

Supreme Court of Florida

No. 69,804

THE FLORIDA BAR re STANDARD
JURY INSTRUCTIONS-CRIMINAL.

[May 28, 1987]

PER CURIAM

The Supreme Court Committee on Standard Jury Instructions (Criminal) has submitted to this Court the following recommendations or changes:

- (1) An amendment to SEXUAL BATTERY--VICTIM LESS THAN TWELVE YEARS OF AGE, F.S. 794.011(2);
- (2) An amendment to SEXUAL BATTERY--VICTIM TWELVE YEARS OF AGE OR OLDER, F.S. 794.011(3);
- (3) An amendment to SEXUAL BATTERY--VICTIM TWELVE YEARS OF AGE OR OLDER--CIRCUMSTANCES SPECIFIED, F.S. 794.011(4);
- (4) An amendment to SEXUAL BATTERY--PERSON TWELVE YEARS OF AGE OR OLDER--SLIGHT FORCE, F.S. 794.011(5);
- (5) A new instruction: SOLICITATION OF CHILD TWELVE YEARS OF AGE OR OLDER BUT UNDER EIGHTEEN YEARS OF AGE TO ENGAGE IN SEXUAL ACTIVITY BY PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY, F.S. 794.041(2)(a);
- (6) A new instruction: SEXUAL ACTIVITY WITH CHILD TWELVE YEARS OF AGE OR OLDER BUT UNDER EIGHTEEN YEARS OF AGE BY PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY, F.S. 794.041(2)(b);
- (7) An amendment to LEWD, LASCIVIOUS, INDECENT ASSAULT OR ACT UPON OR IN THE PRESENCE OF CHILD; SEXUAL BATTERY, F.S. 800.04;
- (8) A new instruction: CONTRABAND IN COUNTY DETENTION FACILITY, F.S. 951.22;
- (9) A new instruction: 3.04(g) - VOLUNTARY INTOXICATION;
- (10) Amended instruction on DUI MANSLAUGHTER, F.S. 316.193;
- (11) An addition in instruction 3.04(c) ENTRAPMENT, deleting the last paragraph of the instruction and substituting the following: "On the issue of entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped";
- (12) A new instruction on ACCESSORY AFTER THE FACT, F.S. 777.03;

(13) A new definition of the words "obtains or uses" as set forth in section 812.012, F.S. (1985), the following paragraph will replace the old "obtains or uses" paragraph:

"Obtains or uses" means any manner of:

- (a) Taking or exercising control over property.
- (b) Making any unauthorized use, disposition, or transfer of property.
- (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
- (d) 1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or
- 2. Other conduct similar in nature.

(14) An amendment to the theft instruction, F.S. 812.014(b),(c), dealing with value, the figure of \$100.00 will be changed to \$300.00;

(15) An amendment to the worthless check instruction, F.S. 823.05(2), changing the figure of \$50.00, which appears in element 5, is hereby changed to read \$150.00;

(16) An amendment to the worthless check-obtaining property, F.S. 823.05(4), the figure of \$50.00, which appears in element 7, is changed to read \$150.00;

(17) An amendment relating to the schedule of lesser included offenses as attached hereto.

We approve for publication these recommended changes, which follow this opinion. We caution all interested persons, however, that the notes and comments reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their correctness or applicability.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, BARKETT and KOGAN, JJ., Concur
SHAW, J., Concur specially with an opinion

SEXUAL BATTERY--VICTIM LESS THAN TWELVE YEARS
OF AGE - F.S. 794.011(2)

Before you can find the defendant guilty of sexual battery upon a person less than twelve years of age, the State must prove the following two elements beyond a reasonable doubt:

Elements

1. (Victim) was less than twelve years of age.
2.
 - a. [(Defendant) committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]
 - b. [(Defendant) committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object.]
 - c. [(Defendant) injured the sexual organ of (victim) in an attempt to commit an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] would have penetrated or would have had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]
 - d. [(Defendant) injured the sexual organ of (victim) in an attempt to commit an act upon (victim) in which the [anus] [vagina] of (victim) would be penetrated by an object.]

The punishment provided by law for sexual battery upon a person less than twelve years of age is greater depending upon the age of the defendant. Therefore, if you find the defendant guilty of sexual battery upon a person less than twelve years of age and you further find that at the time of the sexual battery the defendant was eighteen years of age or older, you should find him or her guilty of sexual battery upon a person less than twelve years of age by a person eighteen years of age or older.

If you find that the defendant was not eighteen years of age or older but did commit the sexual battery, you should find him or her guilty only of sexual battery upon a person less than twelve years of age by a person under eighteen years of age.

Give if applicable

However, any act done for bona fide medical purposes is not a sexual battery.

Definition

Give if applicable

"Union" is an alternative to penetration and means coming into contact.

Note to Judge

In the event of multiple perpetrators, give instruction on enhancement, F.S. 794.023.

Note to Judge

The option of the word "[with] (victim)" in 2a and 2c is provided to reflect the manner in which the crime was committed. See Coleman v. State, 484 So.2d 624 (Fla. 1st DCA 1986), at pages 627, 628.

SEXUAL BATTERY--VICTIM TWELVE YEARS OF AGE
OR OLDER--GREAT FORCE -
F.S. 794.011(3)

Before you can find the defendant guilty of sexual battery upon a person twelve years of age or older with the use of a deadly weapon or physical force, the State must prove the following four elements beyond a reasonable doubt:

Elements

1. (Victim) was twelve years of age or older.
2. a. [(Defendant) committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]
- b. [(Defendant) committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object.]
3. (Defendant) in the process
 - a. [used or threatened to use a deadly weapon.]
 - b. [used actual physical force likely to cause serious personal injury.]
4. The act was done without the consent of (victim).

Definitions

Give in all cases

"Consent" means intelligent, knowing and voluntary consent and does not include coerced submission.

Give if applicable

Evidence of the victim's mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing and voluntary consent.

"Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic or intoxicating substance administered to that person without his or her consent

or due to any other act committed upon that person without his or her consent.

"Mentally defective" means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

"Union" is an alternative to penetration and means coming into contact.

Give if
3a alleged

A weapon is a "deadly weapon" if it is used or threatened to be used in a way likely to produce death or great bodily harm.

Give if
3b alleged

"Serious personal injury" means great bodily harm or pain, permanent disability, or permanent disfigurement.

Give if
applicable

However, any act done for bona fide medical purposes is not a sexual battery.

Note to Judge

In the event of multiple perpetrators, give instruction on enhancement, F.S. 794.023.

Note to Judge

The option of the word "[with] (victim)" in 2a is provided to reflect the manner in which the crime was committed. See Coleman v. State, 484 So.2d 624 (Fla. 1st DCA 1986), at pages 627, 628.

SEXUAL BATTERY--VICTIM TWELVE YEARS OF AGE
OR OLDER--CIRCUMSTANCES SPECIFIED-
F.S. 794.011(4)

Before you can find the defendant guilty of sexual battery upon a person twelve years of age or older under specified circumstances, the State must prove the following four elements beyond a reasonable doubt:

Elements

1. (Victim) was twelve years of age or older.
2. a. [(Defendant) committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]
- b. [(Defendant) committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object.]
3. a. [(Victim) was physically helpless to resist.]
- b. [(Defendant) coerced (victim) to submit by threatening to use force or violence likely to cause serious personal injury and (victim) reasonably believed that (defendant) had the present ability to execute the threat.]
- c. [(Defendant) coerced (victim) to submit by threat of retaliation against (victim) or any other person and (victim) reasonably believed that (defendant) had the ability to execute the threat in the future.]
- d. [(Defendant), without prior knowledge or consent of (victim), administered or had knowledge of someone else administering to (victim) a narcotic, anesthetic or other intoxicating substance that mentally or physically incapacitated (victim).]

e. [(Victim) was mentally defective and (defendant) had reason to believe this or had actual knowledge of that fact.]

4. The act was committed without the consent of (victim).

Definitions

Give in all cases

"Consent" means intelligent, knowing, and voluntary consent and does not include coerced submission.

Give if applicable

Evidence of the victim's mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing and voluntary consent.

"Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic or intoxicating substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

"Mentally defective" means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

"Union" is an alternative to penetration and means coming into contact.

Give if 3a alleged

"Physically helpless" means that a person is unconscious, asleep or for any other reason physically unable to communicate unwillingness to act.

Give if 3b alleged

"Serious personal injury" means great bodily harm or pain, permanent disability, or permanent disfigurement.

Give if applicable

However, any act done for bona fide medical purposes is not a sexual battery.

Note to Judge

In the event of multiple perpetrators, give instruction on enhancement, F.S. 794.023.

Note to Judge

The option of the word "[with] (victim)" in 2a is provided to reflect the manner in which the crime was committed. See Coleman v. State, 484 So.2d 624 (Fla. 1st DCA 1986), at pages 627, 628.

SEXUAL BATTERY--PERSON TWELVE YEARS OF AGE
OR OLDER--SLIGHT FORCE -
F.S. 794.011(5)

Before you can find the defendant guilty of sexual battery upon a person twelve years of age or older by the use of slight force, the State must prove the following four elements beyond a reasonable doubt:

Elements

1. (Victim) was twelve years of age or older.
2. a. [(Defendant) committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]
- b. [(Defendant) committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object.]
3. (Defendant) in the process used physical force and violence not likely to cause serious personal injury.
4. The act was committed without the consent of (victim).

Definitions

Give in all cases

"Consent" means intelligent, knowing and voluntary consent and does not include coerced submission.

"Serious personal injury" means great bodily harm or pain, permanent disability, or permanent disfigurement.

Give if applicable

Evidence of the victim's mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing and voluntary consent.

"Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic or intoxicating sub-

stance administered to that person without his or her consent, or due to any other act committed upon that person with his or her consent.

"Mentally defective" means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

"Union" is an alternative to penetration and means coming into contact.

Give if
applicable

However, any act done for bona fide medical purposes is not a sexual battery.

Note to Judge

In the event of multiple perpetrators, give instruction on enhancement, F.S. 794.023.

Note to Judge

The option of the word "[with] (victim)" in 2a is provided to reflect the manner in which the crime was committed. See Coleman v. State, 484 So.2d 624 (Fla. 1st DCA 1986), at pages 627, 628.

SOLICITATION OF CHILD TWELVE YEARS OF AGE
OR OLDER BUT UNDER EIGHTEEN YEARS OF AGE
TO ENGAGE IN SEXUAL ACTIVITY BY PERSON IN
FAMILIAL OR CUSTODIAL AUTHORITY -
F.S. 794.041(2)(a)

Before you can find the defendant guilty of solicitation of a child to engage in sexual activity by a person in familial or custodial authority, the State must prove the following three elements beyond a reasonable doubt:

Elements

1. (Child) was twelve years of age or older but less than eighteen years of age.
2. (Defendant) stood in the position of familial or custodial authority with regard to (child);
3. (Defendant) [commanded] [encouraged] [hired] [requested] [tried to induce] (child) to engage in sexual activity in which:
 - a. [the sexual organ of the [(defendant)] [(victim)] would penetrate or have union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]
 - b. [the [anus] [vagina] of (victim) would be penetrated by an object.]

It is not necessary that such sexual activity actually take place for the crime to be completed.

It is not a defense that (child) was willing to engage in such sexual activity or consented to engage in such sexual activity.

Give if applicable

However, any act done for bona fide medical purposes is not a sexual battery.

Definition

Give if applicable

"Union" is an alternative to penetration and means coming into contact.

SEXUAL ACTIVITY WITH CHILD TWELVE YEARS OF AGE
OR OLDER BUT UNDER EIGHTEEN YEARS OF AGE BY
PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY -
F.S. 794.041(2) (b)

Before you can find the defendant guilty of sexual activity with a child by a person in familial or custodial authority, the State must prove the following three elements beyond a reasonable doubt:

Elements

1. (Child) was twelve years of age or older but less than eighteen years of age.
2. (Defendant) stood in the position of familial or custodial authority with regard to (child).
3. (Defendant) engaged in sexual activity with (child) in which:
 - a. [the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]
 - b. [the [anus] [vagina] of (victim) was penetrated by an object.]

It is not a defense that (child) was willing to engage in such sexual activity or consented to engage in such sexual activity.

Give if applicable

However, any act done for bona fide medical purposes is not a sexual battery.

Definition

Give if applicable

"Union" is an alternative to penetration and means coming into contact.

LEWD, LASCIVIOUS, INDECENT ASSAULT OR ACT
UPON OR IN THE PRESENCE OF CHILD; SEXUAL
BATTERY
F.S. 800.04

Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:

Elements

1. (Victim) was under the age of sixteen years.

Give as applicable

2. (Defendant)

Subsection (1)

[made an assault upon (victim) in a lewd, lascivious or indecent manner.]

[handled or fondled (victim) in a lewd, lascivious or indecent manner.]

Subsection (2)

[committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]

[committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object.]

Subsection (3)

[knowingly committed a lewd or lascivious act in the presence of (victim).]

Definitions

Give in all cases

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

Give when F.S. 800.04(1) is charged

As used in regard to this offense the words "lewd," "lascivious" and "indecent" mean the same thing. They mean a wicked, lustful, unchaste, licentious or sensual intent on the part of the person doing an act.

Give when

An "assault" is an intentional, unlawful

assault is
charged under
F.S. 800.04(1)

threat by word or act to do violence to the
person of another, coupled with an apparent
ability to do so, and doing some act which
creates a well-founded fear in such other per-
son that such violence is imminent.

Give when
F.S.
800.04(3)
is charged

As used in regard to this offense 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.

Note to
judge

There is no need to make reference
to the words "without committing the crime of
sexual battery" because this refers to forcible
sexual relations. Lanier v. State, 443 So.2d
178 (Fla. 3d DCA 1983); Chapter 84-86, Laws of
Florida.

CONTRABAND IN COUNTY DETENTION FACILITY
(F.S. 951.22)

Before you can find the defendant guilty of the crime of (crime charged), the State must prove the following two elements beyond a reasonable doubt:

Elements

1. (Defendant)

[introduced contraband into]
[knowingly possessed contraband in]
[gave contraband to an inmate in]
[received contraband from an inmate in]
[took contraband from]
[attempted to take or send contraband from]

a county detention facility.

2. (Defendant) did not do so through regular channels as duly authorized by the Sheriff or officer in charge of the facility.

The court now instructs you that for purposes of this offense, "contraband" means:

Select definition
depending upon
item alleged

(any currency or coin.)
(any article of food or clothing.)
(any written or recorded communication.)
(any intoxicating beverage or beverage which causes or may cause an intoxicating effect.)
(any narcotic, hypnotic or excitative drug.)
(any drug of any kind, including nasal inhalation) (sleeping pill) (barbiturate.)
(any controlled substance, [item alleged] is a controlled substance.)
(any firearm.)
(any instrumentality that may be or is intended to be used as a dangerous weapon.)
(any instrumentality that may be or is intended to be used as an aid in attempting to escape.)

Note to Judge:
In event municipal
facility involved,
see statute.

"County detention facility" means a county jail, a county stockade, a county prison camp and any other place used by a county or county officer to detain persons charged with or convicted of crimes, including the grounds thereof.

Definitions
Give as applicable

To "introduce" means to put inside or into.

Note to Judge:
See p. 220 for
definition of
"possession."

3.04(g) - VOLUNTARY INTOXICATION

A defense asserted in this case is voluntary intoxication by use of [alcohol] [drugs].

The use of [alcohol] [drugs] to the extent that it merely arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment does not excuse the commission of a criminal act.

However, where a certain mental state is an essential element of a crime, and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist and therefore the crime could not be committed.

As I have told you, [the intent to (specific intent charged)] [premeditated design to kill] [(other mental state)] is an essential element of the crime of (crime charged).

Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntary use of [alcohol] [drugs] as to be incapable of forming [the intent to (specific intent charged)] [premeditated design to kill] [(other mental state)], or you have a reasonable doubt about it, you should find the defendant not guilty of (crime charged).

Give where
other
applicable
crimes are
general
intent
crimes

Voluntary intoxication is not a defense to (lesser included crimes) (crimes charged in additional counts).

DUI MANSLAUGHTER
F.S. 316.193

Before you can find the defendant guilty of DUI Manslaughter, the state must prove the following three elements beyond a reasonable doubt:

Elements

1. (Defendant) operated a vehicle.
2. (Defendant), by reason of such operation, caused the death of (victim).
3. At the time of such operation (defendant)

Give 3a and/or
3b as applicable

- a. [was under the influence of] [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that his normal faculties were impaired.]
- b. [had a blood alcohol level of 0.10 percent or higher.]

Definitions

Give as
applicable

F.S.
316.003(76)

"Vehicle" is any device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices used exclusively upon stationary rails or tracks.

"Normal faculties" means those faculties of a person, such as the ability to see, hear, walk, talk, make judgments, and, in general, to normally perform the many mental and physical acts of our daily lives.

F.S.
877.111(1)

() is a chemical substance under Florida law.

Ch. 893,
F.S.

() is a controlled substance under Florida law.

"Alcoholic beverages" are considered to be beer, wine, whiskey, and all other alcoholic beverages of any kind and description which are made for human consumption.

Note to
judge

In appropriate cases, an instruction may
be given on one or more of the presumptions of
impairment established by F.S. 316.1934.

ACCESSORY AFTER THE FACT
F.S. 777.03

Before you can find the defendant guilty of being an accessory after the fact, the State must prove the following five elements beyond a reasonable doubt:

Elements

1. A (felony alleged) was committed by (name of person committing felony).
2. After the (felony alleged) was committed (defendant) maintained, assisted or gave any other aid to (name of person committing felony).
3. At that time (defendant) knew that (name of person committing felony) had committed the (felony alleged).
4. (Defendant) did so with the intent that (name of person committing felony) avoid or escape detection, arrest, trial or punishment.
5. (Defendant) was not related to (name of person committing felony) by blood or marriage as husband, wife, parent, grandparent, child, grandchild, brother or sister.

Note to judge

Define the felony alleged.

Proof of Intent

The intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case.

CHARGED OFFENSES

CATEGORY 1

CATEGORY 2

First degree (premeditated)
murder - 782.04(1)

Second degree (depraved mind)
murder - 782.04(2)
Manslaughter - 782.07

Second degree (felony) murder
782.04(3)
Third degree (felony) murder
782.04(4)
Attempt
Vehicular homicide - 782.071
Culpable negligence - 784.05(2)
Aggravated battery - 784.045
Aggravated assault - 784.021
Battery - 784.03
Assault - 784.011
*

First degree (felony)
murder - 782.04(1)

None

Attempt
Second degree (depraved mind)
murder - 782.04(2)
Second degree (felony) murder
782.04(3)
Third degree (felony) murder
782.04(4)
Manslaughter - 782.07
Aggravated battery - 784.045
Aggravated assault - 784.021
Battery - 784.03
Assault - 784.011
*

Second degree (depraved
mind) murder -
782.04(2)

Manslaughter - 782.07

Third degree (felony) murder
782.04(4)
Attempt
Vehicular homicide - 782.071
Culpable negligence - 784.05(2)
Aggravated battery - 784.045
Aggravated assault - 784.021
Battery - 784.03
Assault - 784.011
*

*But see Martin v. State, 342 So.2d 501 (Fla. 1977)

<u>CHARGED OFFENSES</u>	<u>CATEGORY 1</u>	<u>CATEGORY 2</u>
Second degree (felony) murder - 782.04(3)	None	Third degree (felony) murder - 782.04(4) Attempt
Third degree (felony) murder - 782.04(4)	None	Attempt Aggravated assault - 784.021 Battery - 784.03 Assault - 784.011 *
Manslaughter - 782.07	None	Attempt *** Aggravated assault - 784.021 Battery - 784.03 Assault - 784.011 Vehicular homicide - 782.071 Culpable negligence - 784.05(2)** Culpable negligence - 784.05(1)** *
Assault - 784.011	None	Attempt
Aggravated assault - 784.021(1)(a)	Assault - 784.011	Attempt Improper exhibition of dangerous weapons or firearms - 790.10 Discharging firearms in public 790.15
Aggravated assault - 784.021(1)(b)	Assault - 784.011	Attempt
Battery - 784.03	None	Attempt

*But see Martin v. State, 342 So.2d 501 (Fla. 1977).

**But see Smith v. State, 330 So.2d 526 (Fla. 4th DCA 1976), and Murray v. State, 328 So.2d 501 (Fla. 4th DCA 1976).

***See Taylor v. State, 444 So.2d 931 (Fla. 1984).

<u>CHARGED OFFENSES</u>	<u>CATEGORY 1</u>	<u>CATEGORY 2</u>
Aggravated battery - 784.045(1) (a)	Battery - 784.03	Attempt
Aggravated battery - 784.045(1) (b)	Battery - 784.03	Attempt Improper exhibition of dangerous weapons or firearms - 790.10 Discharging firearms in public - 790.15
Culpable negligence - 784.05(2)	Culpable negligence - 784.05(1)	None
Assault of law enforcement officer - 784.07(2)	None	Attempt Assault - 784.011*
Battery of law enforcement officer - 784.07(2)	None	Attempt Battery - 784.03*
Kidnapping - 787.01	False imprisonment - 787.02	Attempt Aggravated assault - 784.021(1) (b) Battery - 784.03(1) (a) Assault - 784.011

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*Rotenberry v. State, 468 So.2d 971 (Fla. 1985).

CHARGED OFFENSESCATEGORY 1CATEGORY 2

Discharging firearms in
public - 790.15

None

Furnishing weapons to
minors under 18 years
of age, etc. -
790.17

None

Selling arms to minors by
dealers - 790.18

None

Felons; possession of
firearms unlawful;
exception; penalty -
790.23

None

Sexual battery -
794.011(2)

Battery - 784.03

Sexual battery -
794.011(3)

Battery - 784.03

Carrying concealed firearm -
790.01(2)
Improper exhibition of
dangerous firearms - 790.10

Attempt

Attempt

Attempt

Attempt (may be applicable
when concealed weapon is
charged)
Carrying concealed firearm -
790.01(2)
Carrying concealed weapon -
790.01(1)

Attempt
Assault - 784.011
Aggravated assault -
784.021(1)(a)
Aggravated battery -
784.045(1)(a)

Attempt
Aggravated battery -
784.045(1)(a)
Aggravated assault -
784.021(1)(a)
Assault - 784.011
Sexual battery - 794.011(4)
Sexual battery - 794.011(5)

CHARGED OFFENSESCATEGORY 1CATEGORY 2

Sexual battery - 794.011(4)	Battery - 784.03	Attempt Aggravated assault - 784.021(1)(a) Assault - 784.011 Sexual battery - 794.011(5)
Sexual battery - 794.011(5)	Battery - 784.03	Attempt Assault - 784.011
Unnatural and lascivious act - 800.02	None	Attempt
Exposure of sexual organs - 800.03	None	Unnatural and lascivious act - 800.02
Lewd, lascivious, or indecent assault or act upon or in presence of child - 800.04	None	Attempt Assault - 784.011 Battery - 784.03 Unnatural and lascivious act - 800.02

CHARGED OFFENSESCATEGORY 1CATEGORY 2

Arson - 806.01(1)

Arson - 806.01(2)
Criminal mischief -
806.13(1)(b)1.Attempt
Criminal mischief -
806.13(1)(b)2.
Criminal mischief -
806.13(1)(b)3.
Criminal mischief -
806.13(2)Criminal mischief -
806.13(1)(b)1

None

Attempt

Criminal mischief -
806.13(1)(b)2Criminal mischief -
806.13(1)(b)1

Attempt

Criminal mischief -
806.13(1)(b)3Criminal mischief -
806.13(1)(b)1
Criminal mischief -
806.13(1)(b)2

Attempt

Burglary with assault
or battery or while
armed - 810.02(2)

Burglary - 810.02(3)

Attempt
Burglary of dwelling or with
human being inside -
810.02(3)
Trespass - 810.08(2)(a)
Trespass - 810.08(2)(c)Burglary of dwelling or
with human being
inside - 810.02(3)

Burglary - 810.02(3)

Attempt
Trespass - 810.08(2)(a)
Trespass - 810.08(2)(b)

Burglary - 810.02(3)

None

Attempt
Trespass - 810.08(2)(a)Possession of burglary
tools - 810.06

None

None

<u>CHARGED OFFENSES</u>	<u>CATEGORY 1</u>	<u>CATEGORY 2</u>
Possession of altered property - 812.016	None	Attempt
Dealing in stolen property-- trafficking - 812.019(1)	None	None
Dealing in stolen property--managing and trafficking - 812.019(2)	812.019(1)	Attempt
Robbery with a firearm or deadly weapon - 812.13(2)(a)	Robbery with a weapon - 812.13(2)(b) Robbery - 812.13(2)(c) Petit theft - 812.014(2)(c)	Attempt Grand theft 1st degree 812.014(2)(a) Grand theft 2d degree 812.014(2)(b) Battery 784.03 Aggravated battery 784.045 Assault 784.011 Aggravated assault- 784.021 Extortion 836.05 See <u>Davis v. State</u> , 277 So.2d 300 (Fla. 2d DCA 1973)
Robbery with a weapon- 812.13(2)(b)	Robbery - 812.13(2)(c) Petit theft - 812.014(2)(c)	Attempt Grand theft 1st degree 812.014(2)(a) Grand theft 2d degree 812.014(2)(b) Battery 784.03 Aggravated battery 784.045 Assault 784.011 Aggravated assault- 784.021 Extortion 836.05 See <u>Davis v. State</u> , 277 So.2d 300 (Fla. 2d DCA 1973)

Robbery
812.13(2)(c)

Petit theft 812.014(2)(c)

Attempt
Grand theft 1st degree
812.014(2)(a)
Grand theft 2d degree
812.014(2)(b)
Battery 784.03
Assault 784.011
Aggravated assault
784.021
Extortion 836.05
See Davis v. State, 277 So.2d
300 (Fla. 2d DCA 1973)

CHARGED OFFENSESCATEGORY 1CATEGORY 2

Child abuse - 827.04(1)	Child abuse - 827.04(2)	Attempt, if willfully Negligent treatment of child - 827.05
Child abuse - 827.04(2)	None	Attempt, if willfully Negligent treatment of child - 827.05
Forgery 831.01	None	Attempt
Uttering forged instrument - 831.02	None	No attempt - <u>King v. State</u> , 317 So.2d 852 (Fla. 1st DCA 1975)
Stopping payment; purchase of farm or grove products - 832.04	None	Attempt, except when uttering is charged - 832.04 under \$50
Stopping payment with intent to defraud - 832.041	None	Attempt, except when uttering is charged; 832.04 if farm or grove product 832.041 under \$50 Worthless check - 832.05(2) (second degree misdemeanor)
Worthless checks 832.05(2)	None	Attempt, except when uttering is charged

<u>CHARGED OFFENSES</u>	<u>CATEGORY 1</u>	<u>CATEGORY 2</u>
Bookmaking - 849.25(2)	None	Attempt
Bookmaking - 849.25(3)	Bookmaking - 849.25(2)	Attempt Bookmaking on grounds of permit-holder - 550.361
Driving under the influence - 316.193(1)	None	Attempt
DUI with damage to property or person - 316.193(3)(c)1.	DUI - 316.193(1)	None
DUI with serious bodily injury - 316.193(3)(c)2.	DUI - 316.193(1)	DUI - 316.193(3)(c)1.
DUI manslaughter - 316.193(3)(c)3.	DUI - 316.193(1)	Vehicular homicide - 782.071 DUI - 316.193(3)(c)2. DUI - 316.193(3)(c)1.
Sale, manufacture, delivery or pos- session with intent to sell, manufacture or deliver controlled substance - 893.13(1)(a)	None	Attempt, except when delivery is charged; 893.13(1)(f) if possession or delivery of cannabis charged 893.13(1)(e) if possession is charged*
Sale, delivery or pos- session of more than 10 grams of controlled substance - 893.13(1)(b)	None	Attempt, except when delivery is charged 893.13(1)(a) 893.13(1)(e) if possession is charged

*Provided that charged offense is a second degree felony under section 893.13(1)(a)1.

CHARGED OFFENSESCATEGORY 1CATEGORY 2

Delivery of controlled substance to person under 18 years old - 893.13(1)(c)	None	893.13(1)(a) 893.13(1)(f) if cannabis charged
Bringing controlled substance into state - 893.13(1)(d)	None	Attempt 893.13(1)(e) 893.13(1)(f) if cannabis charged
Possession of controlled substance - 893.13(1)(e)	None	Attempt; 893.13(1)(f) if cannabis charged
Offense of possession or delivery of not more than 20 grams of cannabis - 893.13(1)(f)	None	Attempt, except when delivery is charged
Obtaining controlled substances by fraud - 893.13(3)(a)(1)	None	
Possession of drug paraphernalia - 893.147(1)	None	Attempt
Delivery, possession with intent to deliver, or manufacture with intent to deliver drug paraphernalia - 893.147(2)	None	Attempt, except when delivery is charged

<u>CHARGED OFFENSES</u>	<u>CATEGORY 1</u>	<u>CATEGORY 2</u>
Delivery of drug paraphernalia to a minor - 893.147(3)	None	None
Trafficking in cannabis - 893.135(1)(a)	None	Attempt, except when delivery is charged 893.13(1)(a) if sale, manufacture or delivery is charged Bringing cannabis into state - 893.13(1)(d) Possession of cannabis - 893.13(1)(e) Possession or delivery of cannabis - 893.13(1)(f)
Trafficking in cocaine - 893.135(1)(b)	None	Attempt, except when delivery is charged 893.13(1)(a) if sale, manufacture or delivery is charged Bringing cocaine into state - 893.13(1)(d) Possession of cocaine - 893.13(1)(e)
Trafficking in illegal drugs - 893.135(1)(c)	None	Attempt, except when delivery is charged 893.13(1)(a) if sale, manufacture or delivery is charged Bringing same illegal drug as charged into state - 893.13(1)(d) Possession of same illegal drug - 893.13(1)(e)

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CHARGED OFFENSES

CATEGORY 1

CATEGORY 2

Trafficking in
phencyclidine -
893.135(1)(d)

None

Attempt, except when delivery
is charged
893.13(1)(a) if sale, manu-
facture or delivery is
charged
Bringing phencyclidine into
state - 893.13(1)(d)
Possession of phencyclidine -
893.13(1)(e)

Trafficking in
methaqualone -
893.135(1)(e)

None

Attempt, except when delivery
is charged
893.13(1)(a) if sale, manu-
facture or delivery is
charged
Bringing methaqualone into
state - 893.13(1)(d)
Possession of methaqualone -
893.13(1)(e)

SHAW, J., specially concurring.

The last comprehensive review and revision of the Standard Jury Instructions in Criminal Cases occurred during the period 1977-81. We approved the report of the committee, with modifications, in April 1981. In the matter of USE BY the TRIAL COURTS OF the STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES and the Standard Jury Instructions in Misdemeanor Cases, 431 So.2d 594 (Fla. 1981). The Schedule of Lesser Included Offenses included therein was grounded on Brown v. State, 206 So.2d 377 (Fla. 1968), and the single transaction rule.

The schedule of lesser included offenses has not been reviewed and revised to conform it to section 775.021(4), Florida Statutes (1976), as amended thereafter by chapter 83-156, section 1, Laws of Florida. Section 775.021(4), Florida Statutes (1983), abrogates the single transaction rule by mandating that there be separate convictions and sentences for all separate offenses occurring in the course of one criminal transaction or episode. The statute, as amended in 1983, also mandates that offenses are separate if each offense requires proof of an element not present in the other and that this determination will be based exclusively on the statutory elements of the offenses, not the accusatory pleadings or the proof adduced at trial. The effect of the 1983 change was to define and limit lesser included offenses to those offenses whose statutory elements are completely subsumed within the greater charged offense, i.e., those which are not separate offenses. This requires that two basic changes be made to the schedule of lesser included offenses. First, because permissive lesser included offenses (category two) are based on the accusatory pleadings and proof at trial and their statutory elements are, by this Court's definition, not subsumed within the charged greater offense, they are, by legislative definition, separate offenses. Consequently, category two offenses, if truly permissive, cannot be instructed on as lesser included offenses and the entire category must be deleted from the schedule of lesser included offenses. Second,

the definition and method of determining separate offenses must be rigorously applied to category one, necessarily included lesser offenses, to ensure that each category one offense is in fact statutorily subsumed within the charged greater offense and not a separate offense.

I agree with the recommendations and changes contained herein because they are necessary in order to ensure consistency within the schedule as it now exists. However, because we have never tasked the committee with reexamining the schedule in light of section 775.021(4), the changes perpetuate the inherent errors which result from faulty policy premises, i.e, the single transaction rule and Brown. Accordingly, I call again for a comprehensive review and revision of the schedule of lesser included offenses and Florida Rules of Criminal Procedure 3.490 and 3.510 to conform them to section 775.021(4). For a fuller examination of these faulty premises, errors, and flaws, see my dissents in Wilcott v. State, No. 67,473 (Fla. May 21, 1987), State v. Wimberly, 498 So.2d 929 (Fla. 1986); Linehan v. State, 476 So.2d 1262 (Fla. 1985); and Green v. State, Shaw, J., concurring in result only, 475 So.2d 235 (Fla. 1985).

Original Proceeding - Florida Standard Jury Instructions (Criminal)