stat.

To prove the crime of Use of a Child in a Sexual Performance, the State must prove the following four elements beyond a reasonable doubt:

1. (Defendant) **consented to the participation of (victim) in a sexual performance.**
2. (Defendant) **knew the character and content of the performance.**
3. **At the time, (victim) was ~~less than 18 years of age~~ a child.**
4. (Defendant) **was the [parent] [legal guardian] [custodian] of (victim).**

Definitions.

“Sexual performance” means any performance or part thereof which includes sexual conduct by a child ~~of less than 18 years of age~~.

“Performance” means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

“Child” means any person, whose identity is known or unknown, younger than 18 years of age.

Give if applicable.

A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”

Give as applicable.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

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

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

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

“Bona fide” means genuine.

“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~~ female genitals of the other.

“Simulated” means the explicit depiction of “sexual conduct,” as defined above, which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

Comments

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother's breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2008 [995 So. 2d 489] and amended on month day, 2022.

16.9 PROMOTING A SEXUAL PERFORMANCE BY A CHILD

§ 827.071(3), Fla. Stat.

To prove the crime of Promoting a Sexual Performance by a Child, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) [produced] [directed] [promoted] a performance.
2. The performance included sexual conduct by a child ~~less than 18 years of age~~.
3. (Defendant) knew the character and content of the performance.

Definitions.

"Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, or advertise or to offer or agree to do the same.

"Performance" means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

"Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

"Child" means any person, whose identity is known or unknown, younger than 18 years of age.

Give if applicable.

A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."

Give as applicable.

"Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

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

“Sexual battery” means oral, anal, or ~~vagina~~ female genital penetration by, or union with, the sexual organ of another or the anal or ~~vagina~~ female genital penetration of another by any other object[; however, “sexual battery” does not include an act done for a bona fide medical purpose].

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

“Bona fide” means genuine.

“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~~ female genitals of the other.

“Simulated” means the explicit depiction of “sexual conduct,” as defined above, which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

Lesser Included Offense

PROMOTING A SEXUAL PERFORMANCE BY A CHILD — 827.071(3)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Transmission of Child Pornography by Electronic Device or Equipment	847.0137	11.20

Comments

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2008 [995 So. 2d 489] and was amended on October 2, 2020 and on month, day, year.

16.10 POSSESSION OF MATERIAL INCLUDING ~~SEXUAL CONDUCT BY A CHILD~~ PORNOGRAPHY WITH INTENT TO PROMOTE

§ 827.071(4), Fla. Stat.

To prove the crime of Possession of ~~Material including Sexual Conduct by a Child~~ Pornography with Intent to Promote, the State must prove the following ~~two~~ three elements beyond a reasonable doubt:

1. (Defendant) possessed ~~with intent to promote~~ a[n] [photograph] [motion picture] [exhibition] [show] [representation] [presentation].
2. The [photograph] [motion picture] [exhibition] [show] [representation] [presentation] included, in whole or in part, ~~sexual conduct by a child less than 18 years of age~~ child pornography.
3. At the time, (defendant) had the intent to promote the [photograph] [motion picture] [exhibition] [show] [representation] [presentation].

Give if applicable.

The possession of three or more copies of such [photographs] [motion pictures] [exhibitions] [shows] [representations] [presentations] may justify a finding of an intent to promote ~~if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent existed.~~

Definitions.

Possession.

To prove (defendant) possessed a[n] [photograph] [motion picture] [exhibition] [show] [representation] [presentation] that included sexual conduct by a child, the State must prove beyond a reasonable doubt that [he] [she] a) knew of the nature of the material in the [photograph] [motion picture] [exhibition] [show] [representation] [presentation] and b) intentionally exercised control over that [photograph] [motion picture] [exhibition] [show] [representation] [presentation].

Give if applicable.

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

Joint possession. Give if applicable.

Possession may be sole or joint, that is, two or more persons may possess a[n] [photograph] [motion picture] [exhibition] [show] [representation] [presentation].

§ 827.071(1), Fla. Stat.

“Child pornography” means:

1. Any image depicting a minor engaged in sexual conduct; or

2. Any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct.

§ 827.071(1), Fla. Stat.

"Identifiable minor" means a person:

- 1. Who was a minor at the time the image was created, altered, adapted, or modified, or whose image as a minor was used in the creating, altering, adapting, or modifying of the image; and**
- 2. Who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.**

The term may not be construed to require proof of the actual identity of the identifiable minor.

§ 827.071(1), Fla. Stat.

"Minor" means any person, whose identity is known or unknown, younger than 18 years of age.

§ 827.071(1)(d), Fla. Stat.

"Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, or advertise or to offer or agree to do the same.

§ 827.071(1)(h), Fla. Stat.

"Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

Give if applicable.

A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."

Give as applicable.

§ 827.071(1)(a), Fla. Stat.

"Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

§ 827.071(1)(e), Fla. Stat.

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

§ 827.071(1)(f), Fla. Stat.

"Sexual battery" means oral, anal, or ~~vaginal~~ femal genital penetration by, or union with, the sexual organ of another or the anal or ~~vaginal~~ femal genital penetration of another by any other object[; however, "sexual battery" does not include an act done for a bona fide medical purpose].

§ 827.071(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

“Bona fide” means genuine.

§ 827.071(1)(d), 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~~ female genitals of the other.

§ 827.071(1)(f), Fla. Stat.

“Simulated” means the explicit depiction of “sexual conduct,” as defined above, which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

Lesser Included Offenses

POSSESSION OF MATERIAL INCLUDING SEXUAL CONDUCT BY A CHILD PORNOGRAPHY WITH INTENT TO PROMOTE — 827.071(4)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
<u>Knowing p</u> Possession (<u>do not include “intentional viewing” unless charged</u>) of a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, was known by defendant to include any sexual conduct by a child pornography		827.071(5)(a)	16.11
	Attempt	777.04(1)	5.1

Comments

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2008 [995 So. 2d 489] and amended in 2018 [238 So. 3d 182] and on month day, 2022.

16.11 [POSSESSION] [CONTROL] [INTENTIONAL VIEWING] OF MATERIAL INCLUDING SEXUAL CONDUCT BY A CHILD PORNOGRAPHY

§ 827.071(5)(a), Fla. Stat.

To prove the crime of [Possession] [Control] [Intentional Viewing] of ~~Material including Sexual Conduct by a Child Pornography~~, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) [knowingly possessed] [knowingly controlled] [intentionally viewed] a(n) [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation].
2. The [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation] included, in whole or in part, ~~sexual conduct by a child less than 18 years of age~~ child pornography.
3. (Defendant) knew that the [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation] included ~~sexual conduct by a child less than 18 years of age~~ child pornography.

Definitions. Give if applicable.

Possession.

To prove (defendant) possessed a(n) [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation] that included child pornography, the State must prove beyond a reasonable doubt that [he] [she] a) knew of the nature of the material in the [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation]; and b) intentionally exercised control over that [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation].

Give if applicable.

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

Joint possession. Give if applicable.

Possession may be sole or joint, that is, two or more persons may possess a(n) [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation].

§ 827.071(1), Fla. Stat.

“Child pornography” means:

- 1. Any image depicting a minor engaged in sexual conduct; or**
- 2. Any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct.**

§ 827.071(1), Fla. Stat.

“Identifiable minor” means a person:

- 1. Who was a minor at the time the image was created, altered, adapted, or modified, or whose image as a minor was used in the creating, altering, adapting, or modifying of the image; and**
- 2. Who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.**

The term may not be construed to require proof of the actual identity of the identifiable minor.

§ 827.071(1), Fla. Stat.

“Minor” means any person, whose identity is known or unknown, younger than 18 years of age.

§ 827.071(1)(h), Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

Give if applicable.

A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”

Give as applicable.

§ 827.071(1)(a), Fla. Stat.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

§ 827.071(1)(e), Fla. Stat.

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

§ 827.071(1)(f), Fla. Stat.

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

§ 827.071(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

“Bona fide” means genuine.

§ 827.071(1)(d), 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~~ female genitals of the other.

§ 827.071(1)(f), Fla. Stat.

“Simulated” means the explicit depiction of “sexual conduct,” as defined above, which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

§ 827.071(1)(b), Fla. Stat.

“Intentionally view” means to deliberately, purposefully, and voluntarily view. Proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation over any period of time.

Possession.

~~To prove (defendant) possessed a[n] [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation] that included sexual conduct by a child, the State must prove beyond a reasonable doubt that [he] [she] a) knew of the nature of the material in the [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation]; and b) intentionally exercised control over that [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation].~~

Give if applicable.

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

~~Joint possession. Give if applicable.~~

~~Possession may be sole or joint, that is, two or more persons may possess a[n] [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation].~~

Lesser Included Offenses

**[POSSESSION] [CONTROL] [INTENTIONAL VIEWING] OF MATERIAL INCLUDING
SEXUAL CONDUCT BY A CHILD PORNOGRAPHY — § 827.071(5)(a)**

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

Effective October 1, 2012, if the photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation includes sexual conduct by more than one child, then each such child in each such photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation that is knowingly possessed, controlled, or intentionally viewed is a separate offense.

As of September 2022, it was unclear whether acts done for bona fide medical purposes or a mother's breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2008 [995 So. 2d 489] and amended in 2013 [131 So. 3d 720] and 2018 [238 So. 3d 182] and on month day, 2022.

21.8 TAMPERING WITH OR FABRICATING PHYSICAL EVIDENCE

§ 918.13 Fla. Stat.

To prove the crime of [Tampering with] [Fabricating] Physical Evidence, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) knew that ~~[a criminal trial] or [a criminal proceeding] [an investigation by a duly constituted [prosecuting authority] [law enforcement agency] [grand jury] [legislative committee]] of this state was [pending] [about to be instituted]~~ a criminal trial, proceeding, or investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of Florida was pending or was about to be instituted.

Give 2a or 2b as applicable.

2. a. (Defendant) [altered] [destroyed] [concealed] [removed] any ~~[record] [document] [thing] [item alleged]~~ record, document, or other item, with the purpose to impair its [verity] [availability] in the [investigation] [proceeding] such proceeding or

investigation.

- b. (Defendant) [made] [presented] [used] any ~~[record]~~~~[document]~~
~~[thing]~~ [item alleged] record, document, or other item, knowing
it to be false.

Give if § 918.13(2)(b), Fla. Stat. is charged.

If you find the defendant guilty of [Tampering with] [Fabricating] Physical Evidence, you must further determine whether the State has proven beyond a reasonable doubt that the [tampering] [fabricating] related to a criminal trial, proceeding, or investigation related to a capital felony.

The Court instructs you that (name of capital felony) is a capital felony. If necessary, define elements of the capital felony but do not instruct on the State's burden of proof when defining that crime.

Lesser Included Offenses

21.8 [TAMPERING WITH] [FABRICATING] PHYSICAL EVIDENCE — 918.13

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comment

This instruction was adopted in 2010 [44 So. 3d 565] and amended in 2013 [131 So. 3d 755],
and on month day, 2022.

23.1 MAINTAINING A PLACE OF PROSTITUTION, LEWDNESS, OR ASSIGNATION

§ 796.07(2)(a), Fla. Stat.

**To prove the crime of Maintaining a Place of [Prostitution] [Lewdness]
[Assignment], the State must prove the following element beyond a reasonable
doubt:**

(Defendant) **[established] [owned] [maintained] [operated] any [place] [structure] [building] [conveyance] for the purpose of [lewdness] [assignation] [prostitution].**

Give if applicable. § 796.07(7)(a), Fla. Stat.; § 480.043(1), Fla. Stat.; § 480.033, Fla. Stat.

If you find the defendant guilty of Maintaining a Place of [Prostitution] [Lewdness] [Assignation], you must also determine whether the State has proven beyond a reasonable doubt that the [place] [structure] [building] [conveyance] that was [established] [owned] [maintained] [operated] for the purpose of [lewdness] [assignation] [prostitution] was a massage establishment that was or should have been licensed by the Florida Department of Health.

All “massage establishments” must be licensed by the Florida Department of Health. A “massage establishment” means a site or premises, or portion thereof, wherein a massage therapist practices massage therapy. A “massage therapist” means a person licensed as required by law who administers massage for compensation. “Massage therapy” means the manipulation of the soft tissues of the human body with the hand, foot, knee, arm, or elbow, whether or not such manipulation is aided by hydrotherapy, including colonic irrigation, or thermal therapy; any electrical or mechanical device; or the application to the human body of a chemical or herbal preparation.

Definitions. Give as applicable.

§ 796.07(1)(a), Fla. Stat.

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

§ 796.07(1)(b), Fla. Stat.

“Lewdness” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

§ 796.07(1)(e), Fla. Stat.

“Assignment” means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.

§ 810.011(1), Fla. Stat.; Dubose v. State, 210 So. 3d 641 (Fla. 2017).

A “structure” is any building of any kind, either temporary or permanent, which has a roof over it and includes any closely adjoining land enclosed by a fence or wall. [The enclosure need not be continuous as it may have an ungated opening for entering and exiting.]

§ 810.011(3), Fla. Stat.

A “conveyance” means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car.

§ 796.07(1)(d), Fla. Stat.

“Sexual activity” means oral, anal, or ~~vaginal~~female genital penetration by, or union with, the sexual organ of another; anal or ~~vaginal~~female genital penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation[; however, the term does not include acts done for bona fide medical purposes].

§ 796.07(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

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

The definition of “an object” includes a finger.

“Bona fide” means genuine.

Lesser Included Offenses

MAINTAINING A PLACE OF PROSTITUTION, LEWDNESS, OR ASSIGNATION — 796.07(2)(a), Fla. Stat.			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

The crimes in § 796.07(2)(a), Florida Statutes, ~~and § 796.07(7)(a), Florida Statutes, are enhanced~~ is bumped up based on the number of prior violations. ~~As of July 2017, it is unclear whether the existence of a prior violation will be treated as an element of the crime that must be found by the jury in a bifurcated trial or whether a prior violation can be proven to the judge at sentencing. As of September 2022, it was unclear whether the existence of a prior violation is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior violation. Therefore, if the information or indictment contains an allegation of one or more prior violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior violation is treated as an element, the historical fact of a prior violation should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).~~

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1981 and amended in 2008 [995 So. 2d 476], 2010 [48 So. 3d 41], 2013 [122 So. 3d 302], ~~and~~ 2017 [229 So. 3d 295], and month day, 2022.

**23.2 SOLICITING FOR THE PURPOSE OF PROSTITUTION
OR A LEWD OR INDECENT ACT**

§ 796.07(2)(b), Fla. Stat.

To prove the crime of Soliciting for the Purpose of [Prostitution] [Any Lewd or Indecent Act], the State must prove the following element beyond a reasonable doubt:

(Defendant) **[offered] [offered to secure] [agreed to secure] another person for the purpose of [prostitution] [any lewd or indecent act].**

Definitions. § 796.07(1), Fla. Stat.

Give if applicable.

~~§ 796.07(1)(a), Fla. Stat.~~

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

~~§ 796.07(1)(b), Fla. Stat.~~

A “lewd act” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

~~§ 796.07(1)(d), Fla. Stat.~~

“Sexual activity” means oral, anal, or ~~vaginal~~female genital penetration by, or union with, the sexual organ of another; anal or ~~vaginal~~female genital penetration of another by any other object; or the handling or fondling of the

sexual organ of another for the purpose of masturbation]; however, the term does not include acts done for bona fide medical purposes].

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

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

The definition of “an object” includes a finger.

“Bona fide” means genuine.

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

The crime in § 796.07(2)(b), Florida Statutes, is ~~enhanced~~ bumped up based on the number of prior violations. ~~As of July 2017, it is unclear whether the existence of a prior violation will be treated as an element of the crime that must be found by the jury in a bifurcated trial or whether a prior violation can be proven to the judge at sentencing.~~ As of September 2022, it was unclear whether the existence of a prior violation is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior violation. Therefore, if the information or indictment contains an allegation of one or more prior violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior violation is treated as an element, the historical fact of a prior violation should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. State v. Harbaugh, 754 So. 2d 691 (Fla. 2000).

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1981 and amended in 2008 [995 So. 2d 476], 2010 [48 So. 3d 41], 2013 [122 So. 3d 302], ~~and~~ 2017 [~~229~~ So. 3d 295], and month day, 2022.

**23.3 RECEIVING FOR THE PURPOSE OF PROSTITUTION,
LEWDNESS, OR ASSIGNATION**

§ 796.07(2)(c), Fla. Stat.

To prove the crime of Receiving for the Purpose of [Prostitution] [Lewdness] [Assignment], the State must prove the following element beyond a reasonable doubt:

Give element 1 or element 2 as applicable.

1. (Defendant) **[received] [offered to receive] [agreed to receive] a person into a [place] [structure] [building] [conveyance] for the purpose of [prostitution] [lewdness] [assignment].**
2. (Defendant) **permitted a person to remain in a [place] [structure] [building] [conveyance] for the purpose of [prostitution] [lewdness] [assignment].**

Definitions. Give as applicable.

§ 796.07(1)(~~a~~), Fla. Stat.

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

§ 796.07(1)(~~b~~), Fla. Stat.

“Lewdness” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

§ 796.07(1)(e), Fla. Stat.

“Assignment” means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.

§ 810.011(1), Fla. Stat.; Dubose v. State, 210 So. 3d 641 (Fla. 2017).

A “structure” is any building of any kind, either temporary or permanent, which has a roof over it and includes any closely adjoining land enclosed by a fence or wall. [The enclosure need not be continuous as it may have an ungated opening for entering and exiting.]

§ 810.011(3), Fla. Stat.

A “conveyance” means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car.

§ 796.07(1)(d), Fla. Stat.

“Sexual activity” means oral, anal, or vaginalfemale genital penetration by, or union with, the sexual organ of another; anal or vaginalfemale genital penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation[; however, the term does not include acts done for bona fide medical purposes].

§ 796.07(1), Fla. Stat.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

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

The definition of “an object” includes a finger.

“Bona fide” means genuine.

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

The crime in § 796.07(2)(c), Florida Statutes, is enhanced based on the number of prior violations. As of July 2017/September 2022, it was unclear whether the existence of a prior violation is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior violation. Therefore, if the information or indictment contains an allegation of one or more prior violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior violation is treated as an element, the historical fact of a prior violation should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. State v. Harbaugh, 754 So. 2d 691 (Fla. 2000).

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1981 and amended in 2008 [995 So. 2d 476], 2010 [48 So. 3d 41], 2013 [122 So. 3d 302], and 2017 [229 So. 3d 295], and month day, 2022.

**23.4 TRANSPORTING FOR THE PURPOSE OF PROSTITUTION,
LEWDNESS, OR ASSIGNATION**

§ 796.07(2)(d), Fla. Stat.

To prove the crime of Transporting for the Purpose of [Prostitution] [Lewdness] [Assignment], the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) [directed] [took] [transported] [offered or agreed to [direct] [take] [transport]] a person to [a place] [a structure] [a building] [another person].**
- 2. At the time, (defendant) knew or had reasonable cause to believe that such [directing] [taking] [transporting] was for the purpose of [prostitution] [lewdness] [assignment].**

Definitions. § 796.07(1), Fla. Stat.

Give as applicable.

~~§ 796.07(1)(a), Fla. Stat.~~

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

~~§ 796.07(1)(b), Fla. Stat.~~

“Lewdness” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

~~§ 796.07(1)(c), Fla. Stat.~~

“Assignment” means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.

§ 796.07(1)(d), Fla. Stat.

“Sexual activity” means oral, anal, or ~~vaginal~~female genital penetration by, or union with, the sexual organ of another; anal or ~~vaginal~~female genital penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation[; however, the term does not include acts done for bona fide medical purposes].

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

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

The definition of “an object” includes a finger.

“Bona fide” means genuine.

§ 810.011(1), Fla. Stat.; Dubose v. State, 210 So. 3d 641 (Fla. 2017).

A “structure” is any building of any kind, either temporary or permanent, which has a roof over it and includes any closely adjoining land enclosed by a fence or wall. [The enclosure need not be continuous as it may have an ungated opening for entering and exiting.]

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

The crime in § 796.07(2)(d), Florida Statutes, is ~~enhanced~~ bumped up based on the number of prior violations. ~~As of July 2017, it is unclear whether the existence of a~~

prior violation will be treated as an element of the crime that must be found by the jury in a bifurcated trial or whether a prior violation can be proven to the judge at sentencing. As of September 2022, it was unclear whether the existence of a prior violation is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior violation. Therefore, if the information or indictment contains an allegation of one or more prior violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior violation is treated as an element, the historical fact of a prior violation should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1981 and amended in 2008 [995 So. 2d 476], 2010 [48 So. 3d 41], 2013 [122 So. 3d 302], and 2017 [229 So. 3d 295], and month day, 2022.

23.5 OFFERING TO COMMIT, COMMITTING, OR ENGAGING IN PROSTITUTION, LEWDNESS, OR ASSIGNATION

§ 796.07(2)(e), Fla. Stat.

To prove the crime of Offering to Commit, Committing, or Engaging in [Prostitution] [Lewdness] [Assignment], the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) [offered to commit] [committed] [engaged in] [prostitution] [lewdness] [assignment].**
- 2. At the time, (defendant) was 18 years of age or older.**

Definitions. § 796.07(1), Fla. Stat.

Give as applicable.

~~§ 796.07(1)(a), Fla. Stat.~~

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

~~§ 796.07(1)(b), Fla. Stat.~~

“Lewdness” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

~~§ 796.07(1)(c), Fla. Stat.~~

“Assignment” means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.

~~§ 796.07(1)(d), Fla. Stat.~~

“Sexual activity” means oral, anal, or ~~vaginal~~female genital penetration by, or union with, the sexual organ of another; anal or ~~vaginal~~female genital penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation[; however, the term does not include acts done for bona fide medical purposes].

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

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

The definition of “an object” includes a finger.

“Bona fide” means genuine.

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

The crime in § 796.07(2)(e), Florida Statutes, is ~~enhanced~~ bumped up based on the number of prior violations. ~~As of July 2017, it is unclear whether the existence of a prior violation will be treated as an element of the crime that must be found by the jury in a bifurcated trial or whether a prior violation can be proven to the judge at sentencing.~~ As of September 2022, it was unclear whether the existence of a prior violation is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior violation. Therefore, if the information or indictment contains an allegation of one or more prior violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior violation is treated as an element, the historical fact of a prior violation should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1981 and amended in 2008 [995 So. 2d 476], 2010 [48 So. 3d 41], 2013 [122 So. 3d 302], ~~and~~ 2017 [229 So. 3d 295], and month day, 2022.

23.6 SOLICITING FOR PROSTITUTION, LEWDNESS, OR ASSIGNATION

§ 796.07(2)(f), Fla. Stat.

To prove the crime of Soliciting for [Prostitution] [Lewdness] [Assignment], the State must prove the following element beyond a reasonable doubt:

(Defendant) **[solicited] [induced] [enticed] [procured] another to commit [prostitution] [lewdness] [assignment].**

Definitions. § 796.07(1), Fla. Stat.

Give as applicable.

~~§ 796.07(1)(a), Fla. Stat.~~

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

~~§ 796.07(1)(b), Fla. Stat.~~

“Lewdness” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

~~§ 796.07(1)(c), Fla. Stat.~~

“Assignment” means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.

~~§ 796.07(1)(d), Fla. Stat.~~

“Sexual activity” means oral, anal, or ~~vaginal~~female genital penetration by, or union with, the sexual organ of another; anal or ~~vaginal~~female genital penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation[; however, the term does not include acts done for bona fide medical purposes].

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

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

The definition of “an object” includes a finger.

“Bona fide” means genuine.

§ 777.04(2), Fla. Stat.

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

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

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

The crime in § 796.07(2)(f), Florida Statutes, is ~~enhanced~~ bumped up based on the number of prior violations. ~~As of July 2017, it is unclear whether the existence of a prior violation will be treated as an element of the crime that must be found by the jury in a bifurcated trial or whether a prior violation can be proven to the judge at sentencing.~~ As of September 2022, it was unclear whether the existence of a prior violation is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior violation. Therefore, if the information

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

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1981 and amended in 2008 [995 So. 2d 476], 2010 [48 So. 3d 41], 2013 [122 So. 3d 302], ~~and~~ 2017 [229 So. 3d 295], and month day, 2022.

23.7 ENTERING FOR THE PURPOSE OF PROSTITUTION, LEWDNESS, OR ASSIGNATION

§ 796.07(2)(g), Fla. Stat.

To prove the crime of Entering for the Purpose of [Prostitution] [Lewdness] [Assignment], the State must prove the following element beyond a reasonable doubt:

(Defendant) **[resided in] [entered] [remained in] a [place] [structure] [building] [conveyance] for the purpose of [prostitution] [lewdness] [assignment].**

Definitions. § 796.07(1), Fla. Stat.

Give as applicable.

~~§ 796.07(1)(a), Fla. Stat.~~

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

~~§ 796.07(1)(b), Fla. Stat.~~

“Lewdness” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

~~§ 796.07(1)(c), Fla. Stat.~~

“Assignment” means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.

~~§ 810.011(1), Fla. Stat.; Dubose v. State, 210 So. 3d 641 (Fla. 2017).~~

A “structure” is any building of any kind, either temporary or permanent, which has a roof over it and includes any closely adjoining land enclosed by a fence or wall. [The enclosure need not be continuous as it may have an ungated opening for entering and exiting.]

~~§ 810.011(3), Fla. Stat.~~

A “conveyance” means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car.

~~§ 796.07(1)(d), Fla. Stat.~~

“Sexual activity” means oral, anal, or vaginalfemale genital penetration by, or union with, the sexual organ of another; anal or vaginalfemale genital penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation[]; however, the term does not include acts done for bona fide medical purposes].

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

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

The definition of “an object” includes a finger.

“Bona fide” means genuine.

Lesser Included Offenses

ENTERING FOR THE PURPOSE OF PROSTITUTION, LEWDNESS, OR ASSIGNATION — 796.07(2)(g), Fla. Stat.			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

The crime in § 796.07(2)(g), Florida Statutes, is ~~enhanced~~ bumped up based on the number of prior violations. As of ~~July 2017~~, it is unclear whether the existence of a prior violation will be treated as an element of the crime that must be found by the jury in a bifurcated trial or whether a prior violation can be proven to the judge at sentencing.

As of September 2022, it was unclear whether the existence of a prior violation is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior violation. Therefore, if the information or indictment contains an allegation of one or more prior violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior violation is treated as an element, the historical fact of a prior violation should be determined by the jury beyond a

reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

As of September 2022, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1981 and amended in 2008 [995 So. 2d 476], 2010 [48 So. 3d 41], 2013 [122 So. 3d 302], and 2017 [229 So. 3d 295], and on month day, 2022.

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. To explain the specified locations, the judge should provide definitions (see below) from the appropriate statutes that are referred to in § 893.13(1), 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 a mental health facility];

[the real property comprising a health care facility licensed under chapter 395, Florida Statutes, that provides substance abuse treatment];

[the real property comprising a licensed service provider];

[the real property comprising a facility providing services that include clinical treatment, intervention, or prevention];

[the real property comprising a recovery residence];

[the real property comprising an assisted living facility];

[the real property comprising a pain management clinic].

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*, 326 So. 3d 1129 (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 November 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)(e), 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.~~

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).

Define appropriate specified location(s) here. See § 893.13(1), Fla. Stat., for statutory cites for location definitions.

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 Substance, if Possession with Intent to Sell, Manufacture, or Deliver is charged		893.13(6)	25.7
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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.

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*, 326 So. 3d 1129 (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 September 2022, 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.

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], 2019 [272 So. 3d 243], and on December 15, 2021, and on month day, 2022.

28.5(a) [RACING ON A HIGHWAY] [STREET TAKEOVERS] [STUNT DRIVING]
 § 316.191(3)(a), Fla. Stat.

To prove the crime of [Racing on a Highway] [Street Takeovers] [Stunt Driving], the State must prove the following element beyond a reasonable doubt:

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

(Defendant)

- a. **drove a motor vehicle in**
- b. **[participated] [coordinated, through social media or otherwise] [facilitated] [collected monies] at any location for**
- c. **knowingly rode as a passenger in**
- d. **purposefully caused moving traffic, including pedestrian traffic, to slow, or stop, or be impeded in any way for**
- e. **operate a motor vehicle for the purpose of filming or recording the activities of participants in**
- f. **operate a motor vehicle carrying any amount of fuel for the purposes of fueling a motor vehicle involved in**

[a race]

[a drag race] or

[an acceleration contest involving a motor vehicle]

[a street takeover]

[any stunt driving]

[a speed competition or contest involving a motor vehicle]

[a test of physical endurance involving a motor vehicle]

[an exhibition of speed or acceleration involving a motor vehicle]

[an attempt, involving a motor vehicle, to make a speed record]

on a [highway] [roadway] [parking lot].

Definitions. Give as applicable.

§ 316.191(1)(~~bd~~), Fla. Stat.

“Drag race” means the operation of two or more motor vehicles from a point side by side at accelerating speeds in a competitive attempt to outdistance each other, or the operation of one or more motor vehicles to the same point, for the purpose of comparing the relative speeds or power of acceleration of such motor vehicle or motor vehicles within a certain distance or time limit.

§ ~~316.003(44)~~316.191(1)(f), Fla. Stat. Some of these terms have their own statutory definitions, which should be given if necessary.

“Motor vehicle” means a self-propelled vehicle not operated upon rails or guideway, including any motorcycle, auticycle, moped, all-terrain vehicle, off-road vehicle, or vehicle not licensed to operate on a highway or roadway,

[, but not including a bicycle, electric bicycle, motorized scooter, electric personal assistive mobility device, mobile carrier, personal delivery device, or 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” means 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].

§ 316.191(1)(eg), Fla. Stat.

“Race” means the use of one or more motor vehicles in competition, arising from a challenge to demonstrate superiority of a motor vehicle or driver and the acceptance or competitive response to that challenge, either through a prior arrangement or in immediate response, in which the competitor attempts to outgain or outdistance another motor vehicle, to prevent another motor

vehicle from passing, to arrive at a given destination ahead of another motor vehicle or motor vehicles, or to test the physical stamina or endurance of drivers over long distance driving routes. A race may be prearranged or may occur through a competitive response to conduct on the part of one or more drivers which, under the totality of circumstances, can reasonably be interpreted as a challenge to race.

§ 316.003(68), Fla. Stat.

“Roadway” means that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways, the term roadway as used herein refers to any such roadway separately, but not to all such roadways collectively.

§ 316.003(81), Fla. Stat.

“Street or highway” means

(a) The entire width between the boundary lines of every way or place of whatever nature when any part thereof is open to the use of the public for purposes of vehicular traffic;

(b) The entire width between the boundary lines of any privately owned way or place used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons, or any limited access road owned or controlled by a special district, whenever, by written agreement entered into under s. 316.006(2)(b) or (3)(b), a county or municipality exercises traffic control jurisdiction over said way or place;

(c) Any area, such as a runway, taxiway, ramp, clear zone, or parking lot, within the boundary of any airport owned by the state, a county, a municipality, or a political subdivision, which area is used for vehicular traffic but which is not open for vehicular operation by the general public; or

(d) Any way or place used for vehicular traffic on a controlled access basis within a mobile home park recreation district which has been created under s. 418.30 and the recreational facilities of which district are open to the general public.

§ 316.191(1)(i), Fla. Stat.

“Street takeover” means the taking over of a portion of a highway, roadway, or parking lot by blocking or impeding the regular flow of traffic to perform a race, drag race, burnout, doughnut, drifting, wheelie, or other stunt driving.

§ 316.191(1)(a), Fla. Stat.

“Burnout” means a maneuver performed while operating a motor vehicle whereby the motor vehicle is kept stationary, or is in motion, while the wheels are spun, resulting in friction which causes the motor vehicle’s tires to heat up and emit smoke.

§ 316.191(1)(c), Fla. Stat.

“Doughnut” means a maneuver performed while operating a motor vehicle whereby the front or rear of the motor vehicle is rotated around the opposite set of wheels in a continuous motion which may cause a circular skid-mark pattern of rubber on the driving surface or the tires to heat up and emit smoke from friction, or both.

§ 316.191(1)(e), Fla. Stat.

“Drifting” means a maneuver performed while operating a motor vehicle whereby the motor vehicle is steered so that it makes a controlled sideways skid through a turn with the front wheels pointed in a direction opposite to that of the turn.

§ 316.191(1)(j), Fla. Stat.

“Stunt driving” means to perform or engage in any burnouts, doughnuts, drifting, wheelies, or other dangerous motor vehicle activity on a highway, roadway, or parking lot as part of a street takeover.

§ 316.191(1)(k), Fla. Stat.

“Wheelie” means a maneuver performed while operating a motor vehicle whereby a motor vehicle is ridden for a distance with the front wheel or wheels raised off the ground.

Lesser Included Offenses

[RACING ON A HIGHWAY] [STREET TAKEOVERS] [STUNT DRIVING] — 316.191(3)(a)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

The filming or recording the activities of participants covered in element e. above does not apply to bona fide members of the news media. See § 316.191(2)(e), Fla. Stat.

Pursuant to § 316.191(3), Fla. Stat., repeat offenders of § 316.191(2), Fla. Stat., are subject to higher penalties. As of September 2022, it was unclear whether the facts related to prior(s) should be considered elements to be proven to the jury or sentencing factors to be proven to the judge. If treated as an element, do not read the allegation of prior(s) and do not send the charging document into the jury room. If the defendant is found guilty, the historical fact of a previous conviction, which includes withholds of adjudication, shall be determined beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

This instruction was adopted in 2009 [6 So. 3d 574] and amended in 2012 [95 So. 3d 868], 2013 [31 So. 3d 755], 2019 [262 So. 3d 59], ~~and on~~ October 2, 2020, and on month day, 2022.

**28.11(a) DRIVING WHILE DESIGNATED AS A
HABITUAL TRAFFIC OFFENDER**

§ 322.34(5), Fla. Stat.

To prove the crime of Driving While Designated as a Habitual Traffic Offender, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) **drove a motor vehicle upon a highway in this state.**
2. **At the time,** (defendant) **was designated as a habitual traffic offender.**

Definitions.

§ 322.01(16), Fla. Stat.

“Drive” means to operate or be in actual physical control of a motor vehicle in any place open to the general public for purposes of vehicular traffic.

§ 322.01(27), Fla. Stat. Some of these terms (such as “vehicle” and “electric bicycle”) have their own statutory definitions, which should be given if necessary.

“Motor vehicle” means any self-propelled vehicle, including a motor vehicle combination, not operated upon rails or guideway, excluding vehicles moved solely by human power[, motorized wheelchairs, and electric bicycles].

§ 322.01(39), Fla. Stat.

“Street or Highway” means the entire width between the boundary lines of every way or place if any part thereof is open to the use of the public for purposes of vehicular traffic.

“Habitual traffic offender” is any person whose record, as maintained by the Department of Highway Safety and Motor Vehicles, shows that [he] [she] has been designated a Habitual Traffic Offender.

Optional Definition. The option of “on a vehicle” pertains to a vehicle such as a motorcycle.

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

Lesser Included Offenses

DRIVING WHILE DESIGNATED AS A HABITUAL TRAFFIC OFFENDER — 322.34(5)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
No Valid Driver’s License		322.03	28.9

	Attempt	777.04(1)	5.1
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Comments

A person driving a moped upon a highway requires a driver license. *Soto v. State*, 711 So. 2d 1275 (Fla. 4th DCA 1998).

§ 322.34(5), Fla. Stat. states that Driving While Designated as a Habitual Traffic Offender (HTO) is a third-degree felony. However, § 322.34(10), Fla. Stat. creates the possibility that the crime could be a misdemeanor depending on whether the defendant has a prior forcible felony conviction and the reasons for the driver license suspensions that led to the HTO designation. If § 322.34(10), Fla. Stat. is at issue, it was unclear as of September 2022 whether the State must prove to the jury that the defendant did not have a prior forcible felony conviction or whether the prior forcible felony conviction is a recidivist factor to be proven by the State to the judge under a preponderance of the evidence standard at sentencing. It was also unclear whether a withhold of adjudication for a forcible felony qualifies as a conviction.

If the charging document contains an allegation of one or more prior forcible felony convictions, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty, and if the prior forcible felony conviction is determined by a judge or appellate court to be an element, the historical fact of a conviction shall be determined beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

If the defendant does not have a forcible felony conviction and if the HTO designation resulted from three driver license suspension cases that came about because of reasons listed in § 322.34(10)(a)1.-5., Fla. Stat., this crime will be a misdemeanor. However, if at least one of the three prior driver license suspensions that resulted in the HTO designation was for a reason other than a circumstance listed in § 322.34(10)(a)1.-5., Fla. Stat., this crime will be a felony, regardless of whether the defendant had a prior forcible felony conviction. See *Wyrick v. State*, 50 So.3d 674 (Fla. 5th DCA 2010).

This instruction was adopted in 2007 [958 So. 2d 361] and amended in 2013 [131 So. 3d 692], on April 1, 2020, ~~and~~ on October 2, 2020, and on month day, 2022.

29.13(c) SEXUAL ACTIVITY WITH AN ANIMAL* § 828.126, Fla. Stat.

To prove the crime of Sexual Activity with an Animal,* the State must prove the following element beyond a reasonable doubt:

Give as applicable.

(Defendant) knowingly

- a. engaged in ~~sexual conduct~~ or sexual contact with an animal.
- b. caused or aided or abetted another person to engage in ~~sexual conduct~~ or sexual contact with an animal.
- c. permitted ~~sexual conduct~~ or sexual contact with an animal to be conducted on any premises under [his] [her] charge or control.
- d. [organized] [promoted] [conducted] ~~[advertised]~~ [aided] [abetted] [participated in as an observer of] sexual contact with an animal.
- e. [advertised] [offered] [solicited for] [accepted an offer of] an animal for the purpose of sexual contact with such animal ~~[performed any service in the furtherance of] an act involving sexual conduct or sexual contact with an animal for a commercial or recreational purpose.~~
- f. performed any service in the furtherance of an act involving sexual contact with an animal.
- g. [filmed] [distributed] [possessed] any pornographic image or video of a person and an animal engaged in sexual contact.

Definitions.

~~§ 828.126(1)(a), Fla. Stat.~~

~~“Sexual conduct” means any touching or fondling by a person, either directly or through clothing, of the sex organs or anus of an animal or any transfer or transmission of semen by the person upon any part of the animal for the purpose of sexual gratification or arousal of the person.~~

§ 828.126(1)(b), Fla. Stat.

~~“Sexual contact” means any contact, however slight, between the mouth, sex organ, or anus of a person and the sex organ or anus of an animal, or any penetration, however slight, of any part of the body of the person into the sex organ or anus of an animal, or any penetration of the sex organ or anus of the person into the mouth of the animal, for the purpose of sexual gratification or sexual arousal of the person.~~ act committed between a person and an animal for the purpose of sexual gratification, abuse, or financial gain which involves:

- (a) Contact between the sex organ or anus of one and the mouth, sex organ, or anus of the other;
- (b) The fondling of the sex organ or anus of an animal; or
- (c) The insertion, however slight, of any part of the body of a person or any object into the vaginal or anal opening of an animal, or the insertion of any part of the body of an animal into the vaginal or anal opening of a person.

Give if applicable.

§ 777.04(2), Fla. Stat.

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

Possession.

To prove (defendant) “possessed a pornographic image or video,” the State must prove beyond a reasonable doubt that [he] [she] a) knew of the existence of the pornographic image or video; b) knew of the nature, character, or content of the material; and c) intentionally exercised control over the image or video.

Give if applicable.

Control can be exercised over a pornographic image or video whether the image or video is carried on a person, near a person, or in a completely separate location. Mere proximity to an image or video 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 image or video or the present ability to direct its control by another.

Joint possession.

Possession of a pornographic image or video may be sole or joint, that is, two or more persons may possess it.

Lesser Included Offenses

SEXUAL ACTIVITY WITH AN ANIMAL* — 828.126			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

*In certain cases, such as those where the State charged that the defendant possessed a video containing a person’s sexual contact with an animal, the judge and the parties may want to rename the crime.

This crime does not apply to accepted animal husbandry practices, conformation judging practices, or accepted veterinary medical practices. This crime does not apply to accepted animal husbandry practices, including, but not limited to, bona fide agricultural purposes, assistance with the birthing process or artificial insemination of an animal for reproductive purposes, accepted conformation judging practices, or accepted veterinary medical practices. See § 828.126(45), Fla. Stat.

This instruction was adopted in 2013 [131 So. 3d 720] and amended in 2018 [257 So. 3d 370] and on month day, 2022.

29.19 ABUSE OF A DEAD HUMAN BODY
§ 872.06(2), Fla. Stat.

To prove the crime of Abuse of a Dead Human Body, the State must prove the following element beyond a reasonable doubt:

(Defendant) [mutilated] [committed sexual abuse] [grossly abused] a dead human body.

Give if applicable. § 872.06(1), Fla. Stat.

“Sexual abuse” means anal or female genital penetration of a dead human body by the sexual organ of a person or by any other object; or contact or union of the penis, female genitals, or anus of a person with the mouth, penis, female genitals or anus of a dead human body; or contact or union of a person’s mouth with the penis, female genitals, or anus of a dead human body.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Give if applicable.

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

The definition of “an object” includes a finger.

Give if applicable. § 872.06(2), Fla. Stat.

An act done for a bona fide medical purpose or for any other lawful purpose does not constitute a violation of this statute.

Lesser Included Offense

ABUSE OF A DEAD HUMAN BODY — 872.06(2)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

Comments

As of September 2022, it was unclear whether an act done for a bona fide medical purpose or other lawful purpose should be treated as an affirmative defense or like an element that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

“Mutilation” has not been defined as that term is used in this statute. In *English v. State*, 191 So. 3d 448 (Fla. 2016), the court considered § 316.605(1) Fla. Stat., a provision that included the term mutilation in relation to the obstruction of a license plate. While the majority opinion did not reach the issue, the dissenting

opinion included a definition for mutilation as “encompass[ing] any severe injury that results in the cutting off or removal of an essential part of a person or thing and impairs its completeness, beauty or function.” *Id.* at 454 n.2 (Fla. 2016) (Perry, J., dissenting), citing *State v. Stout*, 958 S.W.2d 32, 34 (Mo. App. E.D. 1997) (defining mutilation as used in an animal abuse statute). See also § 794.08(1), Fla. Stat., defining “female genital mutilation” as the “circumcising, excising or infibulating, in whole or in part, the labia majora, labia minora, or clitoris of a female person.

The term “grossly abused” has not been defined for purposes of this statute either. However, see § 825.102(2), Fla. Stat., defining aggravated abuse of an elderly person as occurring when a person commits an act on a victim that would constitute aggravated battery; willfully torturing, maliciously punishing, or willfully caging a victim; or knowingly abusing a victim and in so doing causing great bodily harm, permanent disability, or permanent disfigurement to the victim.

This instruction was adopted on month day, 2022.