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LEWD OR LASCIVIOUS CONDUCT

Contents

CHAPTER 800: LEWDNESS; INDECENT EXPOSURE

Important Note: Effective October 1, 1999, the Indecent Assault Statute (800.04) was completely rewritten to reflect a wider variety of lewd acts. Most of the principles reflected in the new version of the statute are the same as those that existed in the old statute, but some confusion will inevitably arise when comparing the appellate decisions as applied to the separate versions of the statute. This chapter was originally written pursuant to the law interpreting the pre-1999 revisions, so any confusion in terminology in most likely the result of that fact.

Definitions for F.S. 800.02 and 800.03 as set forth in the Standard Jury Instructions

See Miscellaneous Filing Considerations/Multiple Counts for additional cases in this area.

Lascivious:

Lustful, normally tending to excite a desire for sexual satisfaction.

Public Place:

Any place intended or designed to be frequented or resorted to by the public.

Unnatural:

Not in accordance with nature or with normal feelings or behavior.

Conforti v. State, 800 So.2d 350 (Fla. 4th DCA 2001):

Error to revoke probation on basis of lewd and lascivious act in violation of section 800.02 where charge was based on encounter in which defendant sat in his car and performed solitary act of masturbation while undercover police officer stood outside and watched.

Plain wording of statute requires that alleged lewd and lascivious act be committed by a person with "another person."

An act under this section must be offense to some other person.

Lowman v. Moore, 744 So.2d 1210 (Fla. 2d DCA 1999):

Defendant was improperly convicted of lewd assault upon a child when the victim was 16 years of age at the time of the offense. The age of the child is an essential element of the offense.

The case is remanded to sentence the defendant for commission of an unnatural and lascivious act, a violation of section 800.02 and impermissible as to included offense of 800.04.

Harris v. State, 742 So.2d 835 (Fla. 2d DCA 1999):

Where defendant was charged with one count for violating section 800.04(3), in that he committed an act defined as sexual battery upon a child under age 16, and the Information alleged defendant's penis penetrated or had union with the minor victim's vagina, trial court properly refused to give jury instruction on unnatural and lascivious act, as proscribed by section 800.02 as the lesser included offense.

Discussion: This opinion provides a nice little history of section 800.02 and shows how appellate courts have basically interpreted this statute to apply to just about every type of sex other than penis to vagina sex.

Williams v. State, 627 So.2d 1279 (Fla. 1st DCA 1993):

It was reversible error in prosecution for lewd, lascivious or indecent assault upon child under 16 years of age to refuse defendant's requested instructions on category 2 offense of unnatural and lascivious act; fact that victim was under 16 years old at time of incident did not eliminate necessity of such instruction.

No instruction on exposure of sexual organs was required in prosecution for lewd, lascivious or indecent assault upon child under 16 years of age, as incident occurred in defendant's home.

Discussion: This case involved fondling of the victim's genitals.

Thomas v. State, 326 So.2d 413 (Fla. 2d DCA 1975):

Act of forced oral copulation constituted "unnatural and lascivious act" within meaning of this criminal statute prohibition such act.

Vulgar and Indecent Manner:

In such a manner as to be offensive to common decency, lewd or obscene.

Ross v. State, 876 So.2d 684 (Fla. 4th DCA 2004): *Ross*

Defendant was properly convicted for violating section 800.03 by wearing, in retail store, short shorts that were substantially sure to lead to exposure of penis.

Defendant's argument that exposure was accidental without lascivious intent were factual matters that trial judge decided against defendant, and circuit court was required to uphold trial judge's factual finding where it was supported by competent substantial evidence.

W.R.H v. State, 763 So.2d 1111 (Fla. 4th DCA 2000):

Evidence that defendant mooned a group of people on a public street and then exposed his penis to them while shouting vulgarities was sufficient to constitute the charge of exposure of sexual organs.

It was a jury question whether the suspect committed this act in a vulgar or indecent manner.

Wonyetye v. State, 648 So.2d 797 (Fla. 4th DCA 1994):

Evidence that defendant, while on private premises of another, masturbated as he looked into bedroom windows where young girls were sleeping fit definition of "vulgar or indecent" exposure of sexual organs.

Discussion: The defendant claimed that his act was not criminal because there was no evidence that he intended anyone to see him. The appellate court then goes on to define the relevant terms while rejecting defendant's argument.

Goodmakers v. State, 450 So.2d 888 (Fla. 2d DCA 1984):

Defendant's conduct in being nude in place which was not set apart for that purpose, but while he was asleep or unconscious, motionless on his back, and not in state of sexual arousal did not constitute violation of indecent exposure statute. State could have prosecuted for misdemeanor of disorderly conduct.

Definitions for F.S. 800.04 as set forth in the Standard Jury Instructions:

Assault:

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

Rider v. State, 724 So.2d 617 (Fla. 5th DCA 1998):

Evidence presented issues for jury as to whether 12-year-old child had been assaulted and as to whether defendant was assailant; victim testified that defendant took off victim's clothes, laid on top of her and put his penis in her vagina, then later made her get back into bed, rolled her over onto her stomach and "put his penis into [her] butt," and examining physician testified that child had two-inch tear in her vagina, that there were dried secretions on victim, that outside area of her thighs and buttocks showed redness and irritation, and that injuries were of recent origin.

Timot v. State, 738 So.2d 387 (Fla. 4th DCA 1999):

Information alleging lewd assault by committing a sexual battery on a child under 16 did not entitle the defendant to an instruction on assault since it was not an element of the offense.

Assault is not an element of sexual battery upon a child under the age of 16.

Lifka v. State, 530 So.2d 371 (Fla. 1st DCA 1988):

Absence evidence of overt act by defendant that constituted threat to do violence or injury to victims, defendant's exposing his penis to young girls on two separate occasions did not constitute lewd and lascivious assaults.

Defendant's conviction for lesser included offense of indecent exposure in prosecution for lewd and lascivious assault was supported by evidence that, on two separate occasions defendant exposed his penis to young girls, each under the age of 16.

Discussion: This case involves a fact pattern frequently seen in our unit. The defendant simply drove by the victims and raised his hips so that they could see his penis. For some unknown reason, the State charged the defendant with the "handle, fondle or make an assault upon" language of the statute instead of the "lewd act in the presence of" language. It is for this reason that the case was reversed. The court speculates that the State may have charged it as an assault so that it could justify charging a separate count for each victim.

Lewd and Lascivious:

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.

Andrews v. State, 130 So.3d 788 (Fla. 1st DCA 2014):

Sufficient evidence that defendant acted with lewd or lascivious intent in asking victim to take a nude photograph of herself during second encounter between defendant and victim in bathroom of victim's friend's house supported conviction for solicitation of a child under the age of 16 to commit a lewd or lascivious act; victim testified that she felt uncomfortable after first encounter in bathroom because defendant was saying things she felt should have been directed to “a grown woman,” and that defendant asked her to take a nude photograph on the spot during second encounter, in bathroom only the two of them shared, while rubbing her leg and looking her “up and down.”

Generally speaking, the words “lewd” and “lascivious,” when used in a statute to define an offense, usually have the same meaning, that is, an unlawful indulgence in lust, eager for sexual indulgence.

Which acts or conduct is lewd or lascivious, for purposes of a criminal offense, is a factual issue to be decided on a case-by-case basis.

Keum San Yi v. State, 2013 WL 6331660 (Fla.App. 5 Dist.)

Trial court's jury instruction on lewd and lascivious molestation, which required State to prove that defendant touched the buttocks, breasts, or genitalia of the victim, or the clothes covering the buttocks, breasts, or genitalia of the victim, was fundamentally erroneous, where instruction improperly omitted the essential element that defendant touch the victim in a lewd or lascivious manner.

Issue of whether defendant's touching of victim was done in a lewd or lascivious manner was contested at trial on charges including lewd and lascivious molestation, and thus erroneous jury instruction on the offense that omitted the element that the defendant's touching of the victim be done in a lewd or lascivious manner required reversal of defendant's convictions of the offense; defendant acknowledged that, as victim's adoptive father, he hugged and had other physical contact with her, but he expressly denied any improper touching.

Usry v. State, 2013 WL 4104463 (Fla.App. 1 Dist.)

Evidence was sufficient to support finding that defendant exposed his genitals in a lewd or lascivious manner, so as to support conviction for felony lewd or lascivious exhibition; despite defendant's argument that he only committed misdemeanor offense of exposure of genital organs, evidence established that defendant repeatedly stood across from thirteen-year-old victim's bus stop, made noise to get her attention, and exposed his genitals to her, and victim testified that defendant waved his “private part” at her.

Marra v. State, 970 So.2d 475 (Fla. 5th DCA 2007):

Evidence was insufficient to show that defendant tongue-kissed or “French” kissed minor victim, as required for conviction for lewd and lascivious conduct regarding a minor; evidence and inferences established a kiss in which defendant's tongue made contact with victim's cheek and lips but did not make contact with victim's

tongue or enter victim's mouth.

Evidence was sufficient to show that defendant attempted to tongue-kiss or "French" kiss minor victim, so as to support conviction for attempted lewd and lascivious conduct regarding a minor; defendant was prevented from "French" kissing victim only because victim moved her head on his first attempt and had her lips closed on his second attempt.

Discussion: This is an interesting case that shows how important it is to use proper language in your charging document. The court noted that the State had to specifically prove a "French Kiss" because they charged it that way in the information. The court then went on to cite dictionary references for the term to show that it required a tongue-to-tongue contact. The court rejected the State's argument that the term was surplusage. In conclusion, be careful not to add elements to your charge by including unnecessary language.

State v. Santiago, 938 So.2d 603 (Fla. 4th DCA 2006):

Issue of whether defendant's actions constituted lewd and lascivious behavior was for jury, where it was undisputed that defendant placed his hands on the buttocks of child who was less than twelve years of age. It was improper for court to dismiss case on a 3.190(c)(4) motion.

Rosen v. State, 940 So.2d 1155 (Fla. 5th DCA 2006):

Evidence was sufficient to support conviction of lewd and lascivious molestation; although defendant did not try to kiss or proposition students in his classroom, and made no other sexually indicative statements or motions, victims testified that defendant deliberately rested his hand on, rubbed, or squeezed their buttocks.

When conduct occurs as described in statute on lewd and lascivious molestation, question of whether acts were committed lewdly or lasciviously is one of fact.

For purposes of statute on lewd and lascivious molestation, "lewd and lascivious conduct" generally denotes unlawful indulgence of lust, gross indecency with respect to sexual relations, or wicked, lustful, unchaste, licentious, or sensual conduct.

Under statute on lewd and lascivious molestation, lewdness must be determined on case-by-case basis and may be imputed from circumstances.

Competent, substantial evidence supported convictions of battery, based on defendant's inappropriate touching of students in his classroom; state presented evidence that defendant intentionally touched students without their consent.

Even if convictions of battery were not supported by evidence, invited error rule would preclude reversal, where defendant insisted on inclusion of jury instruction of battery as lesser included of lewd and lascivious molestation charges, and, in closing argument, defendant reminded jury that they could convict him of battery.

Under invited error rule, defense counsel may not "sandbag" trial judge by requesting and approving jury instruction that defense knows will result in automatic reversal, if given.

Method v. State, 920 So.2d 141 (Fla. 4th DCA 2006):

Issue of whether defendant's actions constituted lewd and lascivious behavior was for jury, where defendant allegedly rubbed a child's back underneath her clothing, touched a child's back and/or stomach and/or thigh underneath her clothing, and hugged a child from behind thereby placing his hands over her breast area.

M.L.C. v. State, 875 So.2d 810 (Fla. 2d DCA 2004):

Evidence that juvenile briefly touched two of his middle school classmates on their clothed buttocks without any accompanying suggestive remarks or body language was insufficient to show lewd or lascivious intent. Facts constituted battery.

Williamson v. State, 839 So.2d 921 (Fla. 2d DCA 2002):

Defendant was erroneously convicted of lewd and lascivious act on person under sixteen years of age on basis of brief events occurring when child dumped coins into swim trunks defendant was wearing.

Defendant did not initiate event, defendant directed child to stop when he became uncomfortable with situation, and there was not

evidence from which court could infer wicked, lustful, unchaste, licentious, or sensual design on part of defendant.

Farrell v. State, 791 So.2d 598 (Fla. 3d DCA 2001):

Defendant was properly convicted lewd or lascivious assault upon a child where only evidence presented at trial involved victim touching defendant.

Intent can be imputed from circumstances, and requisite intent can be imputed from defendant's acquiescence to victim's touch.

Discussion: No facts or detailed discussion is provided in this case. It simply points to the Egal v. State opinion for this proposition.

Burks v. State, 766 So.2d 468 (Fla. 5th DCA 2000):

Error to deny motion for judgment of acquittal where there was no evidence which would support conclusion that defendant's act of coming from behind his trailer while naked and putting his hands on his hips was act of "wicked, lustful, unchaste, licentious or sexual design."

Trailer was located in remote location on five acres of land, and there was no evidence that defendant knew of presence of others.

Discussion: This case is worth reading for entertainment value. The perplexed appellate judges repeatedly display their amazement at the conduct of the victims in this case. Not only did they find that the pitiful defendant had done nothing wrong, they expressed amazement that the State did not file aggravated battery charges against the victim's mother's fiancee for beating up the defendant after learning of the alleged lewd act. "Astonishing" and "incredible" are words frequently used to refer to the conduct of the victim and her family members. The court also noted that this opinion is confined to the "unique facts and circumstances of this particular case." There is also good review of how other appellate decisions have defined "lewd and lascivious."

Washington v. State, 766 So.2d 325 (Fla. 4th DCA 2000):

Trial court did not err in denying defendant's motion for judgment of acquittal and permitting jury to decide, based upon totality of

circumstances, whether defendant's actions in brushing, touching or caressing victim outside of her clothing violated statute.

No abuse of discretion in denial of motion for new trial on ground that police officer vouched for truth of victim's testimony during his testimony on redirect examination, where defense opened door to line of testimony on cross examination, and officer did not testify that he in fact believed victim's statements.

Discussion: The fifteen year old victim went to speak to her teacher at Royal Palm Beach High School. When she entered his classroom, the light were on and the door was open. During their conversation the teacher went to the door twice, walked outside, looked outside the door, and then came back inside. The second time, after looking once more out into the hallway, he closed the door and then turned off the lights. After he talked with the victim for a brief time, he walked over to her and put his arms around her, giving her a hug. He then caressed his hands up and down her back and passed her buttocks and then he caressed his hands up and down her leg and thigh. The victim testified that he touched her bare skin on her arms and thighs about four inches above the knee. The teacher did not speak at the time, but made moaning noises as if in pleasure. The teacher described the incident as a "full embrace" admitting that they did not leg go of each other until the janitor attempted to unlock the door. A janitor testified that he noticed the door to be locked with the two inside. The defendant admitted that the two of them hugged behind closed doors, but denied anything else. The defendant also admitted to making false statements about this. The teacher said that the victim attempted to kiss him, but he would not kiss her back. He explained that when the janitor came to the door he realized that the situation looked bad and that is why he did not want to let the janitor in. The appellate court provides a decent history of how the appellate courts have handled the definition of the terms "lewd and lascivious". Their basic conclusion is that it is not possible for statutes to describe every act to be considered lewd and therefore it is generally a jury question based on the totality of the circumstances.

Burnett v. State, 737 So.2d 1106 (Fla. 1st DCA 1998):

Because charges brought against defendant, which were based on evidence that he had shown two adult videos to minors, were specifically prohibited in another statute, state could not legally

convict defendant of a violation of statute prohibiting lewd and lascivious conduct in the presence of a minor based on that evidence alone.

Special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms.

State v. Coyle, 718 So.2d 218 (Fla. 2d DCA 1998):

Statute prohibiting open and gross lewd and lascivious behavior (798.02) is not unconstitutionally vague.

"Lewd and lascivious," for purposes of statute prohibiting lewd and lascivious behavior, includes a component of unlawfulness or wickedness.

Discussion: The two defendants were entertainers at an adult club. Police officers felt their form of entertainment was "lewd" and therefore arrested them.

D.M. v. State, 712 So.2d 1204 (Fla. 5th DCA 1998):

Enticing to lewdness is a crime under statute which makes it unlawful "to solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation." (F.S. 796.07(2)(f)) The act does not have to involve prostitution.

State v. Conforti, 688 So.2d 350 (Fla. 4th DCA 1997): Judge Wright

Cunnilingus and masturbation rhythmically performed to music before a paying customer in a dark, private room do not amount to expressive conduct protected by the First Amendment.

Because the sex acts in this case are not protected expressive conduct, trial court erred in concluding that statute prohibiting lewd acts was unconstitutional as applied.

Statute is constitutional on its face. Statute's definition of lewdness as "any indecent or obscene act" is not unconstitutionally vague, nor is it overbroad.

Lewdness did not violate defendants' right to privacy because defendants had no legitimate expectation of privacy in the conduct which formed the basis for the charges.

Discussion: The two defendants in this case were dancers at Studio XXX. An undercover police officer went to this business establishment and paid $80 for a "two female entertainment package." The officer was escorted to a private room and treated to some erotic dancing from the two defendants. This dancing included masturbation and cunnilingus. The defendant were charged under the prostitution statute (796.07). A detailed constitutional discussion is presented in this case.

Durant v. State, 647 So.2d 163 (Fla. 2d DCA 1994):

Evidence that defendant urinated off his back steps knowing that neighbor girls were outside and would see him insufficient to prove illicit intent as required by statute.

State v. Mitchell, 624 So.2d 859 (Fla. 5th DCA 1993

Evidence that defendant kissed child victim on her mouth, played in her hair and rubbed her buttocks was sufficient to establish prima facie case of lewd, lascivious or indecent act upon a child.

Discussion: The 32 year old defendant, not related to the 11 year old victim playfully placed the girl on his lap, brushed her hair with his hands, started to kiss her on the mouth and placed his hand under her shorts, but over her panties a short time. He never attempted to touch her sexual organs and he never asked her to undress or to do anything of a sexual nature. The trial court granted a motion to dismiss prior to trial, but the appellate court determined that a prima facie case had been presented.

Chaplin v. State, 622 So.2d 165 (Fla. 2d DCA 1993):

Evidence sustained conviction for lewd and lascivious act upon or in the presence of child; although State failed to present any evidence that defendant solicited child to touch his exposed penis, it did present sufficient evidence that he knowingly exposed his penis to her in a lewd manner.

Discussion: The State charged the defendant with indecent assault by information in that he "knowingly did commit a lewd and

lascivious act in the presence of a child under the age of sixteen years, by willfully and knowingly exposing his penis to the view of the child, and by soliciting and procuring the child to touch, feel or hold his exposed penis, which act as stated was lewd and lascivious in the presence of said child..." The state presented evidence of the defendant's exposure, but no evidence of the solicitation. The court notes that "where a statute provides a penalty for acts in the disjunctive and the indictment alleged the acts in the conjunctive, proof of one act will suffice. Therefore, the defendant was not prejudiced by the trial court's deletion from the jury instructions the language that the defendant had solicited the child to touch his exposed penis.

Brinson v. State, 574 So.2d 298 (Fla. 5th DCA 1991):

Defendant committed lewd or lascivious act in presence of kidnapped 8 year old child, within meaning of aggravated kidnapping provision, when he forced child's older sister to disrobe in child's presence in order to facilitate his rape of sister in separate part of house; it was immaterial that girls were related, and that it would not have been either lewd or lascivious for sister to have voluntarily disrobed in child's presence for purpose of taking bath. Defendant committed lewd or lascivious at in "presence" of kidnapped 8 year old child within meaning of aggravated kidnapping provision, when he raped child's sister in room which was separated from that in which child was being held only by bed sheet; rape was committed in "sensory presence" of child, if not in her "physical presence."

Discussion: Although this is a kidnapping case, it is a valuable source for defining lewd and lascivious in the context of the indecent assault statute.

Brady v. State, 553 So.2d 316 (Fla. 1st DCA 1989):

Defendant's conduct in throwing or depositing nude photographs from an automobile, which were then picked up by certain juveniles, did not constitute a violation of statute prohibiting a lewd and lascivious act in presence of a child under age of 16.

Egal v. State, 469 So.2d 196 (Fla. 2d DCA 1985):

The term "lewd and lascivious" imputes more than negligent disregard of decent proprieties and consideration due to others.

Conduct which in some circumstances might be purely innocent, such as nudity, can be found to be lewd and lascivious if accompanied by requisite improper intent.

Evidence was sufficient to support conviction for committing lewd and lascivious act in presence of female child under 14 years old, as evidence showed that defendant stood nude at his door in front of girl who solicited orders for Girl Scout cookies, defendant bought cookies and reappeared at door while still naked, and filled out order form with fictitious name and address, even though defendant did not speak any words or make any motions evidencing illicit intent.

Lewd and lascivious interest of defendant can be imputed from circumstances.

Discussion: This case is essential for determining lewd intent where the flasher never actually touches himself or says anything of a lewd content.

Cheesebrough v. State, 255 So.2d 675 (Fla. 1971):

Sexual intercourse between husband and wife in presence of child under 14 years of age for the purpose of demonstrating to such child the method of procreation of the human race was lewd and lascivious act in violation of statute F.S. 800.04.

Statute making it a felony to knowingly commit any lewd or lascivious act in the presence of a child under the age of 14 years is not unconstitutionally vague, despite fact that it does not define "lewd or lascivious act"; nor is the statute void for overbreadth on claim that it violates right of privacy and is so broad that its sanctions could apply to conduct protected by the Constitution.

Discussion: The victim asked his mother how babies were made. Mom proceeded to show the child how the process worked. Mom and stepdad gave the boy a lesson in procreation in the bedroom. This case also provides citations for several cases that define lewd and lascivious.

Pennington v. State, 219 So.2d 56 (Fla. 3d DCA 1969):

Evidence was insufficient to convict defendant of indecent assault upon a seven year old girl where victim testified that appellant invited her into the house and touched her once in the vaginal area; the touching was outside the clothing she wore, she was fully clothed and the defendant made no attempt to fondle her nor utter endearments to her.

Discussion: The defendant admitted that he touched the child but declared that the touching occurred as he was removing her from the house after she failed to follow his instructions to leave. The appellate court notes that in considering whether the evidence of the child was sufficient to constitute proof of lewd and lascivious intent, it should be pointed out that the child under examination by the court stated that she did not know the state in which she lived, did not know what telling la lie was, and did not know what a court was or what an oath was.

Boles v. State, 27 So.2d 293 (Fla. 1946):

Lewd, lascivious and indecent are synonyms and connote a wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator.

Evidence was insufficient to prove lewd and lascivious conduct where 12 year old victim testified that she took her shoes to be repaired at the defendant's shoe repair shop. Defendant put his arms around her, with his right hand on her right breast and his left hand on her left breast, and told her she was his little sweetie, as if she were his daughter.

Discussion: The defendant owned a shoe repair shop which was very popular with neighborhood children. They would frequently play in his shop and he would sometimes have to chase them out when they got too close to dangerous machinery. He was known to be fatherly with the children. This case if very interesting to read from an historical perspective. The court analyzes the facts from an old fashioned viewpoint. Many of their observation that they consider to be "fatherly" could be considered indicia of the pedophile profile today.

Presence:

"In the presence of" means that (victim) saw, heard, or otherwise sensed

that the act was taking place."

Myers v. State, 788 So.2d 1112 (Fla. 2d DCA 2001):

> Defendant, who took sleeping child's hand and placed it on his penis, could be convicted of a lewd act upon a child even though the child was asleep and did not realize what was happening.
>
> Perception of act by child is not an element of lewd act upon a child. It is only an element of lewd act in the presence of a child.
>
> Discussion: A witness observed the defendant laying on a bed with the sleeping 8-year-old child. The defendant put the child's hand on his exposed penis and appeared to be masturbating with it. The defendant argued that under State v. Werner, 609 So.2d 585 (Fla. 1992), the victim had to see or sense that the lewd act was occurring. This court ruled that this rule only applies to a lewd act in the presence of a child, not upon a child.

Buggs v. State, 693 So.2d 57 (Fla. 5th DCA 1997):

> Word "presence" in indecent assault statute does not mean child must be able to articulate or even comprehend what offender is doing, but only that child must see or sense that a lewd or lascivious act is taking place.
>
> Extraction of hair and blood did not involve "testimonial compulsion" or "enforced communication," and thus, defendant's Fifth Amendment rights were not implicated.
>
> Discussion: The victim of the lewd act charge did not testify at trial. Other testimony established that she was the sister of the victim, sleeping on the same waterbed as the victim, was screaming and crying with the victim as the assailant said words to the effect, "shut up or I'll kill you," and held the victim's hand throughout the sexual battery.
>
> This case is also useful for search warrant issues. The probable cause language in the search warrant is cited in the opinion and is a good basis for comparison.

State v. Werner, 609 So.2d 585 (Fla. 1992):

"Presence" under statute prohibiting commission of lewd or lascivious act in presence of child under age sixteen years requires that child see or sense that lewd or lascivious act is taking place for violation to occur, even if child is unable to articulate or comprehend what offender is doing.

Discussion: The victim in this case is a thirteen month child. Her mother walked into the bathroom and saw the child sitting on the floor at the foot of her father, the defendant. The defendant told his wife that he had been masturbating while caring for the child. Since the State could not prove that the child actually saw the lewd act, the Supreme Court ruled that the act was not technically "in the presence of the child." When you get a case of this nature, make sure that your detective documents all observations of the child by witnesses who are competent to testify. For instance, the Supreme Court noted that "testimony of a third party as to the child's emotional state or reaction to the incident can constitute sufficient evidence of sensory awareness." The Court then uses Kalinoski v. State, 414 So.2d 656 (Fla. 1st DCA 1982), as an example of this point. In the Kalinoski decision, the 1st DCA concluded that there was sufficient evidence to prove that a lewd or lascivious act had been committed in the presence of a four year old child based upon the child's effort to view the defendant through her parent's car window and the child's grasp of her mother's shoulder as if she wanted protection.

Solicitation

Cleveland v. State, 2014 WL 856498 (Fla.App. 1 Dist.)

To prove lewd or lascivious conduct by way of solicitation, the state is required to show that the victim was under the age of 16, that the defendant solicited the victim to commit a lewd or lascivious act, and that the defendant was 18 years of age or older at the time of the offense.

Evidence that defendant asked victim to “let” him perform sexual act on her was sufficient to support conviction of lewd or lascivious conduct by way of solicitation, where neither victim's age nor defendant's age was in dispute.

Pamblanco v. State, 38 Fla. L. Weekly D830 (Fla. 5th DCA 2013):

> Felony offense of solicitation of a child under the age of 16 to commit lewd or lascivious conduct requires the actual commission of lewd or lascivious conduct.
>
> For the completed offense of solicitation of a child under the age of 16 to commit lewd or lascivious conduct, the request must be made to someone under 16; it is not enough that a defendant believes the victim is under 16.
>
> Evidence that defendant believed that target of his solicitation to commit lewd or lascivious act was under age of 16 was insufficient to support conviction of solicitation of a child under the age of 16 to commit lewd or lascivious conduct.
>
> Instructional error in prosecution for solicitation of a child under the age of 16 to commit lewd or lascivious conduct, permitting conviction based upon finding that defendant solicited person he believed to be under 16 years of age, was fundamental and required reversal, where some text messages for which defendant was prosecuted were sent to 12-year-old girl, others were sent to police detective to whom girl gave her phone, and general verdict made it impossible to determine which text messages formed basis of conviction.

Randall v. State, 919 So.2d 695 (Fla. 4th DCA 2006):

> Defendant's statement that he wanted to "lick" victim's vagina was not sufficient to support conviction of solicitation to commit lewd or lascivious conduct.
>
> Discussion: The key here is that the defendant simply said what he wanted to do, but did not specifically ask to do it.

Case Law defining elements of F.S. 800.04 not contained in statute or jury instructions:

Act

Fey v. State, 2013 WL 1222811 (Fla.App. 4 Dist.)

Evidence was sufficient to establish defendant's conduct constituted battery and lewd or lascivious conduct; the victim testified that he was asleep, he stretched his feet, struck defendant, and woke up, then defendant left, and defendant's intent in sitting near the victim's feet was to cause the touching of the victim's feet with defendant's body so defendant could derive sexual pleasure.

The battery statute's prohibition of an intentional touch or strike covers situations where a defendant knows that a touch or strike is substantially certain to result from his acts.

Conduct which in some circumstances might be purely innocent may constitute lewd and lascivious conduct if accompanied by the requisite improper intent.

Discussion: Defendant had a foot fetish, so he snuck into the home of the young boys and sat next to their feet while they were asleep. He positioned himself so when the boys moved in their sleep, their foot would bump his chest or leg. He testified that this aroused him and he sometimes masturbated when the child's foot would touch him.

Morris v. State, 789 So.2d 1032 (Fla. 1st DCA 2001):

Defendant who told child that he desired to engage her in oral sex, using language which described this in graphic detail, was properly charged with committing a lewd act in the presence of a child. Statute is applicable to verbal conduct which is unaccompanied by other physical action.

Discussion: The defendant was charged under the pre-1999 version of the indecent assault statute. It should be noted that the current version makes it unlawful to solicit a child to commit a lewd or lascivious act. It should be noted that there was a strong dissent in this opinion.

Age

Figueroa v. State, 2016 WL 6394931(Fla. 5th DCA 2016)

Defendant was improperly convicted of lewd molestation of a child between 12 and 16 when her testimony was that the touching occurred before she turned 12 years of age.

Tate v. State, 2016 WL 2930800 (Fla. Dist. Ct. App. May 18, 2016)

Defendant pled to lewd molestation and lewd battery. Even though he was in his thirties, the State's information cited to the section where the suspect is less than 18. He received 10 years prison on the lewd battery followed by 15 years of probation on the lewd molestation. After serving about 6 years of his probation he violated. Since the information had only charged him with a third degree felony the maximum period of probation had expired and he could no longer be violated.

Insko v. State, 969 So.2d 992 (Fla. 2007):

The age of the defendant is an element of the crime of lewd or lascivious conduct.

Defendant who was convicted of lewd and lascivious conduct by a person under 18 on a person under 16, when in fact he was over 18 at the time of the offense, waived claim that on retrial following reversal of his conviction, he could not be retried for such offense, where defendant failed to object to instruction that allowed jury to find that he was under 18 when he committed the offense, and defendant did not challenge jury's verdict on the basis of its error as to his age or raise that error on appeal.

State v. D.A. 939 So.2d 149 (Fla. 5th DCA 2006):

The age of the defendant is an element of the crime of lewd or lascivious molestation.

Discussion: This was an interesting Speedy Trial case. The juvenile was charged with the incorrect section of Lewd Molestation indicating the offender was 18 years of age or older. During the recapture period, the state tried to amend the information to the correct subsection which states the defendant is less than 18. The appellate court ruled that the defendant's age is an element of the offense, citing *Glover v. State*, 863 So. 2d 236 (Fla. 2003) and ruled that the State cannot file a new charge after

the expiration of Speedy Trial. The court acknowledged a conflict with other jurisdictions on the issue and certified it to the Florida Supreme Court.

Rosen v. State, 940 So.2d 1155 (Fla. 5th DCA 2006):

Jury's failure to make finding that defendant was at least 18 years of age, and that victim was under 12 years of age, was not fundamental error, even though ages of defendant and victim resulted in defendant's offense of lewd and lascivious molestation being classified as first degree felony; for purposes of *Apprendi* case, defendant's age amounted to physical fact, rather than amorphous sentence-enhancing concept such as motive, and ages of defendant and victim were undisputed.

Implicit in *Apprendi* rationale is common sense concept that there must be some dispute about fact before it is required to be submitted to jury.

Felipe v. State, 910 So.2d 433 (Fla. 4th DCA 2005):

Remand on issue of whether victim was 11 or 12 years of age at time of lascivious molestation crime was required to determine whether there was a factual basis for defendant's nolo contendere plea to the first degree felony charge of lewd and lascivious conduct on a child under the age of 12.

Desbonnes v. State, 846 So.2d 565 (Fla. 4th DCA 2003): (Tobin)

Age of defendant is not an element of lewd or lascivious molestation charge. It is only a factor for sentencing for the crime.

Lowman v. Moore, 744 So.2d 1210 (Fla. 2d DCA 1999):

Defendant was improperly convicted of lewd assault upon a child when the victim was 16 years of age at the time of the offense. The age of the child is an essential element of the offense.

The case is remanded to sentence the defendant for commission of an unnatural and lascivious act, a violation of section 800.02 and impermissible as to included offense of 800.04.

Attempt:

Batchelor v. State, 2016 WL 3265542 (Fla. 2nd DCA June 15, 2016)

Evidence was sufficient to support defendant's conviction for attempted lewd battery on a child; defendant had a realistic expectation of imminent sexual activity with the fictitious minor when he was arrested, a law enforcement officer posed as "Missy" on an adult, online dating website, defendant responded to "Missy" after seeing her profile on the website and the two began to communicate, "Missy" told defendant that she was looking for a man to show her thirteen-year-old daughter named "Brooke" about sex and defendant was willing to help, and to this end, defendant asked for a photograph of the fictional "Brooke" and agreed to show her about sex, and defendant traveled for a period of 35 minutes to one hour to the location where he expected to meet the fictitious "Missy" and "Brooke."

When he reached the house that was the site of the sting operation, Mr. Batchelor texted "Missy" to alert her to his arrival. Law enforcement officers arrested him in the house's driveway.

Duclos-Lasnier v. State, 2016 WL 1263821 (Fla. Dist. Ct. App. Apr. 1, 2016)

Defendant could be convicted of attempted lewd or lascivious battery on a child 12 or older but younger than 16 arising out of his exchange of text messages with 13-year-old victim's phone in which he sent her pictures of his naked penis and arranged to meet her to engage in sexual activity, despite contention that State could not prove victim's age because defendant was actually exchanging messages with an adult sheriff's deputy posing as victim; legal impossibility was not a defense to the offense, defendant knew the phone number belonged to victim, and defendant arrived at the arranged location prepared to have sex with a minor, and clearly not intending to meet an adult police officer.

Florida has not adopted the defense of legal impossibility

Defendant who exchanged text messages with adult sheriff's deputy posing as 13-year-old victim, in which he arranged to meet victim for the purpose of engaging in sexual activity, committed a

sufficient overt act toward completion of the offense of lewd or lascivious battery on a child 12 or older but younger than 16 to support conviction of attempt to commit the offense, even if the message agreeing to meet was merely preparatory; defendant also sent a picture of his naked erect penis and showed up at the designated location, demonstrating his willingness and ability to consummate the offense.

Mizner v. State, 2014 WL 6778278 (Fla.App. 2 Dist.):

Defendant's conduct, committed as part of a "sexual mentor" sting operation initiated by a law enforcement cybercrime squad, constituted mere preparation and not overt acts leading to the commission of a sexual battery on a minor less than 12 years of age, and thus defendant could not be convicted of attempted sexual battery; arrangement to meet at restaurant and "get to know each other first" and, if either party felt uncomfortable for any reason, he or she could just walk away, was just a preliminary step to whatever followed, and when defendant was arrested in the restaurant parking lot, he was approximately 60 miles and eight-to-ten hours away from the proposed sexual contact with the fictitious minor, so he did not have a realistic expectation of imminent contact with the minor.

Carlilse v. State, 38 Fla. L. Weekly D156 (Fla. 5th DCA 2013):

Sufficient evidence supported conviction for attempted lewd and lascivious battery; defendant took significant steps toward consummating his desire to have sex with a person he believed was a thirteen-year-old boy, in that he conducted sexually explicit e-mail and text exchanges, arranged to meet the boy and his father to engage in sexual activity, and drove to the boy's home, arriving with lubricant to utilize in his sexual escapades.

Bist v. State, 35 Fla. L. Weekly D803 (Fla. 5th DCA 2010):

Law enforcement team's actions in using an independent nonprofit organization to set up sting operation consisting of supposed meeting of defendant and 13-year-old girl for sexual activity which

would be filmed for television did not amount to objective entrapment in violation of due process; there was no prejudicial financial incentive present, law enforcement did not induce or otherwise manufacture the instrumentalities for the crime to occur, there was no suggestion of impropriety by organization, and the recording and storage of all communications between defendant and the decoy girl insured the integrity of the investigation.

The mere failure of law enforcement to supervise or monitor participant in a sting operation does not violate due process.

Defendant's entrance into what he thought was a 13-year-old girl's home, in possession of flowers, chocolate, lubricant, and condoms, amounted to an overt act sufficient to establish attempt to commit lewd and lascivious battery, where defendant had conducted sexually explicit online conversations with the supposed girl, who was an online decoy, defendant had arranged to meet decoy in the home, and defendant had driven over 200 miles to the home.

Marra v. State, 970 So.2d 475 (Fla. 5th DCA 2007):

Evidence was insufficient to show that defendant tongue-kissed or "French" kissed minor victim, as required for conviction for lewd and lascivious conduct regarding a minor; evidence and inferences established a kiss in which defendant's tongue made contact with victim's cheek and lips but did not make contact with victim's tongue or enter victim's mouth.

Evidence was sufficient to show that defendant attempted to tongue-kiss or "French" kiss minor victim, so as to support conviction for attempted lewd and lascivious conduct regarding a minor; defendant was prevented from "French" kissing victim only because victim moved her head on his first attempt and had her lips closed on his second attempt.

Discussion: This is an interesting case that shows how important it is to use proper language in your charging document. The court noted that the State had to specifically prove a "French Kiss" because they charged it that way in the information. The court then went on to cite dictionary references for the term to show that it required a tongue-to-tongue contact. The court rejected the State's argument that the term was surplusage. In conclusion, be

careful not to add elements to your charge by including unnecessary language.

Wiggins v State, 816 So.2d 745 (Fla. 4th DCA 2002):

Facts: The 54-year-old defendant gave the 14-year-old victim a ride to her friend's house. As she got out of the car, the defendant handed her two $5 bills wrapped around a letter marked "Private." The letter read:

You are so very fine. Call me Monday around 8:15 A.M. when I am alone, then come over for a ride to school. I'll pay you fifty dollars to just lick your pussy then take you to school. You know that any time you've wanted something I was always there for you. I would never hurry you, I just want to lick you. Come over and see me Monday when I am alone.

The victim showed the letter to authorities and the defendant was arrested and charged with attempted indecent assault.

Holding:

- Defendant committed an overt act toward the commission of a lewd act. He handed the child a note that not only manifested his intent to commit the act, but also contained detailed instructions on where and when the lewd act was to take place. The ten dollars he handed her could reasonably be inferred to be a partial payment of the promised $50 or other inducement.

  Discussion: This case is especially helpful for our computer child exploitation cases because the court discusses the differences between State v. Duke and State v. Hudson and apparently sides with Hudson, thus giving us favorable law concerning the charge of attempted lewd battery when a defendant meets an undercover detective on the Internet and travels to meet him for sex. It is also important to note that in the concurring opinion, Judge Taylor indicates that the crime of lewd conduct would have been appropriate under the circumstances.

Hudson v. State, 745 So.2d 997 (Fla. 2d DCA 1999):

Motions to dismiss in which defendant essentially claimed that facts upon which State relied did not establish prima facia guilt should have been brought pursuant to rule 3.190(c)(4), not

3.190(b) and were technically deficient because they were not made under oath.

The trial court correctly decided that information charged a crime supported by an overt act where after preparatory acts of purchasing an advertisement directed to young males in writing his initial correspondence to police detective who responded to add, representing himself to be a 14 year old boy, the Defendant thereafter wrote numerous letters, mailed respondent a plane ticket and money for travel, arranged for a taxi to bring respondent to his house, and then approached the taxi in order to greet respondent.

Police my use a decoy over the age of 16 and still convict the Defendant of attempted lewd and lascivious act. The fact that no boy under the age of 16 was actually involved, does not belie defendant's intent or undermine propriety of trial court's denial of motion to dismiss.

Kobel v. State, 745 So.2d 979 (Fla. 4th DCA 1999):

Defendant's act of offering minor money to have sex with defendant constituted lesser crime of solicitation rather than attempted procurement.

Defendant's conduct in driving into alley as directed by minors, after specific request to engage in sexual activity, can be viewed as an overt act towards perpetration of attempted indecent assault.

Discussion: The fourth DCA receded from its previous holding in McCann v. State, 711 So. 2d 1290 (Fla. 4th DCA 1998), on the issue of procuring a minor for prostitution. In McCann, the Court ruled that one could procure a minor for prostitution by attempting to engage that person in prostitution with himself. This ruling conflicted with an earlier opinion from a different DCA. The Fourth DCA now agrees with other districts in that procuring a minor for prostitution involves obtaining the minor's sexual services for a third party. This statute is meant to address the evils of the commercialization of prostitution. On the other hand the Court did give us good language for attempted indecent assault charges. According to the 4th DCA, simply driving into the alley for the purpose of having sex with these children was an overt act, necessary for an attempt.

Gregg v. State, 724 So.2d 158 (Fla. 5th DCA 1998):

Trial court properly instructed jury on offense of attempt to commit lewd act upon child, even though information alleged only the completed act, where attempt was supported by the evidence.

Patel v. State, 679 So.2d 850 (Fla. 1st DCA 1996):

Claim that defendant was erroneously convicted of solicitation to commit sexual battery on a child younger than 16 years of age when evidence at trial established, at most, that defendant tried to persuade child under age 16 to engage in sexual relations with him for money was sufficient to require further proceedings.

Discussion: This case points out the difference between soliciting a child to commit indecent assault or sexual battery and attempting to commit the offense upon the child. If a defendant encourages a child to have sex with him it is classified as an attempt to commit the crime. If the defendant encourages the child to commit a sexual offense on someone else, it is solicitation.

Stumpf v. State, 677 So.2d 1298 (Fla. 5th DCA 1996):

Offense of solicitation to commit lewd act on child was not established by evidence that defendant, while riding bicycle, followed 12-year-old child riding his own bicycle, forced child off road causing him to fall and scrape his elbow, and told child that he desired (or intended) to perform sexual act on child, who was frightened by defendant's words and actions.

Smith v. State, 632 So.2d 644 (Fla. 1st DCA 1994):

State failed to prove that defendant made direct movement toward specific purpose of handling, fondling, or assaulting 13 and 14 year old girls, as required to convict defendant for attempt to handle, fondle, or make assault upon child under age 16 years in lewd, lascivious, or indecent manner, based on evidence that defendant told girls "show me your pussy," and then later drove up outside and looked into fast food restaurant to which girls had walked.

Evidence supported conviction for attempt to handle, fondle, or assault child in lewd, lascivious, or indecent manner; defendant evinced specific intent to handle, fondle or assault nine and ten year old girls who were walking along sidewalk by driving by,

sticking out his tongue, and saying either "let me have some pussy," or "give me your pussy," and acted in furtherance of that intent by circling back past the girls three times.

Rubin v. State, 578 So.2d 331 (Fla. 3d DCA 1991):

Evidence showed overt acts by defendant toward commission of lewd and lascivious act in presence of child under age of 16 years and was sufficient to support conviction for two counts of attempt to commit same.

Attempt to commit lewd and lascivious act in presence of child under age of 16 years is a crime.

Consent:

Khianthalat v. State, 974 So.2d 359 (Fla. 2008):

A defendant charged with lewd or lascivious battery on a child 12 years of age or older but less than 16 years of age is not entitled to an instruction on simple battery when the information did not allege lack of consent and the evidence presented at trial did not support lack of consent.

Discussion: This case contains a good discussion regarding the conclusive presumption that children under 12 years of age are incapable of consenting. The court indicates that children between 12 and 16 are capable of consenting, and that is why section 800.04 specifically says that consent is not a defense.

State v. Metzler, 791 So.2d 565 (Fla. 1st DCA 2001):

Trial court erred in dismissing adult charges against defendant who allegedly committed sexual act with 15-year-old victim when defendant was 17 years old, and transferring case to juvenile division, on ground that prosecution of defendant as an adult would violate his rights to privacy and equal protection.

J.A.S. v. State, 705 So.2d 1381 (Fla. 1998):

Statute proscribing lewd, lascivious or indecent act in presence of child under age sixteen not unconstitutional as applied to fifteen-

year-old male juveniles who engaged in "consensual" sex with twelve-year-old girls.

State's legitimate interest in protecting children from harmful sexual conduct outweighs minor's privacy rights under state constitution.

As applied, statute furthers compelling interest of state in health and welfare of its children through least intrusive means by prohibiting harmful sexual conduct and attaching reasonable sanctions through rehabilitative juvenile system.

State v. J.A.S., 686 So.2d 1366 (Fla. 5th DCA 1997):

Error to dismiss charges against 15-year-old juvenile boys who engaged in "consensual" sex with 12-year-old-girls on grounds that statute violated equal protection and privacy rights of juveniles and subjected juveniles to cruel and unusual punishment.

Trial court's experience that boys were always singled out for prosecution not proper evidentiary basis for conclusion that dismissal was appropriate.

Decision by prosecutor to charge only some offenders not ground for claim of denial of equal protection.

State v. Raleigh, 686 So.2d 621 (Fla. 5th DCA 1996):

There is no constitutionally protected right to the defense of consent when *any person* commits a lewd act on a minor. It is of no constitutional or logical significance to the child victim if the perpetrator is also a minor.

Discussion: The defendant in this case was 16 years old. The victims were 15 years old. This decision points out the fact that the age of the defendant is irrelevant for the offense of indecent assault. In a footnote, the court notes that there is no reason why a female could not be prosecuted as readily as a male. Consequently, if two fourteen year old children have voluntary sex with one another, both could technically be charged with second degree felonies. It is up to the prosecutor to ensure that the law is applied fairly and reasonably.

Casado v. State, 648 So.2d 714 (Fla. 1995):

> Constitutional right to privacy does not render unconstitutional those portions of sections 800.04 and 794.041 providing that consent is not a defense to prosecution for sexual activity with a minor under 16.

Jones v. State, 640 So.2d 1084 (Fla. 1994):

> Defendants had standing to assert victims' privacy rights and attack constitutionality of statutory rape provision.
>
> Statutory rape provision is constitutional, despite victims' privacy rights and desire for relationships with defendants; state has obligation and compelling interest in protecting children from sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe, and healthy for them.
>
> Although right to be let alone protects adults from government intrusion into matters related to marriage, contraception, and abortion, state may exercise control over sexual conduct of children beyond scope of its authority to control adults.
>
> Discussion: The facts of the case are simple. A fourteen year old girl and a 19 year old boy want to have sex with each other. The issue is whether the victim's right to privacy is violated by F.S. 800.04 not allowing her to consent to the sexual act.

State v. Sorakrai, 543 So.2d 294 (Fla. 2d DCA 1989):

> For jury to hear testimony indicating victim's consent to criminal conversation with defendant would violate prohibition of statute precluding evidence of consent as a defense to charge of sexual battery on a child under the age of sixteen.
>
> Neither ignorance, misrepresentation nor belief that victim was sixteen years or older is available to defendant charged with lewd and lascivious conduct by committing an act defined as a sexual battery on any child under the age of sixteen.

State v. Lanier, 464 So.2d 1192 (Fla. 1985):

> Defendant charged with engaging in sexual intercourse with 12

year old girl could be convicted of engaging in "lewd, lascivious or indecent assaults or acts upon or in the presence of a child," notwithstanding undisputed facts that 12 year old was previously unchaste and that sexual intercourse was consensual, even where act occurred prior to amendment of relevant statute declaring that neither victim's lack of chastity nor her consent is a defense to such crime.

Discussion: This case represents a rather difficult conceptual analysis. The ruling of the Supreme Court is basic enough in its intent. It simply says that consensual sexual conduct was covered before by F.S. 800.04 prior to the 1984 amendment which specifically stated that consent was not a defense. The language approved for consensual sexual activity was "handle, fondle or make an assault upon." The problem in the analysis is, however, the convoluted language of the district court decision that was reversed. In Lanier v. State, 443 So.2d 178 (Fla. 3d DCA 1983) the 5th DCA wrote an extensive analysis of the meanings of "handle" "fondle" and "assault" and explained how sexual intercourse was by definition not included in that terminology. This is especially so in light of the fact that there were other statues dealing with the same conduct. In reversing the 5th DCA, the Supreme Court did not completely address the 5th DCA's sequence of analysis. It simply concluded that consent was not a defense to F.S. 800.04. This leaves open the question as to whether charging "handle, fondle or assault" is appropriate under the current law which gives two other subsections that adequately cover the conduct, to wit: "actual or simulated sexual intercourse" or "commits an act defined as sexual battery under 794.011(1)(h)." The confusion mounts when you consider the fact that the Standard Jury Instructions still cites the 5th DCA opinion in a "Note to Judge," for the proposition that there is no need to make reference to the words "without committing the crime of sexual battery" because this refers to forcible sexual relations. In conclusion, it would be advisable not to charge "handle, fondle or assault" in cases involving full sexual intercourse. If there is an overlapping proof problem, charge two sections in the alternative.

Principle:

A.M. v. State, 792 So.2d 638 (Fla. 5th DCA 2001):

Defendant was properly convicted of false imprisonment where she held victim's body, hands and legs down while other juveniles fondled the victim's breasts.

Where evidence demonstrated that juvenile intended for crime of lewd and lascivious molestation to be committed and assisted actual perpetrators in committing crime, statute authorizes imposition of principle liability.

Sexual Battery (Act defined as):

Erlsten v. State, 37 Fla. L. Weekly D175 (Fla. 4th DCA 2012):

Charge of lewd, lascivious, or indecent act upon a child under 16, which alleged that defendant committed "an act defined as sexual battery," was not fatally flawed and did not fail to charge a crime, where legislature clearly intended the lewd, lascivious, and indecent act statute to prohibit and criminalize sexual intercourse and acts defined as sexual battery when committed upon those less than 16 years of age, and state opted not to prosecute for capital sexual battery.

Note: This case addresses section 800.04 prior to October 1, 1999 when the language of the statute was much different.

Turner v. State, 710 So.2d 688 (Fla. 1st DCA 1998):

Defendant was properly charged and convicted of lewd and lascivious assault without committing sexual battery. The Defendant was convicted only of lewd and lascivious assault, and not the crime of sexual battery, and victim was not under age 12.

Discussion: The distinction drawn in this case is quite interesting. If the child is less than 12 years of age, digital penetration would constitute a sexual battery and therefore could not be an indecent assault. Once the child reaches 12 years of age, digital penetration does not necessarily constitute a sexual battery and can therefore be charged as indecent assault.

Jozens v. State, 649 So.2d 322 (Fla. 1st DCA 1995):

Count charging lewd and lascivious act in presence of a child

under 16 by committing a sexual battery upon a child of age 6 or 7 charged defendant with a nonexistent crime because sexual battery on child under 12 cannot be lewd and lascivious conduct under section 800.04(3).

Discussion: The court points out the phrase at the end of section 800.04 which specifies "*without committing the crime of sexual battery*, commits a felony of the second degree." Therefore, if the act upon a child under 12 satisfies the definition of sexual battery, it logically cannot be classified as an indecent assault.

Furlow v. State, 529 So.2d 804 (Fla. 1st DCA 1988):

Mere union of object other than defendant's sexual organ with victim's vagina was not sexual battery and was not sexual battery upon child under age of sixteen, but sexual battery by finger required proof of penetration.

Discussion: The State made a poor filing decision in this case. The defendant evidently put his fingers in or on the victim's vagina. Instead of filing the count as "handle, fondle or make an assault upon," the State chose to file the subsection which reads "Commits an act defined as sexual battery." By choosing that subsection, the State added the element of penetration to their proof.

Specific Intent:

Osorio v. State, 769 So.2d 429 (Fla. 4th DCA 2000):

Any error which may have been occasioned by the court's failure to include the word "knowingly" when instructing the jury on the elements of Lewd Act in the Presence of a Child was waived when not presented by a contemporaneous request for such instruction, nor any objection once the instruction was given.

Killian v. State, 730 So.2d 360 (Fla. 2d DCA 1999):

Paperback books with racy titles and covers depicting sexual activity, although found in defendant's home pursuant to valid search warrant, were not admissible in prosecution for capital sexual battery, handling and fondling a child, and use of a child in a sexual performance; defendant's state of mind was not at issue,

books were not relevant to any issue before court, and books were inadmissible to prove defendant acted in conformity with particular character trait.

State of mind is not a material fact in a sexual battery case and intent is not an issue.

Lewd assault is not a specific intent crime.

State of mind is not material fact in sexual battery case.

Discussion: The nine-year-old victim alleged that her uncle took nude photos of her and committed sexual acts upon her. Pursuant to a search warrant, the police found five "dirty" books in the suspect's home. Although these books did not contain photographs, the titles were quite revealing: *Teens for Older Men, Satisfaction Through Incest, Making Great-Grand-Daughter, As Young As They Cum, and Incest Is Best.* The state argued that his interest in such books was relevant to his state of mind, but the court ruled the state of mind was not an issue.

Bergen v. State, 552 So.2d 262 (Fla. 2d DCA 1989):

Statute prohibiting lewd and lascivious acts committed in the presence of a child is not a specific intent crime.

Discussion: The above ruling was in response to the defendant's request for a jury instruction on voluntary intoxication. Therefore, it is not a defense if the defendant was drunk when flashed the kids. It should also be noted that this case was reversed in State v. Hernandez, 596 So.2d 671 (Fla. 1992), on other grounds.

Other:

Lesovsky v. State, 2016 WL 4205336 (Fla.App. 4 Dist.,2016)

Evidence at trial on charges of lewd and lascivious molestation and lewd and lascivious conduct was insufficient to establish that defendant placed her tongue in minor victim's mouth, as necessary to support conviction for lewd and lascivious conduct in the manner charged in criminal information; victim did not testify that she ever felt defendant's tongue in her mouth, stating only that she

and defendant kissed "mouth to mouth," and evidence pertaining to the lewd and lascivious molestation charges, including that defendant placed her hand on victim's breast and genitals, did not support finding that defendant committed the entirely distinct act of placing her tongue in victim's mouth.

Court focused on the fact that the act did not occur as charged in the information. They did not address whether penetration of the tongue was necessary to prove the offense.

Reyes v. State, 2014 WL 4327951 (Fla.App. 4 Dist.):

Discrepancy between criminal information alleging that defendant committed lewd and lascivious molestation by causing "his penis to touch the vaginal area, or vaginal genitalia area" of the victim and jury instruction allowing jury to find defendant guilty of the offense if it found he "intentionally touched in a lewd or lascivious manner the clothing covering the vagina and/or vaginal area of" the victim with his penis was not fundamental error entitling defendant to relief from his conviction of the offense; there was no substantive difference between touching the clothes covering a body part and touching the actual body part.

Lowe v. State, 35 Fla. L. Weekly D1463 (Fla. 5th DCA 2010):

Because statute prohibited only the simulation of any act involving sexual activity, and the statute's definition of sexual activity did not include the simulation of oral sex with an object, defendant's act of placing dildo into his own mouth did not constitute lewd or lascivious exhibition; although defendant simulated the act of oral sex, he did not simulate the act of oral sex with the sexual organ of another, the dildo was not near another person's genitalia, and defendant's actions did not infer that he was simulating oral sex with another person, and it was apparent he was simulating oral sex with an object.

Raines v. State, 32 Fla. L. Weekly D735 (Fla. 5th DCA 2007):

The appellate court approved the trial court's following jury instruction for the crime of lewd battery:

> *To prove the crime of lewd or lascivious battery, the state must prove the following two elements beyond a reasonable doubt:*
>
> *1. [Name of alleged victim] was 12 years of age or older but under the age of 16 years.*
>
> *2. Vincent Rains committed an act upon or with [name of alleged victim] in which the sexual organ of [name of alleged victim] penetrated the mouth of Vincent Rains.*
>
> *Neither the victim's lack of chastity nor the victim's consent is a defense to the crime charged.*

The Jury presented the following question to the court during deliberations:

> *1) committed an act upon? Does this mean willing participant*

The court properly responded:

> *If you determine in your deliberations that the defendant did not acquiesce in the conduct and, therefore, is not a willing participant, then you should find the defendant not guilty. If you determine that the defendant did acquiesce in the conduct, then he may be considered a willing participant and you should find the defendant guilty if all of the other elements of the crime have been proved to you beyond and to the exclusion of a reasonable doubt.*

The court noted, however that the term "acquiesce" was probably not the best choice of words because of its possible connotations. Under the facts of this case, however, it was okay.

State v. Kees, 919 So.2d 504 (Fla. 5th DCA 2005):

> State was not required to present proof that someone was offended by the defendants' conduct in order to establish a prima facie case of lewd and lascivious acts as well as exposure of sexual organs; such proof was necessary only for situations in which alleged illegal conduct occurred in private location, and instant case involved public place, as alleged. See F.S. 796.07 and 800.03.

State v. Farino, 915 So.2d 685 (Fla. 2d DCA 2005):

> Fact that undercover police officer acting in his official capacity was the only witness allegedly offended by the conduct of defendants who were employees of adult entertainment establishments did not preclude conviction of such defendants for lewdness; statute prohibiting lewdness defined it as any indecent or obscene act and did not include as an element that a witness be offended by the conduct.