

28.2 [FELONY] DRIVING UNDER THE INFLUENCE

§ 316.193(2)(b)1 or § 316.193(2)(b)3, Fla. Stat.

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

- 1. (Defendant) drove [or was in actual physical control of] a vehicle.**
- 2. While driving [or in actual physical control of] the vehicle, (defendant)**

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 a. or b. or both if applicable. § 316.193(4), Fla. Stat.

If you find the defendant guilty of Driving Under the Influence, you must also determine whether the State proved beyond a reasonable doubt that:

- a. the defendant had a [blood] [breath]-alcohol level of .15 or higher while driving [or in actual physical control of] the vehicle.**
- b. the defendant was accompanied in the vehicle by a person under the age of 18 years at the time of the crime.**

§ 316.003, Fla. Stat. Some of these terms have their own statutory definitions, which should be given if necessary.

“Vehicle” is every device, in, upon or by which any person or property is, or may be, transported or drawn upon a highway[, except personal delivery devices, mobile carriers, and devices used exclusively upon stationary rails or tracks].

§ 316.1934, Fla. Stat.

Normal faculties include but are not limited to the ability to see, hear, walk, talk, judge distances, drive an automobile, 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.

Give if applicable. The option of “on a vehicle” pertains to vehicles such as motorcycles and bicycles.

Actual physical control of a vehicle means the defendant must be physically in [or on] the vehicle and have the capability to operate the vehicle, regardless of whether [he] [she] is actually operating the vehicle at the time.

§ 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. § 316.1934(2)(a) and (2)(b), Fla. Stat.

- 1. If you find from the evidence that while driving or in actual physical control of a vehicle, the defendant had a blood or 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 driving or in actual physical control of a vehicle, the defendant had a blood or 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 § 316.1934(2)(c), Fla. Stat., if the State charged the defendant with driving with a blood or breath-alcohol level of .08 or over. In those cases, if the jury finds that the defendant drove with an unlawful blood or breath-alcohol level, impairment becomes moot. Robertson v. State, 604 So. 2d 783, 792, n.14 (Fla. 1992); 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 Driving 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 Driving 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 Driving Under the Influence if at the time of the alleged offense, the vehicle was inoperable. However, it is not a defense if the defendant was driving under the influence before the vehicle became inoperable. Therefore, if you are not convinced beyond a reasonable doubt that the vehicle was operable at the time of the alleged offense, you should find the defendant not guilty. However, if you are convinced that the vehicle was operable at the time of the alleged offense, then you should find the defendant guilty, if all the other elements of the charge have been proved beyond a reasonable doubt.

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: BUI and out-of-state DUI/DWI convictions count as prior convictions. See §316.193(6)(k), Fla. Stat.

Now that you have found the defendant guilty of Driving Under the Influence, you must further determine whether the State proved beyond a reasonable doubt that:

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

Give if applicable. 316.193(12), Fla. Stat.

If the records of the Department of Highway Safety and Motor Vehicles show that the defendant has been previously convicted of Driving Under the Influence, you may conclude that the State has established that prior Driving Under the Influence conviction. However, such evidence may be contradicted or rebutted by other evidence. Accordingly, this inference may be considered along with any other evidence in deciding whether the defendant has a prior Driving Under the Influence conviction.

Lesser Included Offenses

FELONY DRIVING UNDER THE INFLUENCE – [THIRD OFFENSE WITHIN 10 YEARS OF A PRIOR CONVICTION] [FOURTH OFFENSE] — 316.193(2)(b)1. OR 316.193(2)(b)3.

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Driving under the influence		316.193(1)	28.1
	Attempt	777.04(1)	5.1
	Driving under the influence causing or contributing to causing property damage or injury	316.193(3)(a)(b)(c)1	28.1(a)

Comments

*It is a third degree felony if a person who commits a DUI has 3 prior DUIs 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.

Another type of felony DUI occurs when a person commits a DUI, has two prior DUIs 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 Driving Under the Influence based on prior convictions. For Felony Driving Under the Influence based on prior convictions, it is error to inform the jury of prior convictions until the verdict on the underlying Driving Under the Influence 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 Driving Under the Influence, 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 2016 [192 So. 3d 1190], 2019 [262 So. 3d 59], on October 2, 2020, on October 7, 2022, and on June 12, 2026.