

## **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:**

*Give 1a and/or 1b and/or 1c as applicable.*

- 1.** (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).
- 2.** The act was committed in the presence of (victim).
- 3.** At the time of the offense, (victim) was under the age of 16 years.

*Give 4a or 4b as applicable.*

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

*Definitions.*

*Give if applicable.*

**The words “lewd” and “lascivious” mean the same thing: 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.**

*Lahey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).*

**“An object” includes a finger.**

*§ 827.071(e), Fla. Stat.*

**“Sodomasochistic 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 from inflicting harm on another or receiving such harm oneself.**

*§ 827.071(g), Fla. Stat.*

**“Sexual bestiality” means any sexual act 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.**

§ 800.04(2), Fla. Stat.

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

§ 800.04(3), Fla. Stat.

**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.**

*Give if applicable.*

**"Bona fide" means genuine.**

§ 775.0862, Fla. Stat.

*Reclassification for sexual offense against student by school authority figure.*

**If you find that (defendant) committed the crime of Lewd or Lascivious Exhibition in the Presence of a Child, you must also determine whether the State has proved beyond a reasonable doubt that (defendant) was an authority figure at a school and (victim) was a student at the same school.**

**"Authority figure" means a person 18 years of age or older who is employed by, volunteering at, or under contract with a school.**

**"School" means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, [or other public school level authorized under the rules of the State Board of Education]. The term "school" does not include facilities dedicated exclusively to the education of adults. *If needed, insert appropriate definitions from § 775.0862(1)(b), Fla. Stat. for "private school" or "voluntary prekindergarten education program" or "early learning program" or "public school as described in s. 402.3025(1)" or "the Florida School for the Deaf and the Blind" or the "Florida Virtual School" or the "K-8 Virtual School."***

**"Student" means a person younger than 18 years of age who is enrolled at a school.**

#### **Lesser Included Offenses**

| <b>LEWD OR LASCIVIOUS EXHIBITION PRESENCE OF CHILD; DEFENDANT 18 OR OLDER<br/>— 800.04(7)(a) and (7)(b)</b> |                               |                   |                 |
|---|-------------------------------|-------------------|-----------------|
| <b>CATEGORY ONE</b>   | <b>CATEGORY TWO</b>           | <b>FLA. STAT.</b> | <b>INS. NO.</b> |
| Lewd or lascivious exhibition presence of child; defendant less than 18                                     |                               | 800.04(7)(c)      | 11.10(e)        |
|   | Attempt                       | 777.04(1)         | 5.1             |
|   | Exposure of Sexual Organs     | 800.03            | 11.9            |
|   | Unnatural and lascivious act* | 800.02*           | 11.8*           |

#### **Comments**

\*The courts do not require the State to allege the defendant's act was "unnatural" or "against the laws of nature" in order for § 800.02, Fla. Stat., to be given as a lesser-included offense.

If the age of the defendant is not in dispute, the parties may agree to not give the necessary lesser-included offense.

There are statutory definitions of “sodomasochistic abuse” and “sexual bestiality” in § 847.001, Fla. Stat., that differ from the statutory definitions in § 827.071, Fla. Stat. As of June 2018, there is no case law that decides which definition applies for a violation of § 800.04(7)(a), Fla. Stat.

This instruction was adopted in 2008 [998 So. 2d 1138] and amended in 2015 [163 So. 3d 478], and 2018.