

23.5 OFFERING TO COMMIT, COMMITTING, OR ENGAGING IN PROSTITUTION, LEWDNESS, OR ASSIGNATION

§ 796.07(2)(e), Fla. Stat.

To prove the crime of Offering to Commit, Committing, or Engaging in [Prostitution] [Lewdness] [Assignment], the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) **[offered to commit] [committed] [engaged in] [prostitution] [lewdness] [assignment].**
2. **At the time,** (defendant) **was 18 years of age or older.**

§ 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.

“Lewdness” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

“Assignment” means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.

“Sexual activity” means oral, anal, or female genital penetration by, or union with, the sexual organ of another; anal or female genital penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation; however, the term does not include acts done for bona fide medical purposes. “Bona fide” means genuine].

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

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

“Union” means contact.

Give if applicable.

Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

The definition of “an object” includes a finger.

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comments

The crime in § 796.07(2)(e), Florida Statutes, is bumped up based on the number of prior violations. As of November 2022, it was unclear whether the existence

of a prior violation is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior violation. Therefore, if the information or indictment contains an allegation of one or more prior violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior violation is treated as an element, the historical fact of a prior violation should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

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 2008 [995 So. 2d 476], 2010 [48 So. 3d 41], 2013 [122 So. 3d 302], 2017 [229 So. 3d 295], and on December 21, 2022.