

11.1 SEXUAL BATTERY — VICTIM LESS THAN 12 YEARS OF AGE

§§ 794.011(2)(a) and (2)(b), Fla. Stat.**

To prove the crime of Sexual Battery upon a Person Less Than 12 Years of Age, the State must prove the following three elements beyond a reasonable doubt:

Give as applicable.

1.
 - a. (Defendant) **committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [female genitals] [mouth] of the [(victim)] [(defendant)].**
 - b. (Defendant) **committed an act [upon] [with] (victim) in which the [anus] [female genitals] of [(victim)] [(defendant)] [was] [were] penetrated by an object.**
 - c. (Defendant) **injured the sexual organ of (victim) in an attempt to commit an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] would have penetrated or would have had union with the [anus] [female genitals] [mouth] of the [(victim)] [(defendant)].**
 - d. (Defendant) **injured the sexual organ of (victim) in an attempt to commit an act upon (victim) in which the [anus] [female genitals] of (victim) would be penetrated by an object.**
2. **At the time, (victim) was less than 12 years of age.**

Give 3a or 3b as applicable.

3.
 - a. **At the time, (defendant) was 18 years of age or older.**
 - b. **At the time, (defendant) was less than 18 years of age.**

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

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

§ 794.021, Fla. Stat.

Ignorance of (victim's) age, (victim's) misrepresentation of his or her age, or 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. Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

“An object” includes a finger.

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

“Union” means contact.

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

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

Give if requested. Khianthalat v. State, 974 So. 2d 359 (Fla. 2008).

Consent of (victim) is not a defense to the crime charged.

Give if requested. § 794.022, Fla. Stat.

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

Lesser-Included Offenses

CAPITAL SEXUAL BATTERY — VICTIM UNDER 12, DEFENDANT 18 OR OVER — 794.011(2)(a)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Battery		784.03(1)(a)1.	8.3
	Sexual battery (Defendant less than 18, victim less than 12)	794.011(2)(b)	11.1
	Sexual battery (Defendant 18 or older, victim 12 or older but less than 18)	794.011(5)(a)	11.4
	Sexual battery (Defendant 18 or older, victim 18 or older)	794.011(5)(b)	11.4
	Sexual battery (Defendant younger than 18, victim 12 or older)	794.011(5)(c)	11.4
	Lewd or lascivious battery (Victim 12 or older but less than 16)	800.04(4)(a)1.	11.10(a)
	Lewd or lascivious battery (Victim less than 16)*	800.04(4)(a)2.*	11.10(b)*
	Attempt	777.04(1)	5.1
	Aggravated Battery	784.045(1)(a)	8.4
	Felony Battery	784.041(1)	8.5
	Aggravated assault	784.021(1)(a)	8.2
	Battery	784.03(1)(a)2.	8.3
	Assault	784.011	8.1

Comments

*It is unclear whether the “encouraging, forcing, or enticing any person less than 16 years of age to engage in ... any other act involving sexual activity” part of Lewd or Lascivious Battery in § 800.04(4)(a)2., Fla. Stat., is a necessary lesser-included offense of § 794.011(2)(a), Fla. Stat., or § 794.011(2)(b), Fla. Stat. If so, the judge should instruct only on “sexual activity” and not on “sodomasochistic abuse, sexual bestiality, or prostitution,” unless those acts are included in the charging document.

**Effective October 1, 2022, the Legislature changed “vagina” to “female genitals” in sex crimes-related statutes. Judges should ensure the jury instructions contain correct statutory terms, which will depend on the date alleged in the charging document. *Flores v. State*, -- So. 3d -- (Fla. 4th DCA 2024) is an example of an appellate court finding fundamental error when the trial judge expanded the definition of “vaginal penetration” by instructing on “female genital penetration.”

In § 794.011(8)(c), Fla. Stat., the legislature created a crime that mirrors this crime except 1) the phrase “engages in any act ... which constitutes sexual battery” is used and 2) there is an additional element that the defendant was in a position of familial or custodial authority to the victim. See Instruction 11.6(a).

See Instruction 11.16 or 11.16(a) if the State charged that the defendant qualified as a Dangerous Sexual Felony Offender, pursuant to § 794.0115, Fla. Stat.

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

This instruction was adopted in 1981 and was amended in 1987 [508 So.2d 1221], 1995 [657 So. 2d 1152], 2007 [863 So. 2d 236], 2015 [156 So. 3d 1037], 2016 [190 So. 3d 1055], on November 20, 2020, on December 15, 2021, and on December 21, 2022.