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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES REPORT 2014-03 **CASE NO.: SC14-**

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To the Chief Justice and Justices of the Supreme Court of Florida:

This report, proposing amended instructions to the Florida Standard Jury Instructions in Criminal Cases, is filed pursuant to Article V, section 2(a), Florida Constitution.

	Instruction #	Topic
Proposal 1	**11.1**	**Sexual Battery – Victim Less Than 12 Years of Age**
Proposal 2	**11.2**	**Sexual Battery – Victim 12 or Older (Great Force or Deadly Weapon)**
Proposal 3	**11.3**	**Sexual Battery – Victim 12 or Older (Specified Circumstances)**
Proposal 4	**11.4**	**Sexual Battery – Victim 12 or Older**
Proposal 5	**11.5**	**Solicitation of a Child to Engage in an Act that Constitutes Sexual Battery by a Person in Familial or Custodial Authority**
Proposal 6	**11.6**	**Sexual Battery – Victim 12 – Under 18 by a Person in Familial or Custodial Authority**

The proposals are in Appendix A. Words and punctuation to be deleted are shown with strike-through marks; words and punctuation to be added are underlined.

1. Overview

In SC12-2031, the Committee filed a proposal for Instruction 11.1 (Capital Sexual Battery), which the Court rejected for two reasons: (1) There was no legal authority cited for the Committee's proposed language about the victim's consent, lack of chastity, and mistakes about the victim's age not being defenses. (2) The box of lesser-included offenses had "Battery" in both Category 1 and Category 2.

As a result, the Court sent a referral letter for the Committee to reconsider its proposal (see Exhibit B).

During the reconsideration, the Committee realized that there was a deficiency with the elements section in all of the sexual battery instructions. Accordingly, the Committee revised Instructions11.1 – 11.6.

Note: None of these proposals have been published because the Committee wanted to meet the Court's April 1, 2014 deadline to file a report.

2. The Elements of Sexual Battery

The crimes of sexual battery covered by Instructions 11.1-11.6 are in s. 794.011(2) - (5), (8)(a), and (8)(b).

In s. 794.011(1)(h), sexual battery is defined as: **Oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any object.**

The Committee concluded that this definition of sexual battery creates 18 possible ways a sexual battery can be committed between a defendant (D) and a victim (V). They are:

1. D's mouth penetrated V's sexual organ.
2. V's mouth penetrated D's sexual organ.
3. D's mouth had union with V's sexual organ.
4. V's mouth had union with D's sexual organ.
5. D's anus was penetrated by V's sexual organ.
6. V's anus was penetrated by D's sexual organ.
7. D's anus had union with V's sexual organ.
8. V's anus had union with D's sexual organ.
9. D's vagina penetrated V's sexual organ.
10. V's vagina penetrated D's sexual organ.
11. D's vagina had union with V's sexual organ.
12. V's vagina had union with D's sexual organ.
13. D penetrated V's anus with an object.
14. D penetrated V's vagina with an object.
15. D forced V to penetrate V's anus with an object.
16. D forced V to penetrate V's vagina with an object.
17. D forced V to penetrate D's anus with an object.

18. D forced V to penetrate D's vagina with an object.

In the existing standard instruction, element 2a covers #1-#12 above. Element 2a reads as follows:

(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)**].**

In the existing standard instruction, element 2b covers #13- #16 above. Element 2b reads as follows:

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

However, element 2b does not cover a sexual battery committed via options #17 or #18 above. In plain English, the standard instruction does not cover the circumstance where a defendant forces a victim to insert an object into the defendant's anus or vagina. Such a circumstance appears to be covered by s. 794.011. Furthermore, this circumstance appears to have been considered as a possible sexual battery in *Watkins v. State*, 48 So. 3d 883 (Fla. 1st DCA 2010)(sexual battery conviction reversed because the evidence demonstrated that defendant forced victim to lick his anus, not penetrate his anus with victim's tongue).

To ensure that the standard sexual battery instructions completely cover all possible variations in the sexual battery statutes, the Committee voted 6-3 to make element 2b in Instructions 11.1-11.4 read as follows:

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

Note: The Committee added the word "with" to element 2b for the same reason that the word "with" was added to element 2a, even though the phrase "sexual battery upon…." is in the sexual battery statutes and the phrase "sexual battery with…" is not. More specifically, the word "with" was added to element 2a after the issuance of *Coleman v. State,* 484 So. 2d 624 Fla. 1st DCA 1986). In *Coleman*, a defendant who forced a victim to perform oral sex on him claimed that the sexual battery statute did not cover that activity because the victim had her mouth penetrated and not her sexual organ. The 1st DCA disagreed and wrote: "We hold that the statute is not intended to be read from the perspective of either the accused or the victim, but is intended to be read from the standpoint of either one performing a sexual act upon the other." *Coleman* at 628.

A minority of three members was not in favor of amending element 2b in the absence of case law directly on point. The majority of members, however, were convinced by the language of the statute and *Coleman v. State* and *Watkins v. State*. The majority also thought that one of the reasons there might not be case law directly on point was because the existing standard instruction may discourage prosecutors from filing a sexual battery charge for the circumstance where D forces V to insert an object into D's anus or vagina.

3. **The language about "Consent is not a defense"**

As mentioned above, a prior Committee proposal for Instruction 11.1 was rejected because there was no legal authority cited for the proposition that a victim's consent was not a defense to capital sexual battery. In response, in Instruction 11.1, the Committee voted unanimously to add:

> *Give if requested. Khianthalat v. State, 974 So. 2d 359 (Fla. 2008).*
> **Consent of** (victim) **is not a defense to the crime charged.**

Khianthalat v. State supports the idea that Florida's sexual battery statutes incorporate a presumption of incapacity to consent to sexual intercourse by a person under the age of 12.

Also, in Instructions 11.5 and 11.6, the Committee unanimously added an italicized cite to s. 794.011(8) above the part of the instruction that informs jurors that consent is not a defense. That statute specifically states: "Without regard to the willingness or consent of the victim…".

4. **The language about "Mistakes about the victim's age is not a defense"**

As mentioned above, a prior Committee proposal for Instruction 11.1 was rejected because there was no legal authority cited for the proposition that mistakes regarding the victim's age was not a defense. In response, the Committee voted unanimously to add the following language in three instructions (11.1, 11.5, & 11.6) because those three instructions pertain to sexual battery statutes where the "criminality of conduct depends upon the victim's being below a certain specified age":

<u>*§ 794.021 Fla. Stat.*</u>

<u>**Ignorance of** (victim's) **age,** (victim's) **misrepresentation of his or her age, or a defendant's bona fide belief of** (victim's) **age is not a defense to the crime charged.**</u>

Note: s. 794.021 states: "When, in this chapter, the criminality of conduct depends upon the victim's being below a certain specified age, ignorance of the age is no defense. Neither shall misrepresentation of age by such person nor a bona fide belief that such person is over the specified age be a defense."

5. <u>**The language about "Victim's lack of chastity is not a defense"**</u>

As mentioned above, a prior Committee proposal for Instruction 11.1 was rejected because there was no legal authority cited for the proposition that a victim's lack of chastity was not a defense. Because the State does not have to prove that the victim was chaste in a sexual battery prosecution and because a victim's lack of chastity is not an affirmative defense to sexual battery, the Committee thought its proposition of law was accurate. The question was whether there should be any mention of a victim's lack of chastity in the standard sexual battery instructions.

The majority of the Committee thought that such language should be included because of the thinking behind s. 794.022, the rape shield statute. That statute states that specific instances of prior consensual sexual activity between a victim and any person other than the offender shall not be admitted into evidence in a sexual battery prosecution, unless it is first established…that such evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease. Another exception to the general rule is that the evidence of specific instances of prior consensual sexual activity between an alleged victim and someone other than the offender is admissible when consent is an issue and the evidence tends to establish a pattern of behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.

The majority of members believed that although the general rule is that evidence about a victim's prior sexual history is inadmissible in a sexual battery case, evidence about the victim's prior sexual history often finds its way to the jury's ears, even when the exceptions in s. 794.022 do not apply. For example, in capital sexual battery trials, members noted that they have seen evidence of a child's prior sexual history be admitted under the theory that the child had sex with

another person and is remembering things incorrectly. Other members noted that in many cases, the only "defense" is to smear the victim by suggesting promiscuity. Other members were persuaded by s. 800.04(2) – which states: "Neither the victim's lack of chastity nor the victim's consent is a defense to the crimes proscribed by this section." The Committee realized that the "this section" in s. 800.04(2) did not apply sexual battery prosecutions under s. 794.0111. However, these members thought the idea behind s. 800.04(2) provided further support that jurors can be instructed that the victim's lack of chastity is not a defense. In essence, the majority view was although lack of chastity is not generally admissible, the victim's lack of chastity is often heard by jurors and is not – in and of itself - a defense to a charge of sexual battery. As a result, the majority view was to add language about lack of chastity not being a defense.

The minority view was that because s. 800.04(2) does not apply to s. 794.011 and because s. 794.022 is only a rule of evidence, the standard sexual battery instructions should not mention anything about a victim's lack of chastity.

The final vote was 6-2 (with one abstention), in favor of adding the following language to all of the sexual battery instructions:

> *Give if requested. § 794.022 Fla. Stat.*
> (Victim's) **lack of chastity is not a defense to the crime charged.**

6. Battery as a lesser-included offense of Sexual Battery

As mentioned above, a prior Committee proposal for Instruction 11.1 was rejected because the Committee had put Battery in both Category 1 and Category 2.

Upon reconsideration, the Committee concluded that there are two different types of simple battery. In s. 784.03(1)(a)1, a battery is committed by a defendant actually and intentionally touching or striking another person against that person's will. In s. 784.03(1)(a)2, a battery is committed by a defendant intentionally causing bodily harm to another person.

The Committee did not think that the s. 784.03(1)(a)2 type of simple battery was a necessarily lesser included offense of sexual batteries, because a sexual battery charging document that tracks s. 794.011(2)-(5) would not include an allegation that the defendant intentionally caused bodily harm to the victim and

because a defendant could commit a sexual battery without causing bodily harm to the victim. However, all sexual batteries charged under s. 794.011(2)-(5) would have to include an intentional touching without consent. Accordingly, in Instructions 11.1-11.4, the Committee cited s. 784.03(1)(a)1 as the appropriate Category One type of battery offense. In Instruction 11.6, the Committee put Battery in Category 2 because Battery is not a necessary lesser-included offense of the Sexual Battery covered in s. 794.011(8)(b). Instead, the Committee cited to s. 784.03 for Battery as a Category 2 offense to cover both types of simple batteries.

The Committee's changes to the lesser-included boxes for these Sexual Battery proposals was unanimous.

PROPOSAL #1: SEXUAL BATTERY — VICTIM LESS THAN 12 YEARS OF AGE

The five changes discussed above were made to Instruction 11.1. Specifically, 1) element 2b is amended to cover the circumstance where a defendant forces the victim to insert an object into the defendant's vagina or anus; 2) language about consent not being a defense is added along with an italicized cite to *Khianthalat v. State*; 3) language about mistakes regarding the victim's age is added along with an italicized cite to s. 794.021; 4) language about lack of victim's chastity not being a defense was added along with an italicized cite to s. 794.022; and 5) a specific reference to s. 784.03(1)(a)1was added as the appropriate cite to battery (intentional touching against the victim's will) as a necessary lesser-included offense of capital sexual battery.

The Committee also unanimously recommends that the italicized sections referring to multiple perpetrators, *Coleman v. State*, and *Glover v. State* be deleted. The multiple perpetrators reference is not applicable because s. 794.023 does not apply to capital sexual battery. Also, the Committee felt that enough time had passed since *Coleman v. State* and *Glover v. State* had been issued so that citations to those cases were no longer necessary. Last, the Committee unanimously agreed to add Felony Battery as Category 2 lesser offense and to list the Category 2 lesser-included offenses in descending order of severity.

PROPOSAL #2: SEXUAL BATTERY —VICTIM 12 YEARS OF AGE OR OLDER — GREAT FORCE OR DEADLY WEAPON

Most of the changes discussed above were also made to Instruction 11.2. Specifically, 1) element 2b was amended so that the standard instruction completely covers all possibilities under the sexual battery statute; 2) language

about the victim's lack of chastity not being a defense was added; and 3) a specific reference to s. 784.03(1)(a)1 was added as the appropriate citation to battery as a lesser-included offense.

The Committee also recommends that the reference to multiple perpetrators be deleted because s. 794.023 does not apply to a life felony (Instruction 11.2 covers s. 794.011(3), which is a life felony). Also, the reference to *Coleman v. State* is no longer necessary and the Committee added Felony Battery as a Category 2 lesser-included offense. The only other change is that the Committee added language to the title to reflect that this instruction covers the circumstance where the defendant either used or threatened to use a deadly weapon or used force likely to cause serious personal injury.

PROPOSAL #3: SEXUAL BATTERY — VICTIM 12 YEARS OF AGE OR OLDER — SPECIFIED CIRCUMSTANCES

All of the proposed relevant changes to this instruction are discussed above. The only additional change proposed to Instruction 11.3 is that the Committee made the title of the crime in the lesser-included box the same as the title of the crime at the beginning of the instruction.

PROPOSAL #4: SEXUAL BATTERY — PERSON 12 YEARS OF AGE OR OLDER

All of the proposed relevant changes to Instruction 11.4 are discussed above.

PROPOSAL #5: SOLICITATION OF CHILD UNDER 18 YEARS OF AGE TO ENGAGE IN AN ACT THAT CONSTITUTES SEXUAL BATTERY BY PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY

For Instruction 11.5, the Committee unanimously added an italicized cite to Fla. Stat. 794.011(8) above the language about consent not being a defense. The Committee also added language about victim's lack of chastity not being a defense and mistakes about the victim's age not being a defense, with cites in italics to Fla. Stat. 794.022 and 794.021, respectively, for the reasons discussed above. Finally, the elements section was also amended to cover all possibilities of sexual battery.

Proposal #6: SEXUAL BATTERY UPON CHILD 12 YEARS OF AGE OR OLDER BUT UNDER 18 YEARS OF AGE BY PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY

For Instruction 11.6, the Committee amended the elements section to cover all possibilities of sexual battery. The Committee also added an italicized cite to Fla. Stat. 794.011(8) above the language about consent not being a defense. The Committee then added language about the victim's lack of chastity not being a defense and mistakes about the victim's age not being a defense, with cites to Fla. Stat. 794.022 and 794.021, for the reasons discussed above. In the lesser-included box, the Committee added Battery, 784.03 in Category 2. The thinking of the Committee was that both types of simple battery (intentional touching against victim's will and intentionally causing bodily harm) might be alleged and proven for this charge and thus a citation to s. 784.03 was sufficient.

Conclusion

The Standard Jury Instructions in Criminal Cases Committee respectfully requests that the Court publish standard jury instructions 11.1-11.6 for comments.

Respectfully submitted this 20th day of February, 2014.

s/ Judge Joseph A. Bulone
The Honorable Joseph A. Bulone
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CERTIFICATE OF COMPLIANCE

I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

s/ Judge Joseph A. Bulone
HONORABLE JOSEPH A. BULONE
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