

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 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, (defendant) knew or should have known or had reason to believe that the transmission was viewed on a computer or television monitor by a person who was under the age of 16 years.**

Give 4a or 4b as applicable.

4. a. **At the time, (defendant) was 18 years of age or older.**

 b. **At the time, (defendant) was less than 18 years of age.**

§ 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.

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(3), Fla. Stat.

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.

Give as applicable.

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), 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[; 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.

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

“Union” means contact.

§ 847.001(6), Fla. Stat.

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

§ 847.001, 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, 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 female genitals of the other.

§ 847.001, Fla. Stat.

“Simulated” means the explicit depiction of sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

§ 847.001, Fla. Stat.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother's breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

§ 847.001, Fla. Stat.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

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.
None			
	Lewd or Lascivious Exhibition over Computer Service, Defendant less than 18 years of age	847.0135(5)(c)	11.10(f)
	Unnatural and lascivious act**	800.02*	11.8*
	Attempt	777.04(1)	5.1

Comments

*As of November 2022, it was unclear whether the Chapter 800 definition of “sexual activity” could be used for this Chapter 847 crime.

**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.

***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.”

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 2008 [998 So. 2d 1138] and amended in 2015 [176 So. 3d 938], 2018 [257 So. 3d 370], on November 20, 2020, on December 15, 2021, and on December 21, 2022.