

16.8 USE OF A CHILD IN A SEXUAL PERFORMANCE WITH CONSENT OF PARENT, LEGAL GUARDIAN, OR CUSTODIAN

§ 827.071(2), Fla. Stat.*

To prove the crime of Use of a Child in a Sexual Performance, the State must prove the following four elements beyond a reasonable doubt:

- 1. (Defendant) consented to the participation of (victim) in a sexual performance.**
- 2. (Defendant) knew the character and content of the performance.**
- 3. At the time, (victim) was a child.**
- 4. (Defendant) was the [parent] [legal guardian] [custodian] of (victim).**

“Sexual performance” means any performance or part thereof which includes sexual conduct by a child. [A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

“Performance” means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

“Child” means any person, whose identity is known or unknown, younger than 18 years of age.

Give as applicable.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

“Sadomasochistic 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.

“Sexual battery” means oral, anal, or female genital* penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object[]; however, “sexual battery” does not include an act done for a bona fide medical purpose. “Bona fide” means genuine[].

“Female genitals*” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Give if applicable.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

“Sexual bestiality” means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or female genitals of the other.

“Simulated” means the explicit depiction of “sexual conduct,” as defined above, which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

Comments

*Effective October 1, 2022, the Legislature changed “vagina” to “female genitals” in sex crimes-related statutes. Judges should ensure the jury instructions contain correct statutory terms, which will depend on the date alleged in the charging document. *Flores v. State*, -- So. 3d -- (Fla. 4th DCA 2024) is an example of an appellate court finding fundamental error when the trial judge expanded the definition of “vaginal penetration” by instructing on “female genital penetration.”

As of November 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or like elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2008 [995 So. 2d 489] and amended on December 21, 2022.