

28.16 [FELONY] BOATING UNDER THE INFLUENCE

§ 327.35(2)(b)1. or § 327.35(2)(b)3., 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.

was under the influence of [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that [his] [her] normal faculties were impaired.

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:

the defendant had a [blood] [breath]-alcohol level of .15 or higher while operating the vessel.

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.

See Comments regarding the issue of whether a jury finding is required. The instruction in a. below is suggested if the judge determines a jury finding is required. The State's allegation of prior convictions should not be read to the jury, and the trial must be bifurcated for jury findings on prior convictions Note: A BUI or a DUI/DWI conviction, whether in Florida or out-of-state, counts as a prior conviction. See § 327.35(6), Fla. Stat.

Since you have found the defendant guilty of Boating Under the Influence, you must now determine whether the State has proven beyond a reasonable doubt whether:

- 3. the defendant was previously convicted two times of [Boating Under the Influence] [(insert qualifying convictions)] and one of the prior convictions took place within 10 years of the Boating Under the Influence that you just found the defendant committed.**
- 4. the defendant was previously convicted three times of [Boating Under the Influence] [(insert qualifying convictions)].**

Lesser Included Offenses

**[FELONY] BOATING UNDER THE INFLUENCE — PRIOR CONVICTIONS —
327.35(2)(b)1. OR 327.35(2)(b)3.**

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
BUI		327.35(1)	28.14
	Attempt	777.04(1)	5.1
	BUI causing property damage or injury	327.35(3)(a)(b)(c)1.	28.15

Comments

*It is a third degree felony if a person who commits a BUI has 3 prior BUIs or otherwise qualifying convictions. In *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000), the Florida Supreme Court indicated the 3 prior convictions for that type of felony DUI are questions of fact for the jury to determine.

Another type of felony BUI occurs when a person commits a BUI, has two prior BUIs or otherwise qualifying convictions, and the third violation occurred within 10 years of a prior conviction. Because of *Erlinger v. United States*, 602 U.S. 821 (2024), the courts may require the jury to find that the 10-year requirement is met.

This instruction should be used for Felony BUI based on prior convictions. For Felony BUI based on prior convictions, it is error to inform the jury of prior convictions before the verdict on the underlying BUI charge is rendered. Therefore, if the information or indictment contains an allegation of prior convictions, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty of BUI, the historical fact of prior convictions shall be determined separately by the jury in a bifurcated proceeding. See *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

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.