

28.14 BOATING UNDER THE INFLUENCE

§ 327.35(1), Fla. Stat.

To prove the crime of Boating Under the Influence, the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) operated a vessel.**
- 2. While operating the vessel, [he] [she]**

Give 2a or 2b or both as applicable.

- a. was under the influence of [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that [his] [her] normal faculties were impaired.**
- b. had a [blood] [breath]-alcohol level of .08 or more grams of alcohol per [100 milliliters of blood] [210 liters of breath].**

Give if applicable. § 327.35(4), Fla. Stat.

If you find the defendant guilty of Boating Under the Influence, you must also determine whether the State has proven beyond a reasonable doubt whether:

- a. the defendant had a [blood] [breath]-alcohol level of .15 or higher while operating the vessel.**
- b. the defendant was accompanied in the vessel by a person under the age of 18 years at the time of the Boating Under the Influence.**

§ 327.02, Fla. Stat.

“Operate” means to be in charge of or in command of or in actual physical control of a vessel upon the waters of this state, or to exercise control over or to have responsibility for a vessel’s navigation or safety while the vessel is underway upon the waters of this state, or to control or steer a vessel being towed by another vessel upon the waters of the state.

§ 327.02, Fla. Stat.; State v. Davis, 110 So. 3d 27 (Fla. 2d DCA 2013).

“Vessel” means a boat and includes every description of watercraft, barge, and airboat, other than a seaplane, on the water used or capable of being used as a means of transportation on water.

§ 327.354, Fla. Stat.

“Normal faculties” include but are not limited to the ability to see, hear, walk, talk, judge distances, operate a vessel, make judgments, act in emergencies and, in general, to normally perform the many mental and physical acts of our daily lives.

Shaw v. State, 783 So. 2d 1097 (Fla. 5th DCA 2001).

Impaired means diminished in some material respect.

§ 322.01, Fla. Stat.

“Alcoholic beverages” are considered to be substances of any kind and description which contain alcohol.

() is a controlled substance under Florida law. Ch. 893, Fla. Stat.

() is a chemical substance under Florida law. § 877.111, Fla. Stat.

Give if appropriate. § 327.354(2)(a) and (2)(b), Fla. Stat.

- 1. If you find from the evidence that while operating or in actual physical control of the vessel, the defendant had a [blood] [breath]-alcohol level of .05 or less, you shall presume that the defendant was not under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired; but this presumption may be overcome by other evidence demonstrating that the defendant was under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired.**
- 2. If you find from the evidence that while operating or in actual physical control of the vessel, the defendant had a [blood] [breath]-alcohol level in excess of .05 but less than .08, that fact does not give rise to any presumption that the defendant was or was not under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired. In such cases, you may consider that evidence along with other**

evidence in determining whether the defendant was under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired.

It is not necessary to instruct on the “prima facie evidence of impairment” in § 327.354(2)(c), Fla. Stat., if the State charged the defendant with boating with a blood or breath-alcohol level of .08 or over. In those cases, if the jury finds that the defendant operated a vessel with an unlawful blood or breath-alcohol level, impairment becomes moot. Tyner v. State, 805 So. 2d 862 (Fla. 2d DCA 2001).

Give only if appropriate. State v. Burns, 661 So.2d 842 (Fla. 5th DCA 1995); Kurecka v. State, 67 So.3d 1052 (Fla. 4th DCA 2010).

A person [arrested] [being investigated] for Boating Under the Influence does not have the right to consult with an attorney before deciding whether to submit to a [breath] [urine] [blood] test.

Give only if appropriate

A person [arrested] [being investigated] for Boating Under the Influence does not have the right to consult with an attorney before deciding whether to submit to a [breath] [urine] [blood] test. However, if the defense maintains that the defendant mistakenly believed that [he] [she] did have such a right and refused to provide a [breath] [blood] [urine] sample because of that mistaken belief, you may consider that claim, as well as the state's competing claim that the defendant's refusal shows that [he] [she] did not want the police to obtain evidence regarding [his] [her] [[breath] [blood] alcohol level] [or] [drug consumption].

Defense of inoperability; give if applicable.

It is a defense to the charge of Boating Under the Influence if the vessel was inoperable at the time of the alleged offense, unless the defendant was controlling or steering the vessel while it was being towed by another vessel upon the waters of the state. However, it is not a defense if the defendant was boating under the influence before the vessel became inoperable.

**§ 327.35(6)(b), Fla. Stat. and § 327.35(6)(c), Fla. Stat.*

See Comments regarding issue of whether a jury finding is required. The following instruction is suggested if the judge determines a jury finding required. The State's allegation of a prior conviction should not be read to the jury, and the trial must be bifurcated if a jury finding is required. Note: BUI and out-of-state DUI/DWI convictions count as prior convictions. See §316.193(6), Fla. Stat.

Now that you have found the defendant guilty of Boating Under the Influence, you must further determine whether the State proved beyond a reasonable doubt that the defendant was previously convicted of [Boating Under the Influence] [(insert qualifying conviction(s)] and that the BUI for which you just found the defendant guilty was committed within [5 years] [10 years] after the date of a prior conviction.

Lesser Included Offense

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

Comments

*The penalties for BUI are increased if the defendant has one or more prior BUI or otherwise qualifying convictions. Because some of the increased penalties apply only to the recidivism fact of prior conviction(s), it is possible that a jury finding is not required for the existence of those prior conviction(s). Therefore, a jury finding may not be necessary for the increased penalties based on prior conviction(s) in § 327.35(2)(a), Fla. Stat., or in § 327.35(2)(b)2., Fla. Stat. However, the judge must impose a jail sentence of at least 10 days if the second BUI conviction occurred within 5 years, or of at least 30 days if the third BUI conviction occurred within 10 years, of the date of a prior BUI or otherwise qualifying conviction. Because of *Erlinger v. United States*, 602 U.S. 821 (2024), the courts may require the jury to find that the “within 5-year” or “within 10-year” requirement has been proven beyond a reasonable doubt in cases where the State is seeking the minimum mandatory jail sentence.

This instruction was adopted in 2009 [6 So. 3d 574] and amended in 2012 [87 So. 3d 679], 2014 [146 So. 3d 1110], 2016 [192 So. 3d 1190], and on June 12, 2026.