

**11.6(a) ENGAGING IN AN ACT THAT [CONSTITUTED SEXUAL BATTERY]  
[INJURED THE SEXUAL ORGAN OF ANOTHER IN AN ATTEMPT TO  
COMMIT SEXUAL BATTERY] BY A PERSON IN FAMILIAL OR CUSTODIAL  
AUTHORITY UPON A PERSON LESS THAN 12 YEARS OF AGE**

§ 794.011(8)(c), Fla. Stat.\*\*

**To prove the crime of Engaging in an Act That [Constituted Sexual Battery] [Injured the Sexual Organ of Another in an Attempt to Commit Sexual Battery] by a Person in Familial or Custodial Authority upon a Person Less Than 12 Years of Age, the State must prove the following three elements beyond a reasonable doubt:**

*Give as applicable.*

1.    a.    (Defendant) **engaged in 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) **engaged in an act [upon] [with] (victim) in which the [anus] [female genitals\*\*] of [(victim)] [(defendant)] [was] [were] penetrated by an object.**
- c.    (Defendant) **engaged in an act that injured the sexual organ of (victim) in an attempt to commit an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] would have penetrated or would have had union with the [anus] [female genitals\*\*] [mouth] of the [(victim)] [(defendant)].**
- d.    (Defendant) **engaged in an act that injured the sexual organ of (victim) in an attempt to commit an act upon (victim) in which the [anus] [female genitals\*\*] of (victim) would be penetrated by an object.**
2.    **At the time, (defendant) was in a position of familial or custodial authority to (victim).**
3.    **At the time, (victim) was less than 12 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 a defendant's bona fide belief of (victim's) age is not a defense to the crime charged.**

*Give if applicable.*

**“Bona fide” means genuine.**

*§ 794.011(8), Fla. Stat.*

**Consent of (victim) is not a defense to the crime charged.**

*§ 794.022, Fla. Stat.*

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

*Give if applicable. § 794.011(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.**

#### **Lesser-Included Offenses**

#### **ENGAGING IN AN ACT THAT [CONSTITUTED SEXUAL BATTERY] [INJURED THE SEXUAL ORGAN OF ANOTHER] BY A PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY UPON A PERSON LESS THAN 12 YEARS OF AGE — 794.011(8)(c)**

| <b>CATEGORY ONE</b> | <b>CATEGORY TWO</b>                                                                                     | <b>FLA. STAT.</b> | <b>INS. NO.</b> |
|---------------------|---------------------------------------------------------------------------------------------------------|-------------------|-----------------|
| None                |                                                                                                         |                   |                 |
|                     | Sexual battery (Defendant 18 or older, victim younger than 12)                                          | 794.011(2)(a)     | 11.1            |
|                     | Sexual battery (Defendant younger than 18, victim younger than 12)                                      | 794.011(2)(b)     | 11.1            |
|                     | Engaging in an act which constituted sexual battery (Victim younger than 12, defendant younger than 18) | 794.011(8)(c)     | 11.6(a)         |
|                     | Sexual battery (Defendant 18 or older, victim 12 or older but younger 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             |

| CATEGORY ONE | CATEGORY TWO       | FLA. STAT.    | INS. NO. |
|--------------|--------------------|---------------|----------|
|              | 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        | 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(8)(c), 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.

A special instruction may be necessary in cases involving “familial authority” because that term is not synonymous with familial relationship. A special instruction may be necessary in cases involving “custodial authority” to help define the scope of “custody.” Cases such as *Crocker v. State*, 752 So. 2d 615 (Fla. 2d DCA 1999), *Oliver v. State*, 977 So. 2d 673 (Fla. 5th DCA 2008), and *Hallberg v. State*, 649 So. 2d 1355 (Fla. 1994) may provide guidance for the special instructions.

As of August 2023, 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 2016 [190 So. 3d 1055] and amended on November 20, 2020, on April 5, 2021, on December 15, 2021, on December 21, 2022, and on September 8, 2023.