

8.30 [HARASSING] [OR] [OBSCENE] TELEPHONE CALL[S] [OR] KNOWINGLY PERMITTING [HARASSING] [OR] [OBSCENE] TELEPHONE CALL[S]

§ 365.16(1) and (2), Fla. Stat.

To prove the crime of (name of crime), the State must prove the following [two] [three] elements beyond a reasonable doubt:

Give as applicable.

§ 365.16(1)(a), Fla. Stat.

- 1. (Defendant) made a telephone call to a location at which the person receiving the call had a reasonable expectation of privacy.**
- 2. During the call, (defendant) made a comment, request, suggestion, or proposal that was obscene, lewd, lascivious, filthy, vulgar, or indecent.**
- 3. At the time, (defendant's) call or language was intended by [him] [her] to abuse, threaten, or harass any person at the called number.**

§ 365.16(1)(b), Fla. Stat.

- 1. (Defendant) made a telephone call, whether or not conversation ensued.**
- 2. During the call, (defendant) did not disclose [his] [her] identity.**
- 3. At the time, (defendant) had the intent to abuse, threaten, or harass any person at the called number.**

§ 365.16(1)(c), Fla. Stat.

- 1. (Defendant) made or caused the telephone of another to repeatedly or continuously ring.**
- 2. At the time, (defendant) had the intent to harass any person at the called number.**

§ 365.16(1)(d), Fla. Stat.

- 1. (Defendant) made repeated telephone calls during which conversation ensued.**
- 2. (Defendant) made the calls solely to harass any person at the called number.**

§ 365.16(2), Fla. Stat.

- 1. (Defendant) knowingly permitted any telephone under [his] [her] control to be used by another person.**
- 2. (Defendant) did so knowing that the telephone was being or would be used to:**

Give as applicable.

- a. **make a telephone call to a location at which the person receiving the call had a reasonable expectation of privacy during which the caller makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent with the intent to abuse, threaten, or harass any person at the called number.**
- b. **make a telephone call, whether or not conversation ensues, without disclosing his or her identity, with the intent to threaten or harass any person at the called number.**
- c. **make or cause the telephone of another to repeatedly or continuously ring with the intent to harass any person at the called number.**
- d. **make repeated telephone calls, during which conversation ensues, solely to harass any person at the called number.**

Definitions. Give as applicable.

§ 365.161(1), Fla. Stat.

“Obscene” means a communication which:

1. **The average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interests;**
2. **Describes, in a patently offensive way, deviate sexual intercourse, sadomasochistic abuse, sexual battery, sexual bestiality, sexual conduct, or sexual excitement; and**
3. **Taken as a whole, lacks serious literary, artistic, political, or scientific value.**

“Deviate Sexual Intercourse” means sexual conduct between persons consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

“Sadomasochistic abuse” means flagellation or torture by or upon a person 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.

“Sexual Battery” means 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.

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

Give if applicable.

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.

“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.

“Sexual Conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse or any act or conduct that constitutes sexual battery.

“Sexual excitement” means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

“Lewd” and “Lascivious” mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

Lesser Included Offense

HARASSING OR OBSCENE TELEPHONE CALLS OR KNOWINGLY PERMITTING HARASSING OR OBSCENE TELEPHONE CALLS — 365.16(1) AND (2)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

*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.”

As of November 2022, it was unclear whether the definition of “harass” in the stalking statute applies to this statute.

This instruction was adopted on December 21, 2022.