

**11.2 SEXUAL BATTERY — VICTIM 12 YEARS OF AGE OR OLDER —
GREAT FORCE OR DEADLY WEAPON**

§ 794.011(3), Fla. Stat.**

To prove the crime of Sexual Battery upon a Person 12 Years of Age or Older with the Use of [a Deadly Weapon] [or] [Actual Physical Force Likely to Cause Serious Personal Injury], the State must prove the following four elements beyond a reasonable doubt:

Give 1a or 1b or both 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.**

Give 2a or 2b or both as applicable.

2. (Defendant), **in the process,**
 - a. **used or threatened to use a deadly weapon.**
 - b. **used actual physical force likely to cause serious personal injury.**
3. **The act was done without the consent of (victim).**
4. **At the time, (victim) was 12 years of age or older.**

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 in all cases. § 794.011(1), Fla. Stat.

"Consent" means intelligent, knowing, and voluntary consent and does not include coerced submission. Consent does not mean the failure by the alleged victim to offer physical resistance to the offender.

Give if applicable. § 794.022(4), Fla. Stat.

Evidence of (victim's) mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing, and voluntary consent.

§ 794.011(1), Fla. Stat.

“Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

§ 794.011(1), Fla. Stat.

“Mentally defective” means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

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 2a alleged.

A “deadly weapon” is any object that will likely cause death or great bodily harm if used or threatened to be used in the ordinary and usual manner contemplated by its design and construction.

Give if applicable.

An object not designed to inflict bodily harm may nonetheless be a “deadly weapon” if it was used or threatened to be used in a manner likely to cause death or great bodily harm.

Give if 2b alleged. § 794.011(1), Fla. Stat.

“Serious personal injury” means great bodily harm or pain, permanent disability, or permanent disfigurement.

“Great bodily harm” means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises.

Give if requested. § 794.022, Fla. Stat.

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

Lesser-Included Offenses

SEXUAL BATTERY — VICTIM 12 YEARS OF AGE OR OLDER — GREAT FORCE OR DEADLY WEAPON — 794.011(3)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Battery		784.03(1)(a)1.	8.3
	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(3), 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.”

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.

The 2014 legislature added a sentencing multiplier to § 921.0024(1)(b), Fla. Stat., for sexual battery crimes involving a defendant 18 years of age or older and a victim younger than 18 years of age. If the State has charged and intends to use this

sentencing multiplier, a special instruction will be necessary for the jury to make additional findings regarding ages.

A special instruction will be necessary in cases where the deadly weapon was an animal or a substance or something that is not commonly referred to as an “object.”

As of November 2022, it was unclear whether acts done for bona fide medical purposes 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 1981 and amended in 1987 [508 So.2d 1221], 1995 [657 So. 2d 1152], 2003 [850 So. 2d 1272], 2008 [995 So. 2d 476], 2015 [156 So. 3d 1037], 2016 [190 So. 3d 1055], on April 3, 2020, on November 20, 2020, on December 15, 2021, and on December 21, 2022.