

**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 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:

Give as applicable.

- 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. committed upon (victim) or forced or enticed (victim) to commit**
[actual or simulated sexual intercourse].
[deviate sexual intercourse].
[sexual bestiality].
[masturbation].
[sadomasochistic 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. [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. 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 (victim's) lack of chastity nor (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: 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: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

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

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

Give if applicable.

“Union” means contact.

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

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

Lesser Included Offenses

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

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

Comments

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

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

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