

**11.11 LEWD OR LASCIVIOUS [BATTERY] [MOLESTATION] [EXHIBITION]
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] [Disabled Person], the State must prove the following three elements beyond a reasonable doubt:

Give 1a, 1b, or 1c as applicable.

- 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 [masturbating] [exposing [his] [her] genitals in a lewd or 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] [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 (victim) lacked the capacity to consent or failed to give consent [to have the act committed in [his] [her] presence].**

Definitions. 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.

§ 825.101, 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, 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, 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, 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, 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.

§ 796.07(1), Fla. Stat.

"Prostitution" is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

§ 825.1025, 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. **"Bona fide"** means genuine[].

§ 825.1025(1), Fla. Stat.

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

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. § 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] [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

11.11 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			
	Attempt	777.04(1)	5.1
	Assault	784.011	8.1
	Battery	784.03	8.3
	Exposure of sexual organs	800.03	11.9
	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.”

§ 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 definitions of “sodomasochistic abuse” and “sexual bestiality” in § 847.001, Fla. Stat., that differ from the definitions in § 827.071, Fla. Stat. As of November 2022, there is no case law that decides which definition applies for a violation of § 825.1025, Fla. Stat.

As of November 2022, it was unclear whether an act done for a bona fide medical purpose should be treated as an affirmative defense or as an element 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 [965 So. 2d 811] and amended in 2010 [48 So. 3d 41], 2015 [163 So. 3d 478], 2018 [257 So. 3d 370], and on December 21, 2022.