

Supreme Court of Florida

No. SC08-484

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES— REPORT NO. 2008-02.

[December 18, 2008]

PER CURIAM.

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases (Committee) has submitted proposed changes to the standard jury instructions. We have jurisdiction. See art. V, § 2(a), Fla. Const.

Previously in case number SC05-1434, the Committee proposed six new instructions pertaining to lewd and lascivious conduct. All six instructions were based upon crimes set forth in section 800.04, Florida Statutes (2006), entitled “Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.” Two of the proposed instructions, instructions 11.10(a) (Lewd or Lascivious Battery (Engaging in Sexual Activity)) and 11.10(b) (Lewd or Lascivious Battery (Encouraging, Forcing, or Enticing)), were authorized for publication and use; the other four, instructions 11.10(c) (Lewd or Lascivious

Molestation), 11.10(d) (Lewd or Lascivious Conduct), 11.10(e) (Lewd or Lascivious Exhibition/Presence of a Child), and 11.10(f) (Lewd or Lascivious Exhibition Over Computer Service), were referred back to the Committee for further consideration. In re Std. Jury Instr. in Crim. Cases (No. 2005-3), 969 So. 2d 245 (Fla. 2007).

On March 12, 2008, the Committee filed Report No. 2008-02, containing revised proposals for instructions 11.10(c) (Lewd or Lascivious Molestation), 11.10(d) (Lewd or Lascivious Conduct), 11.10(e) (Lewd or Lascivious Exhibition/Presence of a Child), and 11.10(f) (Lewd or Lascivious Exhibition Over Computer Service). After submission to the Court, the proposals were published for comment in The Florida Bar News on April 15, 2008. Two comments were filed with regard to proposed instruction 11.10(c). The Committee has filed a response to the comments. No comments were received with regard to the other proposed instructions.

After consideration of the Committee's report and the comments filed, we authorize the four new proposed instructions with minor modifications.¹ New

1. Paragraph 2.b. of instruction 11.10(c) as proposed by the Committee has been modified to add the word "intentionally." Additionally, due to recent legislation moving the statutory language setting forth the crime of lewd and lascivious exhibition over a computer service from section 800.04(7)(b) to section 847.0135(5), Florida Statutes (2008), see ch. 2008-172, §§3-4, Laws of Fla., the statutory reference contained in the title and the table of lesser included offenses for instruction 11.10(f) has been corrected and a comment has been added.

instructions 11.10(c), Lewd or Lascivious Molestation, 11.10(d), Lewd or Lascivious Conduct, 11.10(e), Lewd or Lascivious Exhibition/Presence of a Child, and 11.10(f), Lewd or Lascivious Exhibition Over Computer Service are authorized for publication and use as reflected in the appendix to this opinion. By authorizing these instructions for publication and use, we express no opinion on the correctness of the instructions and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions. We further caution all interested parties that any notes and comments associated with the instructions reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their correctness or applicability. New language is indicated by underlining, and deleted language is struck through. The instructions as set forth in the appendix² shall be effective on the date that this opinion becomes final.

We also note that all four of the new instructions addressed herein include the following definition: “The words ‘lewd’ and ‘lascivious’ mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.” Although we authorize the instructions for publication and use with this definition as proposed by the Committee, we have referred these and other instructions containing similar language to the Committee for consideration of whether a uniform definition for “lewd and lascivious” is needed and whether the term “sensual intent” or “sensual intention” should be included in that definition.

2. The amendments as reflected in the appendix are to the Standard Jury Instructions in Criminal Cases as they appear on the Court’s website at

It is so ordered.

QUINCE, C.J., and WELLS, ANSTEAD, PARIENTE, LEWIS, and CANADY, JJ., concur.

POLSTON, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Original Proceeding – Standard Jury Instructions in Criminal Cases

Judge Terry David Terrell, Chair, Supreme Court Committee on Standard Jury Instructions in Criminal Cases, First Judicial Circuit, Pensacola, Florida,

for Petitioner

Lawrence D. Shearer of McDonald, Shearer and Cohen, P.A., Lakeland, Florida, and Stephen L. Romine of Cohen, Jayson and Foster, P.A., Tampa, Florida,

Responding with comments

www.floridasupremecourt.org/jury_instructions/instructions.shtml. We recognize that there may be minor discrepancies between the instructions as they appear on the website and the published versions of the instructions. Any discrepancies as to the instructions authorized for publication and use after October 25, 2007, should be resolved by reference to the published opinion of this Court authorizing the instructions.

APPENDIX

11.10(c) LEWD OR LASCIVIOUS MOLESTATION

§ 800.04(5), Fla. Stat.

To prove the crime of Lewd or Lascivious Molestation, the State must prove the following three elements beyond a reasonable doubt:

Give 1a or 1b as applicable.

1. (Victim)

- a.** **was 12 years of age or older but less than 16 years of age.**
- b.** **was less than 12 years of age.**

Give 2a or 2b as applicable.

2. (Defendant)

- a.** **intentionally touched in a lewd or lascivious manner the [breasts] [genitals] [genital area] [buttocks] [clothing covering the breasts] [clothing covering the genitals] [clothing covering the genital area] [clothing covering the buttocks] of (victim).**
- b.** **intentionally [forced] [enticed] (victim) to touch the [breasts] [genitals] [genital area] [buttocks] [clothing covering the breasts] [clothing covering the genitals] [clothing covering the genital area] [clothing covering the buttocks] of (defendant).**

Give 3a or 3b as applicable.

3. (Defendant)

- a.** **was 18 years of age or older at the time of the offense.**
- b.** **was less than 18 years of age at the time of the offense.**

Definition.

The words “lewd” and “lascivious” mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

Neither (victim’s) lack of chastity nor consent is a defense to the crime charged.

The defendant’s ignorance of victim’s age, victim’s misrepresentation of [his] [her] age, or the defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Lesser Included Offenses

| <u>LEWD OR LASCIVIOUS MOLESTATION — 800.04(5)</u> | | | |
|--|-------------------------------------|--------------------------|------------------------|
| <u>CATEGORY ONE</u> | <u>CATEGORY TWO</u> | <u>FLA. STAT.</u> | <u>INS. NO.</u> |
| <u>None</u> | | | |
| | <u>Attempt</u> | <u>777.04(1)</u> | <u>5.1</u> |
| | <u>Assault</u> | <u>784.011</u> | <u>8.1</u> |
| | <u>Battery</u> | <u>784.03</u> | <u>8.3</u> |
| | <u>Unnatural and lascivious act</u> | <u>800.02</u> | <u>11.8</u> |

Comment

This instruction was adopted in 2008.

11.10(d) LEWD OR LASCIVIOUS CONDUCT

§ 800.04(6), Fla. Stat.

To prove the crime of Lewd or Lascivious Conduct, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Victim) was under the age of 16 years.**
- 2. (Defendant)**
 - a. [intentionally touched (victim) in a lewd or lascivious manner.]**
 - b. [solicited (victim) to commit a lewd or lascivious act.]**

Give 3a or 3b as applicable.

- 3. a. (Defendant) was 18 years of age or older at the time of the offense.**
- b. (Defendant) was less than 18 years of age at the time of the offense.**

Definitions.

The words “lewd” and “lascivious” mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

To “solicit” means to ask earnestly or to try to induce the person solicited to do the thing solicited.

Neither (victim’s) lack of chastity nor (victim’s) consent is a defense to the crime charged.

The defendant’s ignorance of (victim’s) age, (victim’s) misrepresentation of [his] [her] age, or the defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Lesser Included Offenses

| <u>LEWD OR LASCIVIOUS CONDUCT – 800.04(6)</u> | | | |
|--|---|--------------------------|------------------------|
| <u>CATEGORY ONE</u> | <u>CATEGORY TWO</u> | <u>FLA. STAT.</u> | <u>INS. NO.</u> |
| <u>None</u> | | | |
| | <u>Attempt</u> | <u>777.04(1)</u> | <u>5.1</u> |
| | <u>Assault</u> | <u>784.011</u> | <u>8.1</u> |
| | <u>Battery</u> | <u>784.03</u> | <u>8.3</u> |
| | <u>Unnatural and lascivious act</u> | <u>800.02</u> | <u>11.8</u> |

Comment

This instruction was adopted in 2008.

11.10(e) LEWD OR LASCIVIOUS EXHIBITION
PRESENCE OF CHILD
§ 800.04(7)(a), Fla. Stat.

To prove the crime of Lewd or Lascivious Exhibition, the State must prove the following four elements beyond a reasonable doubt:

- 1. (Victim) was under the age of 16 years.**
- 2. (Defendant)**
 - a. [intentionally masturbated.]**
 - b. [intentionally exposed [his] [her] genitals in a lewd or lascivious manner.]**
 - c. [committed [a sexual act] [sodomasochistic abuse] [sexual bestiality] [simulation of any act involving sexual activity] that did not involve actual physical or sexual contact with (victim).]**
- 3. The act was committed in the presence of (victim).**

Give 4a or 4b as applicable.

- 4. a. (Defendant) was 18 years of age or older at the time of the offense.**
- b. (Defendant) was less than 18 years of age at the time of the offense.**

Definitions.

The words “lewd” and “lascivious” mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

§800.04(1)(a), Fla. Stat.

“Sexual activity” means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of

another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

§847.001(13), Fla. Stat.

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

§847.001(15), Fla. Stat.

“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 vagina of the other.

§ 800.04, Fla. Stat. See State v. Werner, 609 So.2d 585 (Fla. 1992).

“In the presence of” means that (victim) saw, heard, or otherwise sensed that the act was taking place.

Neither (victim’s) lack of chastity nor (victim’s) consent is a defense to the crime charged.

The defendant’s ignorance of (victim’s) age, (victim’s) misrepresentation of his or her age, or the defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Lesser Included Offenses

| <u>LEWD OR LASCIVIOUS EXHIBITION PRESENCE OF CHILD — 800.04(7)(a)</u> | | | |
|--|---|--------------------------|------------------------|
| <u>CATEGORY ONE</u> | <u>CATEGORY TWO</u> | <u>FLA. STAT.</u> | <u>INS. NO.</u> |
| <u>None</u> | | | |
| | <u>Attempt</u> | <u>777.04(1)</u> | <u>5.1</u> |
| | <u>Unnatural and lascivious act</u> | <u>800.02</u> | <u>11.8</u> |

Comment

This instruction was adopted in 2008.

**11.10(f) LEWD OR LASCIVIOUS EXHIBITION
OVER COMPUTER SERVICE**

§ 847.0135(5), Fla. Stat.

To prove the crime of Lewd or Lascivious Exhibition over a Computer Online Service, the State must prove the following four elements beyond a reasonable doubt:

- 1. a. [(Defendant) intentionally masturbated.]**
- b. [(Defendant) intentionally exposed [his] [her] genitals in a lewd or lascivious manner.]**
- c. [(Defendant) committed [a sexual act] [sodomasochistic abuse] [sexual bestiality] [simulation of any act involving sexual activity] that did not involve actual physical or sexual contact with (victim).]**

- 2. The act was committed live over a [computer on-line service] [internet service] [local bulletin board service].**

- 3. (Victim) was under the age of 16 years
or
(Defendant) [knew] [should have known] [had reason to believe] that the transmission was viewed on a computer or television monitor by a victim in this state who was under the age of 16 years.**

- Give 4a or 4b as applicable.*
4. a. (Defendant) was 18 years of age or older at the time of the offense.
- b. (Defendant) was less than 18 years of age at the time of the offense.**

Definitions.

The words “lewd” and “lascivious” mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

§800.04(1)(a), Fla. Stat.

“Sexual activity” means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

§847.001(13), Fla. Stat.

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

§847.001(15), Fla. Stat.

“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 vagina of the other.

Neither (victim’s) lack of chastity nor (victim’s) consent is a defense to the crime charged.

The defendant’s ignorance of the (victim’s) age, (victim’s) misrepresentation of [his] [her] age, or the defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense is not a defense to the crime charged.

Lesser Included Offenses

| <u>LEWD OR LASCIVIOUS EXHIBITION OVER COMPUTER SERVICE — 847.0135(5)</u> | | | |
|---|----------------------------|--------------------------|------------------------|
| <u>CATEGORY ONE</u> | <u>CATEGORY TWO</u> | <u>FLA. STAT.</u> | <u>INS. NO.</u> |
| None | | | |

| | | | |
|--|----------------|------------------|------------|
| | <u>Attempt</u> | <u>777.04(1)</u> | <u>5.1</u> |
|--|----------------|------------------|------------|

Comment

This instruction was adopted in 2008. For offenses occurring prior to October 1, 2008, refer to section 800.04(7)(b), Florida Statutes (2007).