

APPENDIX A

RECEIVED, 08/09/2016 12:48:29 PM, Clerk, Supreme Court

**Committee on Standard Jury Instructions in Criminal Cases
Honorable F. Rand Wallis, Chair
Report 2016-07**

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.

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.

§ 775.0862, Fla. Stat.

Enhancement 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 Unnatural and Lascivious Act*		<u>800.02*</u>	<u>11.8*</u>
	Attempt	777.04(1)	5.1

Comments

*The First, Fourth, and Fifth District Courts of Appeal require the lesser-included of Unnatural and Lascivious Act to be given. The Second District has indicated that this lesser-included offense is a Category 2 lesser. As of July 2016, the Third District and the Florida Supreme Court have not addressed this issue. See *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999); *Funiciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015); *Knighton v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016); and *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). In an abundance of caution, the Committee on Standard Jury Instructions in Criminal Cases put § 800.02, Fla. Stat., in Category One.

*The First, Fourth, and Fifth District Courts of Appeal are not requiring the state to allege the defendant's act was "unnatural" in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

~~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 2017.

**11.10 LEWD, LASCIVIOUS, INDECENT ASSAULT OR ACT UPON OR IN
THE PRESENCE OF CHILD; SEXUAL BATTERY**
§ 800.04, Fla. Stat.

§ 800.04, Fla. Stat., was substantially amended in 1999. This instruction should be given ~~Give~~ 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.

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 — <u>pre-October 1, 1999 § 800.04</u>			
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
	Assault	784.011	8.1
	Battery	784.03	8.3
	Unnatural and lascivious act	800.02	11.8

Comments

*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). Otherwise, the First, Fourth, and Fifth District Courts of Appeal require the lesser-included of Unnatural and Lascivious Act to be given. The Second District has indicated that this lesser-included offense is a Category 2 lesser. As of July 2016, the Third District and the Florida Supreme Court have not addressed this issue. See *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999); *Funciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015); *Knighton v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016); and *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). In an abundance of caution, the Committee on

Standard Jury Instructions in Criminal Cases put § 800.02, Fla. Stat., in Category One.

*The First, Fourth, and Fifth District Courts of Appeal are not requiring the state to allege the defendant's act was "unnatural" in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

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 2017.

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.

Lahey 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.

§ 775.0862, Fla. Stat.

Enhancement 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>Unnatural and lascivious act*</u>		<u>800.02*</u>	<u>11.8*</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 First, Fourth, and Fifth District Courts of Appeal require the lesser-included of Unnatural and Lascivious Act to be given. The Second District has indicated that this lesser-included offense is a Category 2 lesser. As of July 2016, the Third District and the Florida Supreme Court have not addressed this issue. See *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999); *Funciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015); *Knighton v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016); and *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). In an abundance of caution, the Committee on Standard Jury Instructions in Criminal Cases put § 800.02, Fla. Stat., in Category One.

*The First, Fourth, and Fifth District Courts of Appeal are not requiring the state to allege the defendant's act was "unnatural" in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

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 2017.

**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.

Lakey 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.

§ 775.0862, Fla. Stat.

Enhancement 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 Unnatural and lascivious act*		<u>800.02*</u>	<u>11.8*</u>
<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 First, Fourth, and Fifth District Courts of Appeal require the lesser-included of Unnatural and Lascivious Act to be given. The Second District has indicated that this lesser-included offense is a Category 2 lesser. As of July 2016, the Third District and the Florida Supreme Court have not addressed this issue. See *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999); *Funiciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015); *Knighton v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016); and *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). In an abundance of caution, the Committee on Standard Jury Instructions in Criminal Cases put § 800.02, Fla. Stat., in Category One.

*The First, Fourth, and Fifth District Courts of Appeal are not requiring the state to allege the defendant's act was "unnatural" in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

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 July 2016, 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 2017.

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)

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

b. ~~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. § 775.0862, Fla. Stat.

Enhancement 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; <u>DEFENDANT 18 OR OVER;</u> <u>VICTIM LESS THAN 12 — 800.04(5)(b)</u>			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None <u>Lewd or Lascivious Molestation;</u> <u>Defendant 18 or over;</u> <u>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>
<u>Unnatural and lascivious act*</u>		<u>800.02*</u>	<u>11.8*</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
	Battery	784.03	8.3
	Unnatural and lascivious act	800.02	11.8

Comments

*The First, Fourth, and Fifth District Courts of Appeal require the lesser-included of Unnatural and Lascivious Act to be given. The Second District has indicated that this lesser-included offense is a Category 2 lesser. As of July 2016, the Third District and the Florida Supreme Court have not addressed this issue. See *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999); *Funiciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015); *Knighton v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016); and *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). In an abundance of caution, the Committee on Standard Jury Instructions in Criminal Cases put § 800.02, Fla. Stat., in Category One.

*The First, Fourth, and Fifth District Courts of Appeal are not requiring the state to allege the defendant's act was "unnatural" in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

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 2017.

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, (D_{defendant}) was 18 years of age or older at the time of the offense.

b. At the time offense, (D_{defendant}) 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.

§ 775.0862, Fla. Stat.

Enhancement 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>
<u>Unnatural and lascivious act (if element 1a is charged)*</u>		<u>800.02*</u>	<u>11.8*</u>
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</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>
	<u>Assault</u>	<u>784.011</u>	<u>8.1</u>
	Battery	784.03	8.3
	Unnatural and lascivious act	800.02	11.8

Comment

*The First, Fourth, and Fifth District Courts of Appeal require the lesser-included of Unnatural and Lascivious Act to be given. The Second District has indicated that this lesser-included offense is a Category 2 lesser. As of July 2016, the Third District and the Florida Supreme Court have not addressed this issue. See *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999); *Funiciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015); *Knighton v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016); and *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). In an abundance of caution, the Committee on Standard Jury Instructions in Criminal Cases put § 800.02, Fla. Stat., in Category One.

*The First, Fourth, and Fifth District Courts of Appeal are not requiring the state to allege the defendant's act was "unnatural" in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2015 [163 So. 3d 478] and 2017.

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, (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.

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), 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, 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.

§ 775.0862, Fla. Stat.

Enhancement 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

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 July 2016, 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 2017.

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,** (Ddefendant) was 18 years of age or older ~~at the time of the offense.~~

b. **At the time of the 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: 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.

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)
	Attempt	777.04(1)	5.1

Comment

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2015 [176 So. 3d 978], and 2017.

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.

Lahey 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(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
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Comments

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 July 2016, 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 978] and 2017.

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, (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.

Lahey 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 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

11.14 11.11 LEWD OR LASCIVIOUS OFFENSES COMMITTED UPON OR IN THE PRESENCE OF AN ELDERLY PERSON OR DISABLED PERSON – 825.1025			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None <u>Unnatural and Lascivious Act (if element 1a or 1b is charged)*</u>		<u>800.02*</u>	<u>11.8*</u>
	Attempt	777.04(1)	5.1
	Assault	784.011	8.1
	Battery	784.03	8.3
	Unnatural and lascivious act	800.02	11.8
	Exposure of sexual organs	800.03	11.9

Comments

*Since the crime of “Unnatural and Lascivious Act” requires the act be committed with another person, it should not be given as a lesser included offense if the evidence shows that only element #1c was committed. Otherwise, the First, Fourth, and Fifth District Courts of Appeal may require the lesser-included of Unnatural and Lascivious Act to be given. The Second District has indicated that this lesser-included offense is a Category 2 lesser for other lewd and lascivious crimes. As of July 2016, the Third District and the Florida Supreme Court have not

addressed this issue. See *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999); *Funciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015); *Knighton v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016); and *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). In an abundance of caution, the Committee on Standard Jury Instructions in Criminal Cases put § 800.02, Fla. Stat., in Category One.

*The First, Fourth, and Fifth District Courts of Appeal are not requiring the state to allege the defendant’s act was “unnatural” in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

§ 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 July 2016, 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 2017.

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 Unnatural and lascivious act (if sexual intercourse is charged)*		<u>800.02*</u>	<u>11.8*</u>
	Attempt	777.04(1)	5.1

Comments

*The First, Fourth, and Fifth District Courts of Appeal probably require the lesser-included of Unnatural and Lascivious Act to be given. The Second District probably would hold that Unnatural and Lascivious Act is a Category 2 lesser. As of July 2016, the Third District and the Florida Supreme Court have not addressed this issue. See *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999); *Funiciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015); *Knighton v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016); and *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012). In an abundance of caution, the Committee on Standard Jury Instructions in Criminal Cases put § 800.02, Fla. Stat., in Category One.

*The First, Fourth, and Fifth District Courts of Appeal are not requiring the state to allege the defendant’s act was “unnatural” in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

This instruction was adopted in 1981 and amended in 2017.

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 1 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			
	Attempt	777.04(1)	5.1

Comments

This instruction was adopted in 2014 [146 So. 3d 1110] and amended in 2017.

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 <u>Unnatural and lascivious act*</u>		<u>800.02*</u>	<u>11.8*</u>
	Attempt	777.04(1)	5.1

Comments

*The First, Second, Fourth, and Fifth District Courts of Appeal are not requiring the state to allege the defendant’s act was “unnatural” in order for § 800.02, Fla. Stat., to be given as a lesser-included offense. *Harris v. State*, 742 So. 2d 835 (Fla. 2d DCA 1999); *Funiciello v. State*, 179 So. 3d 388 (Fla. 5th DCA 2015); *Knighton v. State*, 193 So. 3d 115 (Fla. 4th DCA 2016); *Horn v. State*, 120 So. 3d 1 (Fla. 1st DCA 2012).

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 2017.

29.24 HUMAN TRAFFICKING

§ 787.06(3), Fla. Stat.

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

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

Give as applicable

2. § 787.06(3)(a)1, Fla. Stat.

The human trafficking was for the labor or services of a child.

§ 787.06(3)(a)2, Fla. Stat.

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

§ 787.06(3)(b), Fla. Stat.

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

§ 787.06(3)(c)1, Fla. Stat.

The human trafficking was for the labor or services of a child who was an unauthorized alien.

§ 787.06(3)(c)2, Fla. Stat.

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

§ 787.06(3)(d), Fla. Stat.

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

§ 787.06(3)(e)1, Fla. Stat.

The human trafficking was for the labor or services of a child by the transfer or transport of the child from outside Florida to within this state.

§ 787.06(3)(e)2, Fla. Stat.

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

§ 787.06(3)(f)1, Fla. Stat.

The human trafficking was for commercial sexual activity of a child by the transfer or transport of the child from outside Florida to within this state.

§ 787.06(3)(f)2, Fla. Stat.

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

§ 787.06(3)(g), Fla. Stat.

The human trafficking was for commercial sexual activity in which a [child] [person who is mentally defective or mentally incapacitated] was involved.

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

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

Definitions.

Give in all cases.

§ 787.06(2)(d), Fla. Stat.

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

“Child” means a person under the age of 18.

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

Give if applicable.

§ 787.06(2)(a), Fla. Stat.

“Coercion” means:

1. **Using or threatening to use physical force against any person;

Restraining, isolating, or confining or threatening to restrain, isolate, or confine any person without lawful authority and against her or his will;**
2. **Using lending or other credit methods to establish a debt by any person when labor or services are pledged as a security for the debt, if the value of the labor or services as reasonably assessed is not applied toward the liquidation of the debt, the length and nature of the labor or services are not respectively limited and defined;**
3. **Destroying, concealing, removing, confiscating, withholding, or possessing any actual or purported passport, visa, or other immigration document, or any other actual or purported government identification document, of any person;**
4. **Causing or threatening to cause financial harm to any person;**
5. **Enticing or luring any person by fraud or deceit; or**
6. **Providing a controlled substance as outlined in Schedule [I] [II] of Florida Statute 893.03 to any person for the purpose of exploitation of that person.**

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

Give as applicable.

§ 787.06(2)(b), Fla. Stat.

“Commercial sexual activity” means:

- a. (name of chapter 796 crime). (Name of chapter 796 crime) is **defined as** *(insert definition of Chapter 796 crime)*.
- b. **an attempt to commit** (name of chapter 796 crime). **An attempt to commit** (name of chapter 796 crime) **is defined as** *(insert definition of attempt in Instruction 5.1 and then define the Chapter 796 crime)*.

- c. **sexually explicit performances. “Sexually explicit performance” means an act or show, whether public or private, that is live, photographed, recorded, or videotaped and intended to arouse or satisfy the sexual desires or appeal to the prurient interest.**
- d. **the production of pornography.**

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

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

§ 787.06(2)(e), Fla. Stat.

“Labor” means work of economic or financial value.

§ 787.06(2)(f), Fla. Stat.

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

§ 787.06(2)(g), Fla. Stat.

“Obtain” means, in relation to labor or services, to secure performance thereof.

§ 787.06(2)(h), Fla. Stat.

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

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

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

§ 787.06(2)(k), Fla. Stat.

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

§ 787.06(3)(g), 794.011(1), Fla. Stat.

“Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence

of a narcotic, anesthetic, or intoxicating substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

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

Give if requested. § 787.06(89), Fla. Stat.

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

Give if requested. § 787.06(10), Fla. Stat.

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

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

A conviction under § 787.06(3)(f)1, Fla. Stat., (human trafficking via commercial sexual activity of a child by transport or transfer into Florida) is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life. However, a conviction under 787.06(3)(g) (human trafficking via commercial sexual activity where a child was involved but without a finding that the child was transported from outside the state) is a life felony.

This instruction was adopted in 2013 [131 So. 3d 692] and amended in 2015 [176 So. 3d 938], and 2017.

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

§ 787.06(4), Fla. Stat.

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

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

Definitions.

Give in all cases.

§ 787.06(2)(d), Fla. Stat.

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

§ 787.06(2)(f), Fla. Stat.

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

§ 787.06(2)(g), Fla. Stat.

“Obtain” means, in relation to labor or services, to secure performance thereof.

Give if requested. § 787.06(10), Fla. Stat.

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

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comment

This instruction was adopted in 2013 [131 So. 3d 692] and amended in 2015 [176 So. 3d 938], and 2017.