

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. (Defendant) engaged in sexual activity with (victim).**
- 2. At the time, (victim) was 12 years of age or older, but less than 16 years of age.**

Give if applicable. § 800.04(1), Fla. Stat.

However, any act done for bona fide medical purposes is not a Lewd or Lascivious Battery.

Give if applicable. § 800.04(8), Fla. Stat.

A mother's breastfeeding of her baby does not under any circumstance constitute a Lewd or Lascivious Battery.

§ 800.04(3), Fla. Stat.

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

Give if applicable.

"Bona fide" means genuine.

§ 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), Fla. Stat.

"Consent" means intelligent, knowing, and voluntary consent, and does not include submission by coercion.

§ 800.04(1), Fla. Stat.

"Coercion" means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance.

§ 800.04(1), Fla. Stat.

"Sexual activity" means the oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object.

§ 800.04(1), Fla. Stat.

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

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.

§ 775.0862, Fla. Stat.

Reclassification for sexual offense against student by school authority figure.

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

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

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

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

Lesser Included Offenses

LEWD OR LASCIVIOUS BATTERY (ENGAGING IN SEXUAL ACTIVITY) — 800.04(4)(a)1

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Aggravated battery	784.045(1)	8.4
	Attempt	777.04(1)	5.1
	Felony battery	784.041(1)	8.5
	Aggravated assault	784.021(1)(a)	8.2
	Battery	784.03	8.3
	Assault	784.011	8.1
	Unnatural and lascivious act*	800.02*	11.8*

Comments

*The courts do not require the State to allege the defendant’s act was “unnatural” or “against the laws of nature” 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).

**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 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)(e), Fla. Stat. If this higher degree is charged, a special instruction will be required because *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requires the jury to make an additional finding regarding the defendant’s age. As of November 2022, it was unclear whether the existence of a prior conviction is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior conviction. Therefore, if the information or indictment contains an allegation of one or more prior convictions, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior conviction is treated as an element, the historical fact of a prior conviction should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

As of November 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses 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 2007 [969 So. 2d 245] and amended in 2015 [163 So. 3d 478], 2018 [257 So. 3d 370], and on December 21, 2022.