

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY

INSTRUCTIONS IN CRIMINAL CASES
REPORT 2016-07

CASE NO.: SC16-

To the Chief Justice and Justices of the Supreme Court of Florida:

This report, proposing amended instructions to the Florida Standard Jury Instructions in Criminal Cases, is filed pursuant to Article V, section 2(a), Florida Constitution.

	<u>Instruction #</u>	<u>Topic</u>
Proposal 1	11.7	Unlawful Sexual Activity with Certain Minors
Proposal 2	11.10	Lewd, Lascivious, Indecent Assault or Act Upon or in the Presence of Child; Sexual Battery
Proposal 3	11.10(a)	Lewd or Lascivious Battery (Engaging)
Proposal 4	11.10(b)	Lewd or Lascivious Battery (Encouraging)
Proposal 5	11.10(c)	Lewd or Lascivious Molestation
Proposal 6	11.10(d)	Lewd or Lascivious Conduct
Proposal 7	11.10(e)	Lewd or Lascivious Exhibition (Presence of a Child)
Proposal 8	11.10(f)	Lewd or Lascivious Exhibition over Computer Service
Proposal 9	11.10(g)	Lewd or Lascivious Exhibition by a Detainee in the Presence of an Employee of a Facility
Proposal 10	11.11	Lewd or Lascivious Offenses (Presence of Elderly/Disabled Person)
Proposal 11	11.12	Incest
Proposal 12	11.18	Sexual Misconduct by a Psychotherapist
Proposal 13	29.13(c)	Sexual Activity with an Animal
Proposal 14	29.24	Human Trafficking
Proposal 15	29.25	Human Trafficking (Parent)

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The proposals are in Appendix A. Words and punctuation to be deleted are shown with strike-through marks; words and punctuation to be added are underlined. All proposals were published in the *Bar News* on May 15, 2016. One comment, pertaining to Proposals 5-8 was received from the Florida Public Defender's Association ("FPDA"). The comment is in Appendix B but some of the FPDA comments pertain to proposals that are not a part of this report.

INITIAL NOTE FOR THE SEX CRIMES IN THIS REPORT

The Committee revised the sex crimes in this report for primarily two reasons: 1) The Committee agreed with a prior committee's decision (for the standard Sexual Battery instructions) that the act of the defendant should be the first element and the ages of the victim and defendant should follow; and 2) the Fifth District issued *Funciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015), and the Fourth District issued *Knighon v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016), both of which held that the jury must be instructed on Unnatural and Lascivious Act (section 800.02, Florida Statutes) as a lesser-included offense in cases where the defendant was charged with Lewd and Lascivious Battery and the evidence showed sexual intercourse between an adult and a child.

The Committee noted two things about the *Funciello* and *Knighon* decisions. First, neither of the charging documents alleged that the defendant's sexual act was "unnatural" or was "against the laws of nature." Despite the absence of an allegation that the defendant's act was "unnatural," the Fourth and Fifth Districts held that the jury still had to be instructed on Unnatural and Lascivious Act. Second, even though the sexual act involved penile/vaginal penetration, which one might think constituted "natural" sex, penile/vaginal penetration is "unnatural" in cases where the victim was a child, at least according to the Fourth and Fifth Districts.

The Committee also reviewed *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). In *Horn*, the defendant was charged with Lewd and Lascivious Molestation. If the *Horn* charging document tracked the statute, then the word "unnatural" or the phrase "against the laws of nature" would also not have been alleged. Nevertheless, the First District held that the jury needed to be instructed on Unnatural and Lascivious Act based on evidence that the defendant placed his head between the child victim's exposed breasts.

The Committee also reviewed *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999), in which the adult defendant's penis penetrated or had union with the child victim's vagina. The defendant was charged with felony Lewd and Lascivious Act under the old section 800.04, Florida Statutes. The defendant asked for an instruction on the misdemeanor of Unnatural and Lascivious Act, which the trial judge refused to give. The Second District affirmed the trial court's ruling and

wrote that unnatural and lascivious acts had been applied to homosexual acts, bestiality, digital sex, and oral sex – anything other than adult male and female sexual intercourse.

It is unclear if this Court would agree with the view of the lower courts that the word “unnatural” (or the verbiage that the defendant’s act was “against the laws of nature”) need not be alleged in order for the misdemeanor crime of Unnatural and Lascivious Act to be given as a lesser-included offense. Moreover, the lower courts appear to conflict regarding the meaning of the word “unnatural” and whether any sexual act with a child must be “unnatural.” The Committee also noted that in *Holton v. State*, 573 So. 2d 284 (Fla. 1990), this Court held that Unnatural and Lascivious Act was not a lesser-included offense of Sexual Battery with Great Force, at least where the victim was an adult. Nevertheless, the current state of Florida case law leads to the conclusion that rape of an adult is “natural,” but consensual sex is “unnatural” if one person is under 18 years of age.

Faced with these issues, the Committee made the following decisions: First, in an abundance of caution, the Committee put Unnatural and Lascivious Act in the Category One box for most of the sex crimes in this report. That decision was based on the case law in the First, Fourth, and Fifth Districts that indicates at least some sexual acts with a child constitutes the crime of Unnatural and Lascivious Act. (There is no case law that holds Unnatural and Lascivious Act is a lesser of Sexual Battery where a child is involved.) Inside the Category One box, the Committee added an asterisk which refers people to the Comment section. In the Comment section, the Committee pointed out that the DCAs are not requiring the word “unnatural” to be alleged. Also, the comment refers to the *Harris*, *Funiciello*, *Knighton*, and *Horn* cases so that lawyers and judges can better understand these issues.

PROPOSAL #1: INSTRUCTION 11.7

The Committee amended Instruction 11.7 because of *Funiciello* and *Knighton*. The misdemeanor crime of Unnatural and Lascivious Act was put in the Category One box with an asterisk that refers people to the Comment section. The amendment to the Comment section was discussed above.

The vote was 7-3 to publish. The three dissenters thought Unnatural and Lascivious Act should be in Category Two, but the majority thought it was safer – given the DCA case law - to put that crime in Category One with a note. No comments were received. Upon post-publication review, the Committee voted unanimously to send the proposal to the Court.

PROPOSAL #2: INSTRUCTION 11.10

Instruction 11.10 covers section 800.04, Florida Statutes, before the October 1, 1999 amendment. The Committee did not want to propose deletion of the instruction because the statute of limitations for sex crimes is lengthy.

The changes to the instruction are not that significant. For example, the Committee added to various italicized notes throughout the instruction to make it clear that this instruction applies to pre-October 1, 1999 crimes. The age of the victim was moved to element #2 so that the defendant's act would be in element #1. The citation to *State v. Werner* was moved above the explanation of "in the presence of." The Committee changed "**the victim**" to "(victim)" so that the judge would not refer to the alleged victim as a victim.

Of greater significance are the changes in the Lesser Included and Comment sections. As discussed above, Unnatural and Lascivious Act was moved into the Category 1 box via a 7-3 vote. Also, the Comment section includes an explanation that Unnatural and Lascivious Act should not be given as a lesser-included offense if element 1d is the only charge because Unnatural and Lascivious Act requires the act to be with another person and element 1d is simply an exhibition in front of another person. The other additions to the Comment section were discussed above.

The proposal was published. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

PROPOSAL #3: INSTRUCTION 11.10(a)

The Committee amended Instruction 11.10(a) so that the defendant's act would become element #1 and the age of the victim would become element #2. The Committee moved Unnatural and Lascivious from Category Two into Category One (along with explanations in the Comment section) for the reasons discussed above. Because the underlying charge involves a battery, the Committee added Aggravated Battery, Felony Battery, Aggravated Assault, and Battery in Category 2 in descending order of severity. The proposal was published. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

PROPOSAL #4: INSTRUCTION 11.10(b)

The Committee amended Instruction 11.10(b) so that the defendant's act would become element #1 and the age of the victim would become element #2. The italicized statutory cites for "sodomasochistic abuse" and "sexual bestiality" were updated although the Comment section informs everyone that definitions for those terms are also in section 847.001, Florida Statutes and the two statutes do not use the exact same definitions. A definition of "prostitution" based on

§ 796.07(1)(a), Florida Statutes, was added along with statutory-based definitions for “consent” and “coercion.” The Committee moved Unnatural and Lascivious from Category Two into Category One (along with explanations in the Comment section) for the reasons discussed above. Also, in the Category One box, the Committee added Soliciting for Prostitution but only if prostitution was charged. Because the underlying charge could involve a “forcing,” the Committee added Aggravated Battery, Felony Battery, Aggravated Assault, and Battery in Category Two in descending order of severity. The proposal was published. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

PROPOSAL #5: INSTRUCTION 11.10(c)

The Committee amended Instruction 11.10(c) so that the defendant’s act would become element #1 and the possible ages of the victim would become element #2. The Committee changed the heading of the lesser-included box to reflect the highest crime in section 800.04(5), Florida Statutes, which would occur if the defendant were over 18 years of age and the victim was less than 12 years old. The Category One lesser included offenses are then listed in descending order of severity depending on the ages of the defendant and the victim. The Committee moved Unnatural and Lascivious from Category Two into Category One (along with explanations in the Comment section) for the reasons discussed above. Because the underlying charge involves a touching, the Committee added Aggravated Battery, Felony Battery, Aggravated Assault, and Battery in Category Two in descending order of severity.

The proposal was published. One comment was received from FPDA who argued that the ages of the victim and defendant should not create Category One lesser-included offenses because the various ages render the crimes mutually exclusive. The majority of the Committee disagreed. First, the Committee thought the Lewd and Lascivious instructions should be consistent with the Sexual Battery instructions (the Sexual Battery instructions have the various ages of the defendant and the victim in the Category One box). Two, the Committee concluded that the appellate courts look favorably upon giving jurors the option of finding lesser-included offenses. Third, the Committee thought there could be a dispute about exactly how old the defendant or victim were at the time of the sexual act. Because age may be a disputed issue, the Committee thought it was safer to put the various ages in the Category One boxes. Accordingly, upon post-publication review, the Committee voted 6-3 to maintain the published proposal. The three dissenters agreed with FPDA regarding the lesser-included offense issue.

PROPOSAL #6: INSTRUCTION 11.10(d)

The Committee amended Instruction 11.10(d) so that the defendant's act would become element #1 and the age of the victim would become element #2. The Committee also revised the definition of "solicit" in order to more closely track the solicitation statute, section 777.04(2), Florida Statutes. The Committee changed the heading of the lesser-included box to reflect the highest crime in section 800.04(6), Florida Statutes, which occurs if the defendant were over 18 years of age. The highest Category One lesser included offense would therefore be if the defendant were not over the age of 18. The Committee moved Unnatural and Lascivious from Category Two into Category One (along with explanations in the Comment section) for the reasons discussed above. However, Unnatural and Lascivious Act is a lesser included offense only if element 1a is charged because element 1b involves a solicitation and Unnatural and Lascivious Act requires the act to be with another person. Because the underlying charge may involve a touching, the Committee added Aggravated Battery, Felony Battery, Aggravated Assault, and Battery in Category Two in descending order of severity.

The proposal was published. The comment from FPDA is also relevant to this proposal. The Committee vote on that issue was the same (6-3) as the vote in Proposal #5.

PROPOSAL #7: INSTRUCTION 11.10(e)

The Committee amended Instruction 11.10(e) so that the defendant's act would become element #1 and the age of the victim would become element #2. The Committee changed the heading of the lesser-included box to reflect the highest crime in section 800.04(7), Florida Statutes, which occurs if the defendant were over 18 years of age. The highest Category One lesser included offense would therefore be if the defendant were not over the age of 18. Because the underlying crime involves an exhibition, which is not an act with another person, the Committee left Unnatural and Lascivious Act in Category Two. The Committee did, however, add a note in the Comment section explaining that "sodomasochistic abuse" and "sexual bestiality" are defined differently in different statutes.

The proposal was published. The comment from FPDA is also relevant to this proposal. The Committee vote on that issue was the same (6-3) as the votes in Proposals #5 and #6.

PROPOSAL #8: INSTRUCTION 11.10(f)

For this instruction, the defendant's act is already in element #1 and the victim's age is already in element #2, so no reordering was necessary. The only change to the elements section was to add the words "At the time of the offense" in

element #4. Because the underlying crime is in Chapter 847, the Committee did not point out that there are different definitions for “sodomasochistic abuse” and “sexual bestiality” in Chapter 827.

The proposal was published. The comment from FPDA is also relevant to this proposal. The Committee vote on that issue was the same (6-3) as the votes in Proposals #5, #6, and #7.

PROPOSAL #9: INSTRUCTION 11.10(g)

The only change proposed for Instruction 11.10(g) is to add a note in the Comment section that explains there are different definitions for sodomasochistic abuse” and “sexual bestiality” in Chapter 827. The proposal was published. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

PROPOSAL #10: INSTRUCTION 11.11

For Instruction 11.11, the Committee put the defendant’s act as element #1 and the victim’s status as either elderly or disabled in element #2. The Committee slightly reworded element #1c and element #3 so that they would track section 825.1025(4)(a), Florida Statutes. The Committee added italicized statutory cites above “disabled adult,” “elderly person,” and “lacks capacity to consent.” The Committee added the section 847.001 definitions of “sodomasochistic abuse” and “sexual bestiality,” but pointed out in the Comment section that the Chapter 827 definitions for those terms differ. The Committee added definitions for “prostitution,” “sexual activity,” “an object,” and “union,” along with italicized statutory or case law cites as support.

Because the underlying crime involves an elderly person or disabled person as a victim, the Committee was unsure if the courts would treat the lesser of Unnatural and Lascivious Act the same way as a crime involving a child has been treated. In an abundance of caution, the Committee moved Unnatural and Lascivious Act from Category Two into Category One, but added an asterisk, which refers people to the Comment section. In the Comment section, the Committee pointed out the usual issues with Unnatural and Lascivious Act as a lesser and also pointed out that it was not a lesser if the crime charged involved only an exhibition. The proposal was published. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal, although three members continue to think Unnatural and Lascivious should be in the Category Two box.

PROPOSAL #11: INSTRUCTION 11.12

For the Incest instruction, the Committee did not change the content of the elements but streamlined their presentation so that there would be three elements, each consisting of one sentence. The Committee was unsure how the courts would deal with Unnatural and Lascivious as a lesser of Incest, but decided that the safest course would be to put it in Category 1 with the explanation in the Comment section. The proposal was published. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

PROPOSAL #12: INSTRUCTION 11.18

For the Sexual Misconduct by a Psychotherapist, the Committee added some italicized statutory cites to provide support for definitions and the explanation that consent is not a defense. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

PROPOSAL #13: INSTRUCTION 29.13(c)

For Sexual Activity with an Animal, the Committee added italicized statutory cites to provide support for definitions of “sexual conduct” and “sexual contact.” The Committee felt certain that the courts would think Unnatural and Lascivious Act was a lesser of this crime, particularly in light of the language about bestiality in *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999). Therefore, the Committee put Unnatural and Lascivious Act in Category One along with an explanation in the Comment section. The proposal was published. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

PROPOSAL #14: INSTRUCTION 29.24

In 2016, the legislature made two changes to the Human Trafficking statute, section 787.06, Florida Statutes. Both changes are effective October 1, 2016. The first change, in Chapter 2016-24, reclassifies a second degree Human Trafficking to a first degree felony and a first degree Human Trafficking to a life felony if the defendant causes great bodily harm, permanent disfigurement, or permanent disability to another during the commission of the crime. The second change, in Chapter 2016-199, states that a victim’s lack of chastity or the willingness or consent of a victim is not a defense to prosecution under this section if the victim was under 18 years of age at the time of the offense.

As a result of these two statutory changes, the Committee added a reclassification section and a “lack of chastity is not a defense” section to this

instruction. The Committee also updated the statutory cite in the section that discusses the defendant being ignorant of the victim's age. In that same section, the Committee changed "**the victim**" to "(victim)" so that the judge would not refer to the alleged victim as a victim.

All votes were unanimous. The proposal was published. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

PROPOSAL #15: INSTRUCTION 29.25

This instruction covers Human Trafficking by a Parent, which is a life felony. Accordingly, the 2016 reclassification legislation does not apply. The only change, therefore, was to add the new "lack of chastity" section, which is cited underneath an italicized section 787.06(10), Florida Statutes. The vote to add this new section was unanimous. The proposal was published. No comments were received. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

CONCLUSION

The Standard Jury Instructions in Criminal Cases Committee respectfully requests the Court authorize for use the proposals for the jury instructions as set forth in Appendix A.

Respectfully submitted this 9th day of
August, 2016.

s/ Judge F. Rand Wallis
The Honorable F. Rand Wallis
Chair, Supreme Court Committee on
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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I hereby certify that a true and correct copy of this report and the appendices were sent by e-mail through the portal to the Honorable Julianne Holt, President of

the Florida Public Defenders Association, at holtj@pd13.state.fl.us; this 9th day of August, 2016.

I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

s/ Judge F. Rand Wallis
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