

Supreme Court of Florida

No. SC18-1113

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES— REPORT 2018-04.

November 15, 2018

PER CURIAM.

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases (Committee) has submitted proposed changes to the standard jury instructions and asks that the Court authorize the amended standard instructions for publication and use. We have jurisdiction. *See* art. V, § 2(a), Fla. Const.

The Committee proposes amending standard criminal jury instructions 11.7 (Unlawful Sexual Activity with Certain Minors), 11.10 (Lewd, Lascivious, Indecent Assault or Act Upon or in the Presence of Child; Sexual Battery), 11.10(a) (Lewd or Lascivious Battery (Engaging in Sexual Activity)), 11.10(b) (Lewd or Lascivious Battery (Encouraging, Forcing or Enticing)), 11.10(c) (Lewd or Lascivious Molestation), 11.10(d) (Lewd or Lascivious Conduct), 11.10(e) (Lewd or Lascivious Exhibition Presence of Child), 11.10(f) (Lewd or Lascivious

Exhibition Over Computer Service), 11.10(g) (Lewd or Lascivious Exhibition by a Detainee in the Presence of an Employee of a Facility), 11.11 (Lewd or Lascivious Offenses Committed Upon or in the Presence of an Elderly Person or Disabled Person), 11.12 (Incest), 11.18 (Sexual Misconduct by a Psychotherapist), 11.21 (Transmission of Material Harmful to Minors by Electronic Device or Equipment), and 29.13(c) (Sexual Activity with an Animal). All of the proposals were published in *The Florida Bar News*. No comments were received by the Committee.

We authorize for publication and use instructions 11.7, 11.10(b), 11.10(c), 11.10(d), 11.10(e), 11.10(f), 11.10(g), 11.18, and 11.21 as proposed. Instruction 11.10(a) is authorized for publication and use as set forth in Appendix A to the Committee's report, rather than as described in the report. Instructions 11.10, 11.11, 11.12, and 29.13(c) are authorized for publication and use as modified. The more significant amendments to the instructions are discussed below.

First, the following changes are common with regard to many of the instructions.

Instructions 11.10, 11.10(a), 11.10(b), 11.10(c), and 11.10(d) as authorized reverse the order of the elements pertaining to the victim's and/or the defendant's ages and the defendant's conduct, so that the defendant's conduct is listed first in order.

The offense of Unnatural and Lascivious Act is added to the table of lesser-included offenses as a Category Two lesser offense to instructions 11.7, 11.10(f), 11.18, and 29.13, and a new comment based in part upon *State v. Knighton*, 235 So. 3d 312 (Fla. 2018), modifies that lesser-included offense, as follows:

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).^[1]

Definitions for "bona fide" and "union" are added to the instructions as applicable, and the term "enhancement" is replaced by "reclassification" in instructions 11.7, 11.10(a), 11.10(b), 11.10(c), 11.10(d), 11.10(e), 11.11, and 11.21, because section 775.0862, Florida Statutes (2018), is a reclassification statute.

Lastly, in instructions 11.10(e), 11.10(g), and 11.11, the statutory definitions for "sodomasochistic abuse" and "sexual bestiality" are changed from those in sections 847.001(13) and 847.001(15), Florida Statutes (2018), respectively, to

1. As proposed, the comment to instruction 11.10 was separated into individual paragraphs and the paragraph citing *Knighton* did not include the referencing asterisk. We have modified the comment so that it is consistent with the other instructions herein at issue.

those in sections 827.071(e) and 827.071(g), Florida Statutes (2018), respectively, and the following new comment is added: “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, there is no case law that decides which definition applies for a violation of [§ 800.04(7)(a), § 800.09, or § 825.1025, as applicable], Fla. Stat.”

Turning to the individual instructions, the following additional changes are made.

We clarify that instruction 11.10 applies only to offenses committed prior to October 1, 1999.

In addition, we authorize instruction 11.10(a) as set out in the Committee’s Appendix A to its report, leaving the offense of Unnatural and Lascivious Act as a Category Two lesser-included offense rather than moving it to the Category One box as discussed in the report.

In instruction 11.10(b), the statutory citations for “sodomasochistic abuse” and “sexual bestiality,” sections 847.001(13) and 847.001(15), respectively, are removed, leaving the citations to sections 827.071(e) and 827.071(g), respectively. In addition, the comment added to instructions 11.10(e), 11.10(g), and 11.11 as set forth above, addressing section 847.001 statutory definitions, is also included in instruction 11.10(b).

The table of lesser-included offenses is updated in instruction 11.10(c) to reflect in the heading the primary offense of Lewd or Lascivious Molestation—Defendant 18 or Over; Victim Less Than 12, and that Lewd or Lascivious Molestation based upon the ages of the victim and/or the defendant are Category One lesser-included offenses, similar to the table of lesser-included offenses in instruction 11.1 (Sexual Battery—Victim Less Than 12 Years of Age).

Instruction 11.11, element three, pertaining to the defendant’s knowledge, is modified to provide “at the time of the offense,” which is consistent with instructions 11.10(a), 11.10(b), 11.10(c), 11.10(d), 11.10(e), and 11.10(f).

With regard to instruction 11.12, the table of lesser-included offenses is modified from the Committee’s proposal to reflect that Unnatural and Lascivious Act is a Category Two lesser offense and includes the corresponding comment described above.

Definitions for “prurient interest” and “morbid interest” have been added to instruction 11.21, and are the same definitions for those terms already provided in instructions 24.1-24.6, the obscenity-related instructions.

Last, we decline the Committee’s request that instruction 29.13(c) be authorized to include Unnatural and Lascivious Act as a Category One lesser-included offense, as that presents a matter of substantive law to be decided in a case or controversy, and to date it does not appear that that issue has expressly

been addressed. *See* art. V, § 3(b), Fla. Const.; *cf. In re Std. Jury Instr. in Crim. Cases—Report No. 2015-05*, 195 So. 3d 1088, 1089 (Fla. 2016) (stating that the issue of the constitutionality of a statutory provision that an instruction is based upon is beyond the scope of a jury instruction case).

Having considered the Committee’s report, we authorize the amended instructions, as set forth in the appendix to this opinion, for publication and use.² New language is indicated by underlining, and deleted language is indicated by struck-through type. We caution all interested parties that any comments associated with the instructions reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their correctness or applicability. In authorizing the publication and use of these instructions, we express no opinion on their correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions. The instructions as set forth in the appendix shall become effective when this opinion becomes final.

It is so ordered.

2. The amendments as reflected in the appendix are to the Criminal Jury Instructions as they appear on the Court’s website at www.floridasupremecourt.org/jury_instructions/instructions.shtml. We recognize that there may be minor discrepancies between the instructions as they appear on the website and the published versions of the instructions. Any discrepancies as to instructions authorized for publication and use after October 25, 2007, should be resolved by reference to the published opinion of this Court authorizing the instruction.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA,
and LAWSON, JJ., concur.

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED
WITHIN SEVEN DAYS. A RESPONSE TO THE MOTION FOR
REHEARING/CLARIFICATION MAY BE FILED WITHIN FIVE DAYS
AFTER THE FILING OF THE MOTION FOR REHEARING/CLARIFICATION.
NOT FINAL UNTIL THIS TIME PERIOD EXPIRES TO FILE A
REHEARING/CLARIFICATION MOTION AND, IF FILED, DETERMINED.

Original Proceeding – Supreme Court Committee on Standard Jury Instructions in
Criminal Cases

Judge F. Rand Wallis, Chair, Supreme Court Committee on Standard Jury
Instructions in Criminal Cases, Daytona Beach, Florida; and Bart Schneider, Staff
Liaison, Office of the State Courts Administrator, Tallahassee, Florida,

for Petitioner

APPENDIX

11.7 UNLAWFUL SEXUAL ACTIVITY WITH CERTAIN MINORS

§ 794.05, Fla. Stat.

To prove the crime of Sexual Activity with a Minor, 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 ~~the~~[(victim)] [(defendant)].

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

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

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

Give if applicable.

“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 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.

Enhancement/Reclassification for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Sexual Activity With 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

UNLAWFUL SEXUAL ACTIVITY WITH CERTAIN MINORS — 794.05			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	<u>Unnatural and Lascivious Act*</u>	<u>800.02*</u>	<u>11.8*</u>
	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).

~~This instruction was adopted in 1998 [723 So. 2d 123] and amended in 2015.~~

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 instruction was adopted in 1998 [723 So. 2d 123] and amended in 2015 [163 So. 3d 478], and 2018.

11.10 LEWD, LASCIVIOUS, INDECENT ASSAULT OR ACT UPON OR IN THE PRESENCE OF CHILD; SEXUAL BATTERY

§ 800.04, Fla. Stat.

~~Give only for those offenses committed before October 1, 1999. § 800.04, Fla. Stat., was substantially amended in 1999. This instruction should be given only for those offenses committed before October 1, 1999.~~

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

~~1. (Victim) was under the age of 16 years.~~

Give as applicable.

2.1. (Defendant)

a. [made an assault upon (victim) in a lewd, lascivious, or indecent manner].

[handled or fondled (victim) in a lewd, lascivious, or indecent manner].

- b. ~~(Defendant)~~ committed upon (victim) or forced or enticed (victim) to commit

[actual or simulated sexual intercourse].

[deviate sexual intercourse].

[sexual bestiality].

[masturbation].

[sodomasochistic abuse].

[actual lewd exhibition of the genitals].

[any act or conduct which simulated that sexual battery was being or would be committed on (victim)].

- c. ~~(Defendant)~~

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

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

- d. ~~(Defendant)~~ knowingly committed a lewd or lascivious act in the presence of (victim).

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

Definitions.

Give in all cases.

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

Give when pre-October 1, 1999 § 800.04(1), Fla. Stat., is charged.

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

Give when assault is charged under pre-October 1, 1999 § 800.04(1), Fla. Stat.

An “assault” is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Give when pre-October 1, 1999 § 800.04(4), Fla. Stat., is charged.

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

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.

Give if applicable.

“Union” means contact.

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

Give applicable definitions from § 847.001, Fla. Stat., when pre-October 1, 1999 § 800.04(2), Fla. Stat., is charged.

There is no need to make reference to the words “without committing the crime of sexual battery” because this refers to forcible sexual relations. Lanier v. State, 443 So.2d 178 (Fla. 3d DCA 1983); Chapters 84–86, Laws of Florida.

Lesser Included Offenses

LEWD, LASCIVIOUS, OR INDECENT ASSAULT OR ACT UPON OR IN PRESENCE OF CHILD — pre-October 1, 1999 800.04			
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
	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).

*Because the crime of Unnatural and Lascivious Act (§ 800.02, Fla. Stat.) requires the defendant’s act be “with another person,” it should not be given as a lesser-included offense if the only evidence is that the defendant committed a lewd or lascivious act in the presence of the victim (element #1d).

This instruction was adopted in 1981 and was amended in 1985 [477 So. 2d 985], 1987 [508 So. 2d 1221], 1992 [603 So. 2d 1175], 1995 [657 So. 2d 1152], 2008 [976 So. 2d 1081], and 2010 [48 So. 3d 41], and 2018.

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:

- 1. ~~(Victim) was twelve years of age or older, but under the age of sixteen years.~~**

Give 1a and/or 1b as applicable.

2.1. (Defendant)

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

- 2. 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.

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

“An object” includes a finger.

“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(3), Fla. Stat.

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

Give if applicable.

“Bona fide” means genuine.

§ 775.0862, Fla. Stat.

~~Enhancement~~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			
	<u>Aggravated battery</u>	<u>784.045(1)</u>	<u>8.4</u>
	Attempt	777.04(1)	5.1
	<u>Felony battery</u>	<u>784.041(1)</u>	<u>8.5</u>
	<u>Aggravated assault</u>	<u>784.021(1)(a)</u>	<u>8.2</u>
	<u>Battery</u>	<u>784.03</u>	<u>8.3</u>
	Assault	784.011	8.1
	<u>Battery</u>	<u>784.03</u>	<u>8.3</u>
	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, 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.

This instruction was adopted in 2007 [969 So. 2d 245] and amended in 2015 [163 So. 3d 478], and 2018.

**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. (Victim) was under the age of sixteen years.~~

2.1. (Defendant) [encouraged] [forced] [or] [enticed] (victim) to engage in [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 penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

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

“An object” includes a finger.

“Union” means contact.

§ 827.071(*de*) ~~and § 847.001(13)~~, 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(*fg*) ~~and § 847.001(15)~~, Fla. Stat.

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

§ 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.

§ 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)(c), 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.

§ 775.0862, Fla. Stat.

Enhancement/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			
<u>Soliciting for prostitution (only if prostitution is charged)</u>		<u>796.07(2)(f)</u>	<u>23.6</u>
	<u>Aggravated battery</u>	<u>784.045(1)</u>	<u>8.4</u>
	Attempt	777.04(1)	5.1
	<u>Felony battery</u>	<u>784.041(1)</u>	<u>8.5</u>
	<u>Aggravated assault</u>	<u>784.021(1)(a)</u>	<u>8.2</u>
	<u>Battery</u>	<u>784.03</u>	<u>8.3</u>
	Assault	784.011	8.1
	Battery	784.03	8.3
	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, 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.

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, 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.

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 or 1b as applicable.

1.—(Victim)

~~was 12 years of age or older but less than 16 years of age.~~

~~was less than 12 years of age.~~

Give 21a and/or 21b as applicable.

2.1. (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 at the time of the offense.**
- b. was less than 18 years of age at the time of the offense.**

Definition.

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

Give if applicable.

§ 800.04(2), Fla. Stat.

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

§ 800.04(3), Fla. Stat.

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

Give if applicable.

“Bona fide” means genuine.

Give if applicable. § 775.0862, Fla. Stat.

~~Enhancement~~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.
<u>None Lewd or Lascivious Molestation; Defendant 18 or over; Victim 12 or over but less than 16</u>		<u>800.04(5)(c)2</u>	<u>11.10(c)</u>
<u>Lewd or Lascivious Molestation; Defendant less than 18; Victim less than 12</u>		<u>800.04(5)(c)1</u>	<u>11.10(c)</u>
<u>Lewd or Lascivious Molestation; Defendant less than 18; Victim 12 or over but less than 16</u>		<u>800.04(5)(d)</u>	<u>11.10(c)</u>
	Attempt	777.04(1)	5.1
	<u>Aggravated battery</u>	<u>784.045(1)</u>	<u>8.4</u>
	<u>Felony battery</u>	<u>784.041(1)</u>	<u>8.5</u>
	<u>Aggravated assault</u>	<u>784.021(1)(a)</u>	<u>8.2</u>
	<u>Battery</u>	<u>784.03</u>	<u>8.3</u>
	Assault	784.011	8.1
	<u>Battery</u>	<u>784.03</u>	<u>8.3</u>
	Unnatural and lascivious act*	800.02*	11.8*

Comments

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

sexual intercourse (or contact), § 800.02, Fla. Stat. should not be given as a lesser-included offense. However, if the sexual activity involved something other than penile-vaginal sexual intercourse (or contact), § 800.02, Fla. Stat. should be given as a lesser-included offense. See State v. Knighton, 235 So. 3d 312 (Fla. 2018).

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

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

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2013 [109 So. 3d 721], ~~and~~ 2015 [163 So. 3d 478] and 2018.

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:

1. ~~(Victim) was under the age of 16 years.~~

Give 1a and/or 1b as applicable.

2.1. (Defendant)

a. [intentionally touched (victim) in a lewd or lascivious manner].

b. [solicited (victim) to commit a lewd or lascivious act].

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

Give 3a or 3b as applicable.

3. a. At the time of the offense, (Defendant) was 18 years of age or older at the time of the offense.

- b. **At the time offense, (Ddefendant) was less than 18 years of age at ~~the time of the offense.~~**

Definitions.

The words “lewd” and “lascivious” mean the same thing; ~~and mean 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 ask earnestly or to try to induce the person solicited to do the thing solicited~~command, encourage, hire, or request another person to engage in specific conduct.

§ 800.04(2), Fla. Stat.

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

§ 800.04(3), Fla. Stat.

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

Give if applicable.

“Bona fide” means genuine.

§ 775.0862, Fla. Stat.

~~Enhancement~~**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 <u>Lewd or lascivious conduct; defendant less than 18</u>		<u>800.04(6)(c)</u>	<u>11.10(d)</u>
	Attempt	777.04(1)	5.1
	<u>Felony battery</u>	<u>784.041(1)</u>	<u>8.5</u>
	<u>Aggravated assault</u>	<u>784.021(1)(a)</u>	<u>8.2</u>
	<u>Battery</u>	<u>784.03</u>	<u>8.3</u>
	Assault	784.011	8.1
	Battery	784.03	8.3
	Unnatural and lascivious act (if element 1a is charged)*	800.02*	11.8*

Comments

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

penile-vaginal sexual intercourse (or contact), § 800.02, Fla. Stat. should be given as a lesser-included offense. See State v. Knighton, 235 So. 3d 312 (Fla. 2018).

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

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

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:

~~1.~~ (Victim) was under the age of 16 years.

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

2.1. (Defendant)

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

3.2. 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, (D)defendant) was 18 years of age or older at the time of the offense.

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

Definitions.

Give if applicable.

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

§ 800.04(1)(a), Fla. Stat.

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

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

“**An object**” includes a finger.

§ ~~847.001(13)~~827.071(e), Fla. Stat.

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

§ ~~847.001(15)~~827.071(g), Fla. Stat.

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

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

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

§ 800.04(2), Fla. Stat.

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

§ 800.04(3), Fla. Stat.

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

Give if applicable.

“Bona fide” means genuine.

§ 775.0862, Fla. Stat.

*Enhancement*Reclassification for sexual offense against student by school authority figure.

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

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

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

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

Lesser Included Offenses

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

	Exposure of Sexual Organs	800.03	11.9
	Unnatural and lascivious act*	800.02*	11.8*

Comments

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

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

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

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

11.10(f) LEWD OR LASCIVIOUS EXHIBITION OVER COMPUTER SERVICE

§ 847.0135(5), Fla. Stat.

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

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

- 1. a. {(Defendant) intentionally masturbated}.**
- b. {(Defendant) intentionally exposed [his] [her] genitals in a lewd or lascivious manner}.**
- c. {(Defendant) committed [a sexual act] [sodomasochistic abuse] [sexual bestiality] [simulation of any act involving sexual activity]}**

that did not involve actual physical or sexual contact with (victim)}.

2. The act was committed live over a [computer on-line service] [internet service] [local bulletin board service].
3. At the time of the offense, (victim) was under the age of 16 years
or

(Defendant) [knew] [should have known] [had reason to believe] that the transmission was viewed on a computer or television monitor by a victim 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 ~~at the time of the offense.~~
- b. At the time of the offense, (Defendant) was less than 18 years of age ~~at the time of the offense.~~

Definitions.

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

§ 800.04(1)(a), Fla. Stat.

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

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

The definition of “an object” includes a finger.

§ 847.001(13), Fla. Stat.

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

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

§ 847.001(15), Fla. Stat.

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

§ 800.04(2), Fla. Stat.

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

§ 800.04(3), Fla. Stat.

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

Give if applicable.

“Bona fide” means genuine.

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

Lesser Included Offenses

LEWD OR LASCIVIOUS EXHIBITION OVER COMPUTER SERVICE, DEFENDANT 18 YEARS OF AGE OR OLDER — 847.0135(5)(b)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Lewd or Lascivious Exhibition over Computer Service, Defendant less than 18 years of age		847.0135(5)(c)	11.10(f)
	<u>Unnatural and lascivious act*</u>	<u>800.02*</u>	<u>11.8*</u>
	Attempt	777.04(1)	5.1

Comments

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

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

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

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].**
- 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.

§ 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 or 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]. [The term also includes any person who is a parole examiner with the Parole Commission.]

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

§ 800.04(1)(a), Fla. Stat.

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

Give if applicable.

“Bona fide” means genuine.

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 of the other.

§ 800.04(1)(d), Fla. Stat.

“Victim” means a person upon whom the acts described above was committed or attempted or a person who has reported these acts to a law enforcement officer.

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.

§ 800.04(2), Fla. Stat.

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

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
	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.

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 June 2018, 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] and 2018.

11.11 LEWD OR LASCIVIOUS OFFENSES 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] ~~or~~ [Disabled Person], the State must prove the following three elements beyond a reasonable doubt:

1. ~~(Victim) was [an elderly] [a disabled] person.~~

Give 2a, 2b, or 2c 1a, 1b, or 1c as applicable.

- ~~2.1. 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 [intentionally masturbating] [intentionally 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] [~~simulated~~ 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 the (victim) lacked the capacity to consent or failed to give consent [to have the act committed in [his] [her] presence].**

Definitions. Give as applicable.

Give if jury is instructed on element #1b or element #1c.

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

If 2a or 2c is alleged, define the act charged from § 825.1025(1), Fla. Stat.

§ 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.

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

Give if applicable.

“Bona fide” means genuine.

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

“An object” includes a finger.

“Union” means contact.

Give if applicable. § 775.0862, Fla. Stat.

Enhancement/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

11.1411.11 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
	<u>Exposure of sexual organs</u>	<u>800.03</u>	<u>11.9</u>
	Unnatural and lascivious act*	800.02*	11.8*
	<u>Exposure of sexual organs</u>	800.03	11.9

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, there is no case law that decides which definition applies for a violation of § 825.1025, Fla. Stat.

This instruction was adopted in 2007 [965 So. 2d 811] and amended in 2010 [48 So. 3d 41], ~~and~~ 2015 [163 So. 3d 478], and 2018.

11.12 INCEST
§ 826.04, Fla. Stat.

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

1. (Victim) **was the** (relationship alleged) **of** (defendant).
2. (Defendant) **[married] [had sexual intercourse with]** (victim).

~~**[married (victim)].**~~
~~**[had sexual intercourse with (victim)].**~~

3. ~~**[At the time of the [marriage] [sexual intercourse], (defendant) knew (victim) was [his] [her] (relationship alleged)].**~~

~~**[At the time of the sexual intercourse, (defendant) knew (victim) was [his] [her] (relationship alleged)].**~~

Definition.

“Sexual intercourse” is the penetration of the female sex organ by the male sex organ. Emission of seed is not necessary.

Lesser Included Offenses

INCEST — 826.04			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			

	Attempt	777.04(1)	5.1
	<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 instruction was adopted in 1981 and amended in 2018.

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), Fla. Stat.

§ 491.0112(4)(a), Fla. Stat.

“Psychotherapist” means any person licensed in Florida pursuant to Chapter 458 (medicine), Chapter 459 (osteopathic medicine), Part H 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)(c), Fla. Stat.

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

Lesser Included Offenses

SEXUAL MISCONDUCT BY A PSYCHOTHERAPIST — 491.0112			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	<u>Unnatural and lascivious act*</u>	<u>800.02*</u>	<u>11.8*</u>
	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).

This instruction was adopted in 2014 [146 So. 3d 1110] and amended in 2018.

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.

§ 847.0137(1)(a)001(8), Fla. Stat.

"Minor" means any person less 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 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 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.

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

Give if applicable.

“Bona fide” means genuine.

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.

~~Enhancement~~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

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

<u>TRANSMISSION OF MATERIAL HARMFUL TO MINORS BY ELECTRONIC DEVICE OR EQUIPMENT —</u>			
<u>847.0138(2)</u>			
<u>CATEGORY ONE</u>	<u>CATEGORY TWO</u>	<u>FLA. STAT.</u>	<u>INS. NO.</u>
<u>None</u>			
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

Comment

This instruction was adopted in 2015 [163 So. 3d 478] and amended in 2018.

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] [performed any service in the furtherance of] an act involving sexual conduct or sexual contact with an animal for a commercial or recreational purpose}.**

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.

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

This crime does not apply to accepted animal husbandry practices, conformation judging practices, or accepted veterinary medical practices. See § 828.126(4), Fla. Stat.

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