

11.4 SEXUAL BATTERY

§§ 794.011(5)(a), (5)(b), (5)(c), and (5)(d), Fla. Stat.**

To prove the crime of Sexual Battery, 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.**

2. (Defendant's) **act was committed without the consent of (victim).**

Give 3a or 3b as applicable.

3. a. **At the time, (victim) was 12 years of age or older [but younger than 18 years of age].**
- b. **At the time, (victim) was 18 years of age or older.**

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 younger than 18 years of age.**

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 requested. § 794.022, Fla. Stat.

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

§ 775.0862, Fla. Stat.

Enhancement for sexual battery against student by school authority figure.

If you find that (defendant) committed the crime of Sexual 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 § 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

SEXUAL BATTERY — DEFENDANT 18 OR OVER; VICTIM 12-LESS THAN 18 — WITHOUT FORCE — 794.011(5)(a)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Battery		784.03(1)(a)1.	8.3
	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)	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(5), 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.”

If § 794.011(5)(d), Fla. Stat., is charged, this instruction can be used as a template with some amendments. Under that statute, the victim must be 12 years of age or older, the age of the defendant is irrelevant, and most of the alternatives regarding the prior conviction can probably be proven to the judge at a sentencing hearing. However, for an enhancement involving a prior conviction for a Kidnapping or False Imprisonment involving a minor, wherein the defendant committed a sexual battery or some enumerated lewd act upon the minor during the course of the kidnapping or false imprisonment, then *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

is likely to require the jury to make certain findings regarding additional circumstances of the prior conviction.

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.

In the event multiple perpetrators is charged and proven, a special instruction is necessary. See § 794.023, Fla. Stat.

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 was amended in 1987 [508 So. 2d 1221], 1995 [657 So. 2d 1152], 2003 [850 So. 2d 1272], 2015 [156 So. 3d 1037], 2016 [190 So. 3d 1055], on November 20, 2020, on December 15, 2021, and on December 21, 2022.