

ICJI 901 FEMALE RAPE

INSTRUCTION NO.

In order for the defendant to be guilty of Rape, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] caused his penis to penetrate, however slightly, the [vaginal] [oral] [anal] opening of [name of victim], a female person, [and]

[4. she was under eighteen (18) years of age.]

[or]

[4. she was incapable of giving legal consent because of unsoundness of mind, due to any cause including, but not limited to, mental illness, mental deficiency, or developmental disability, whether temporary or permanent.]

[or]

[4. she resisted, but her resistance was overcome by force or violence]

[or]

4. [she was prevented from resisting by the] [infliction] [attempted infliction] [or] [threatened infliction] [of bodily harm, accompanied by apparent power of execution.]

[or]

[4. she was unable to resist due to any intoxicating, narcotic, or anesthetic substance

[or]

[4. she was unconscious of the nature of the act. "Unconscious of the nature of the act" means incapable of resisting because of one of the following conditions:

- (1) she was unconscious or asleep; or
- (2) she was not aware, knowing, perceiving, or cognizant that the act occurred.]

[or]

[4. she submitted to the penetration under the belief that the defendant was her husband, and

5. such belief was induced by artifice, pretense, or concealment practiced by the defendant, with the specific intent to induce such belief.]

[or]

[4. she submitted under the belief, instilled by the defendant, that if she did not submit, the defendant would [cause physical harm to some person in the future] [or] [cause damage to property] [or] [engage in other conduct

constituting a crime] [or] [accuse any person of a crime]
[or] [cause criminal charges to be instituted against her]
[or] [expose a secret or publicize an asserted fact, whether
true or false, tending to subject any person to hatred,
contempt or ridicule.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-6101.

The requirement that the victim did not consent to the act of sexual intercourse is not expressly stated in the statute. In *State v. Andreason*, 44 Idaho 396, 257 P. 370 (1927), and *State v. Neil*, 13 Idaho 539, 90 P. 860 (1907), the Court stated that this was an element of the crime of forcible rape.

In *State v. Fowler*, 13 Idaho 317, 324, 89 P. 757, 759 (1907), the Court addressed the provision in IC § 18-6101(3) relating to resistance of the victim but overcome by force and violence. The Court said:

Where the offense is charged as having been committed on a female not under legal disability to give consent to the act, the state must show beyond a reasonable doubt not only the sexual act, but that it was committed without the consent and against the will of the woman. There can be no rape in sexual intercourse by mutual consent where the female is capable of giving legal consent. In such case to prove the act alone amounts to nothing, unless, in the language of the statute ... it has been accomplished 'by force or violence.'

The Court rejected the notion that "unless she kicks, bites, scratches and screams to the utmost of her power and ability she will be deemed to have consented," stating that "What the assailant really meant to do, however, and the manner in which he meant to accomplish his purpose—whether by persuasion, force or fear—is a question of fact to be determined by the jury." In *State v. Lewis*, 96 Idaho 743, 536 P.2d 738 (1975), the Court addressed the provision in IC § 18-6101(4) relating to when the victim is prevented

from resisting by threats of immediate and great bodily harm, accompanied by an apparent power of execution. The Court rejected the view that when a victim has not physically resisted the defendant from engaging in intercourse and when the defendant has neither verbally threatened the victim or visibly displayed weaponry to the victim that as a matter of law the defendant has not committed rape. The Court held that a threat may be expressed by acts and conduct as well as through words or by a display or weaponry. As in *Neil*, the Court held that it is the province of the jury to weigh the evidence and determine whether there was a threat of force which resulted in a sexual act without the victim's consent. See also, *State v. Robran*, 119 Idaho 285, 805 P.2d 491 (Ct. App. 1991); *State v. Gossett*, 119 Idaho 581, 808 P.2d 1326 (Ct. App. 1991).

The fact that the defendant is not married to the victim is not an essential element of the crime of rape. Marriage to the victim is an affirmative defense that may be raised by the defendant in certain instances. IC § 18-6107; and *State v. Huggins*, 105 Idaho 43, 665 P.2d 1053 (1983).

If the defendant is charged under IC § 18-6101(6) and it is alleged that someone other than the defendant committed the rape of the victim, then this instruction will have to be modified to reflect that allegation.

Ability to give legal consent is properly defined in terms of (1) the ability to understand and appreciate the possible consequences of sexual intercourse, and (2) the ability to make a knowing choice. *State v. Soura*, 118 Idaho 232, 796 P.2d 109 (1990).

Battery with intent to commit rape is an included offense of forcible rape. *State v. Bolton*, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991); See ICJI 225.

INSTRUCTION NO.

In order for the defendant to be guilty of Rape, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] caused his penis to penetrate, however slightly, the [oral] [or] [anal] opening of [name of victim], another male,
4. the penetration was for the purpose of sexual arousal, gratification, or abuse, and
- [5. the other male was incapable of giving legal consent because of unsoundness of mind, whether temporary or permanent.]

[or]

[5. the other male resisted, but his resistance was overcome by force or violence] [or] [he was prevented from resisting] [by threats of immediate and great bodily harm] [to himself] [or] [to another person], accompanied by the apparent power to inflict such harm] [or] [by any intoxicating, narcotic, or anesthetic substance administered to him by or with the privity of the defendant].]

[or]

- [5. the other male was unconscious of the nature of the act,
6. which fact was known to the defendant.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-6108.

In *State v. Fowler*, 13 Idaho 317, 324, 89 P. 757, 759 (1907), the Court addressed the provision in IC § 18-6101(3) relating to resistance of the victim but overcome by force and violence. The Court said:

Where the offense is charged as having been committed on a female not under legal disability to give consent to the act, the state must show beyond a reasonable doubt not only

the sexual act, but that it was committed without the consent and against the will of the woman. There can be no rape in sexual intercourse by mutual consent where the female is capable of giving legal consent. In such case to prove the act alone amounts to nothing, unless, in the language of the statute ... it has been accomplished 'by force or violence.

The Court rejected the notion that "unless she kicks, bites, scratches and screams to the utmost of her power and ability she will be deemed to have consented," stating that "[w]hat the assailant really meant to do, however, and the manner in which he meant to accomplish his purpose—whether by persuasion, force or fear—is a question of fact to be determined by the jury." In *State v. Lewis*, 96 Idaho 743, 536 P.2d 738 (1975), the Court addressed the provision in IC § 18-6101(4) relating to when the victim is prevented from resisting by threats of immediate and great bodily harm, accompanied by an apparent power of execution. The Court rejected the view that when a victim has not physically resisted the defendant from engaging in intercourse and when the defendant has nether verbally threatened the victim or visibly displayed weaponry to the victim that as a matter of law the defendant has not committed rape. The Court held that a threat may be expressed by acts and conduct as well as through words or by a display or weaponry. As in *Neil*, the Court held that it is the province of the jury to weigh the evidence and determine whether there was a threat of force which resulted in a sexual act without the victim's consent. See also, *State v. Robran*, 119 Idaho 285, 805 P.2d 491 (Ct. App. 1991); *State v. Gossett*, 119 Idaho 581, 808 P.2d 1326 (Ct. App. 1991).

ICJI 904 RESISTANCE TO RAPE

INSTRUCTION NO.

Although [name of victim] must have resisted the act of penetration, the amount of resistance need only be such as would show the victim's lack of consent to the act.

Comment

In Idaho, a rape victim is not required to resist to the utmost of the victim's ability. *State v. Neil*, 13 Idaho 539, 90 P. 860 (1907). The importance of resistance by the victim is simply to show two elements of the crime—the assailant's intent to use force in order to have sexual intercourse and the victim's non-consent. *State v. Andreason*, 44 Idaho 396, 357 P. 370 (1927). See also, *State v. Fowler*, 13 Idaho 317, 89 P. 757 (1907); *State v. Lewis*, 96 Idaho 743, 536 P.2d 738 (1975); *State v. Robran*, 119 Idaho 285, 805 P.2d 491 (Ct. App. 1991); *State v. Gossett*, 119 Idaho 581, 808 P.2d 1326 (Ct. App. 1991).

This instruction should only be given if the defendant is charged with violating I.C. § 18-6101(3) or I.C. § 18-6108(2).

ICJI 905 IMPLICIT THREAT

INSTRUCTION NO.

A threat of immediate and great bodily harm does not need to be expressed in words or through the exhibition of a deadly weapon. A threat may be expressed by acts and conduct which, under the circumstances, create a fear of immediate and great bodily harm.

Comment

This instruction is based upon *State v. Lewis*, 96 Idaho 743, 536 P.2d 738 (1975). It should only be given in circumstances where there was no express threat and no use or exhibition of a deadly weapon.

This instruction may have to be modified if the threat was made to a third person.

ICJI 906 CHARGE EASILY MADE

Comment

No instruction should be given in any sex offense case that the charge is easily made but difficult to disprove even though the defendant is innocent, nor should the jury be instructed to examine the victim's testimony with caution.

State v. Smoot, 99 Idaho 855, 590 P.2d 1001 (1978); and
State v. Gong, 115 Idaho 86, 764 P.2d 453 (Ct. App. 1988).

ICJI 907 UNSOUNDNESS OF MIND—CONSENT

INSTRUCTION NO.

A person is incapable of giving legal consent to the alleged penetration if, because of unsoundness of mind, the person is unable to understand and appreciate either the nature of the act or the consequences that may flow from that act.

Comment

State v. Soura, 118 Idaho 232, 796 P.2d 109 (1990); *State v. Cosler*, 39 Idaho 519, 228 P. 277 (1924); and *State v. Simes*, 12 Idaho 310, 85 P. 914 (1906).

ICJI 908 UNSOUNDNESS OF MIND—DEFINED

INSTRUCTION NO.

A person is of unsound mind if that person is incapable of normally managing affairs in a reasonable manner. Unsoundness of mind exists when the intellectual powers are fundamentally lacking, or where incapable of understanding and acting with discretion in the ordinary affairs of life. The term 'unsoundness of mind' thus includes a range of mental impairment.

Comment

State v. Soura, 118 Idaho 232, 796 P.2d 109 (1990).

ICJI 909 REASONABLE BELIEF AS TO AGE

INSTRUCTION NO.

You are instructed that it is not a defense to the crime of [name of offense charged] that the defendant did not know the age of [name of victim], or that the defendant reasonably and in good faith believed that [name of victim] was [sixteen (16)] [eighteen (18)] years of age or older.

Comment

This instruction would apply to any sex crime where the victim as a matter of law is held too young to give lawful consent to the defendant's conduct. *State v. Stiffler*, 117 Idaho 405, 788 P.2d 220 (1990) (statutory rape); *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976) (lewd and lascivious conduct); and *State v. Suennen*, 36 Idaho 219, 209 P. 1072 (1922).

ICJI 910 DEFENSE: VICTIM AS SPOUSE OF DEFENDANT

INSTRUCTION NO.

You may not find the defendant guilty of rape unless you find beyond a reasonable doubt that at the time of such alleged offense the defendant and [name of victim] were not married.

Comment

That the defendant and the victim were married is an affirmative defense that may be raised in certain circumstances. *State v. Huggins*, 105 Idaho 43, 665 P.2d 1053 (1983). This instruction should be given only if such defense has been raised by the defendant and is applicable under IC § 18-6107.

This instruction should not be given in a spousal rape case. I.C. § 18-6101(3) or (4).

ICJI 911 COMMON-LAW MARRIAGE DEFINED

INSTRUCTION NO.

Idaho recognizes what is called a "common-law marriage". There are four requirements for a common-law marriage.

First, the man and the woman both must have been eighteen years of age or older and unmarried.

Second, they must have consented to be husband and wife. Such consent need not have been made in any particular way. It can be shown by evidence that they agreed orally or in writing to be husband and wife, or it can be implied from their conduct.

Third, after they consented to be husband and wife, the parties both assumed marital rights, duties, and obligations to each other. This requires that they lived together as husband and wife, treated each other in a manner typical of married people, and held themselves out as husband and wife.

Fourth, the man and woman consented to be husband and wife and they assumed marital rights, duties, and obligations while they were living in the State of Idaho.

Comment

Idaho does not recognize common law marriages formed after January 1, 1996. *Wilkins v. Wilkins*, 137 Idaho 315, 48 P.3d 644 (2002); I.C. §§ 32-201, -301.

I.C. §§ 32-201 to 32-203. The consent to be married can be express or implied. *Metropolitan Life Ins. Co. v. Johnson*, 103 Idaho 122, 645 P.2d 356 (1982). What constitutes the assumption of marital rights, duties, or obligations was addressed in *Freiburghaus v. Freiburghaus*, 103 Idaho 679, 651 P.2d 944 (Ct. App. 1982).

A marriage is void from the beginning if it is incestuous (I.C. § 32-205) or between first cousins (I.C. § 32-206). Under certain circumstances, a polygamous marriage can become valid (I.C. § 32-207). Even if one of the parties were shown to have been married previously, however, the presumption of validity operates in favor of the second marriage. *Warner v. Warner*, 76 Idaho 399, 283 P.2d 931 (1955). Thus, where it was shown that the wife was previously married, had filed for divorce, and the action

had been dismissed, the evidence did not show that she was married at the time of her second marriage because it did not show that her former husband had not obtained a divorce or that she had not filed a second divorce action. *Nicholas v. Idaho Power Company*, 63 Idaho 675, 125 P.2d 321 (1942). If any of these issues are raised, the instruction will have to be amended accordingly.

If the consent and assumption of marital rights, duties, and obligations occurs outside the state of Idaho and the parties thereafter live in Idaho, there can still be a common-law marriage. *In re Foster*, 77 Idaho 26, 287 P.2d 282 (1955). Merely visiting Idaho may not be sufficient, however. *In re Marriage of Wharton*, 639 P.2d 652 (Or. Ct. App. 1982). The instruction should be amended accordingly.

ICJI 912 DEFENSE: DEFENDANT UNDER AGE 14

INSTRUCTION NO.

You may not find the defendant guilty of rape unless you find beyond a reasonable doubt either:

(a) that at the time of such alleged offense the defendant was fourteen (14) years of age or older, or

(b) that at the time of such alleged offense the defendant had the physical ability to accomplish penetration.

Comment

I.C. § 18-6102.

ICJI 920 INFAMOUS CRIME AGAINST NATURE

INSTRUCTION NO.

In order for the defendant to be guilty of the Infamous Crime Against Nature, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] engaged in conduct consisting of the penetration, however, slight, of

[the defendant's penis into the [anal opening] [oral opening] of [name of person].

[or]

the defendant's [anal opening] [oral opening] by the penis of [name of person].

[or]

[the defendant's penis into the [anal opening] [oral opening] [genital opening] of [description of animal].

[or]

the defendant's [anal opening] [oral opening] [genital opening] by the penis of [description of animal].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. §§ 18-6605 & 18-6606.

Under the common law, "the infamous crime against nature" was the same as sodomy and it consisted of sexual intercourse in any bodily opening between a human and an animal and anal intercourse between humans. *People v. Martinez*, 188 Cal.App.3d 19, 232 Cal. Rptr. 736 (Ct. App. 1986). In *State v. Alwater*, 29 Idaho 107, 157 P. 256 (1916), the Idaho Supreme Court held that IC § 18-6605 also prohibits fellatio.

Whether IC § 18-6605 prohibits cunnilingus has not been decided by an appellate court in Idaho, and courts in other jurisdictions are divided on whether a statute prohibiting the "crime against nature" also prohibits cunnilingus. Some courts which have expanded the common law definition of sodomy to include fellatio have held that it does not include cunnilingus, i.e., *Herring v. State*, 46 S.E. 876 (Ga. 1904) (sodomy includes fellatio); *Thompson v. Aldredge*, 200 S.E. 799 (Ga. 1939) (sodomy does not include cunnilingus); *Honselman v. People*, 48 N.E. 304 (Ill. 1897) (infamous crime against nature includes fellatio); *People v. Smith*, 101 N.E. 957 (Ill. 1913) (infamous crime against nature does not include cunnilingus). Other courts have expanded the definition to include cunnilingus, i.e., *Warner v. State*, 489 P.2d 526 (Okla. Crim. App. 1971).

Some penetration, however slight, must occur in order to commit the crime against nature. IC § 18-6606; *People v. Martinez*, 188 Cal.App.3d 19, 232 Cal. Rptr. 736 (Ct. App. 1986); *Hicks v. State*, 713 P.2d 18 (Okla. Crim. App. 1986).

ICJI 921 FORCIBLE PENETRATION BY FOREIGN OBJECT

INSTRUCTION NO.

In order for the defendant to be guilty of Forcible Penetration by Foreign Object, the State must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] caused an object, instrument, or device, that is, a [item], to penetrate the [genital] [or] [anal] opening of [name of person]
4. for the purpose of sexual arousal, gratification, or abuse, and

[5. the penetration was against [name of person]'s will, and

6. the penetration was accomplished [by the use of force or violence] [or] [by duress] [or] [by threats of immediate and great bodily harm, accompanied by the apparent power to inflict such harm].]

[or]

[5. [name of person] was incapable, through any unsoundness of mind, whether temporary or permanent, of giving legal consent.]

[or]

[5. the penetration was against [name of person]'s will, and

6.[name of person] was prevented from resistance by any [intoxicating] [narcotic] or [anesthetic] substance.]

If any of the above has not been proved beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-6608. See *State v. Browning*, 123 Idaho 748, 852 P.2d 500 (Ct. App. 1993) (finger is an object).

ICJI 922 SEXUAL ABUSE OF CHILD

INSTRUCTION NO.

In order for the defendant to be guilty of Sexual Abuse of a Child, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [solicited [name of child] to participate in a sexual act] [or] [caused or had sexual contact with [name of child] not amounting to lewd conduct]] [or] [made any photographic or electronic recording of [name of child]] [or] [induced, caused or permitted [name of child] to witness an act of sexual conduct],
4. the defendant was eighteen (18) years of age or older,
5. [name of child] was under sixteen (16) years of age, and
6. the defendant did such act with the specific intent to gratify the lust, passions, or sexual desire of the defendant, of such child, or of some other person.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-1506. If this is not an included offense, then the words "not amounting to lewd conduct" should be deleted from element 3.

I.C. § 18-1506 is an included offense of I.C. § 18-1508. *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990).

ICJI 923 SEXUAL ABUSE OF CHILD—DEFINITIONS

INSTRUCTION NO.

In these jury instructions, the following words have the meanings stated.

["Solicit" means any offensive written, verbal, or physical act which is intended to communicate to the child the actor's desire to participate either in a sexual act or in sexual foreplay, or the actor's desire to gratify lust by the means of photographing or observing the child engaged in sexual conduct.]

["Sexual contact" means any physical contact between the child and any person which is caused by the actor, or the actor causing the child to have self contact.]

Comment

I.C. §§ 18-1506(2) & 18-1506(3). The terms "sexual act" and "sexual foreplay" are not defined in IC § 18-1506, but see I.C. § 18-1507 for definitions of related terms.

ICJI 924 SEXUAL EXPLOITATION OF CHILD

INSTRUCTION NO.

In order for the defendant to be guilty of Sexual Exploitation of a Child, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
- [3. the defendant [name] knowingly caused, induced or permitted a person, who was then under eighteen (18) years of age, to engage in, or be used for, any explicit sexual conduct, and
4. the defendant did so for a commercial purpose.]

[or]

- [3. the defendant [name] knowingly prepared, arranged for, published, produced, promoted, made, sold, financed, offered, exhibited, advertised, dealt in, possessed or distributed certain sexually exploitative material, and
4. the defendant did so for a commercial purpose.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-1507.

I.C. § 18-1507(4) states that the possession of three or more identical copies of sexually exploitative material creates a presumption that such possession was for a commercial purpose. Consistent with *State v. McCoy*, 100 Idaho 753, 605 P.2d 517 (1980); *State v. Peterman*, 100 Idaho 269, 596 P.2d 442 (1979); and *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), no instruction on presumption should be given. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

ICJI 926 POSSESSION OF SEXUALLY EXPLOITATIVE MATERIAL

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of Sexually Exploitative Material, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho, and
3. the defendant [name] knowingly and wilfully had in the defendant's possession sexually exploitative materials.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-1507A.

ICJI 927 SEXUAL EXPLOITATION-DEFINITIONS

INSTRUCTION NO.

As used in these jury instructions, the following words have the following meanings:

(a) "Child" means a person who is less than eighteen (18) years of age.

(b) "Commercial purpose" means the intention, objective, anticipation, or expectation of monetary gain or other material consideration, compensation, remuneration, or profit.

(c) "Erotic fondling" means touching a person's clothed or unclothed genitals or pubic areas, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts (if the person is a female child), for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. "Erotic fondling" shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(d) "Erotic nudity" means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the child, the human female breasts, or the undeveloped or developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(e) "Explicit sexual conduct" means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, sexual excitement or bestiality.

(f) "Masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts (if the person is a female child), by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person.

(g) "Sadomasochism" means:

1. Real or simulated flagellation or torture for the purpose of real or simulated sexual stimulation or gratification; or

2. The real or simulated condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

(h) "Sexual excitement" means the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(i) "Sexual intercourse" means real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal, between persons of the same or opposite sex, or between a human and an animal, or with an artificial genital.

(j) "Sexually exploitative material" means any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material which depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct.

(k) "Bestiality" means a sexual connection in any manner between a human being and any animal.

Comment

I.C. § 18-1507(2).

ICJI 928 SEXUAL BATTERY OF A CHILD

INSTRUCTION NO.

In order for the defendant to be guilty of Sexual Battery of a Child, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. [the defendant [name] [committed [an act of] [genital-genital contact] [or] [oral-genital contact] [or] [anal-genital contact] [or] [oral-anal contact] [or] [manual-anal contact] [or] [manual-genital contact] [or] [any other] [a] [lewd or lascivious act] upon or with the body of [name of victim],]

[or]

[the defendant [name] involved [name of victim] in [sexual intercourse] [or] [erotic fondling] [or] [erotic nudity] [or] [masturbation] [or] [sodomasochism] [or] [sexual excitement],]

[or]

[the defendant [name] solicited [name of victim] to participate in a sexual act,]

[or]

[the defendant [name] caused or had sexual contact with [name of victim],]

4. the defendant engaged in such conduct with the specific intent of arousing, appealing to, or gratifying the lust, passion, or sexual desires of the defendant, of such child, or of some other person,

5. [name of victim] was [16] [or] [17] years of age, and

6. the defendant was at least 5 years of age older than [name of victim].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-1508A.

ICJI 929 LEWD AND LASCIVIOUS CONDUCT

INSTRUCTION NO.

In order for the defendant to be guilty of Lewd and Lascivious Conduct, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. [the defendant [name] committed [an act of] [genital-genital contact] [or] [oral-genital contact] [or] [anal-genital contact] [or] [oral-anal contact] [or] [manual-anal contact] [or] [manual-genital contact] [or] [any other] [a] [lewd or lascivious act] upon or with the body of [name of victim],]

[or]

[the defendant [name] involved [name of victim] in an act of [bestiality] [or] [sado-masochistic abuse]]

4. [name of victim] was a child under sixteen (16) years of age, and

5. the defendant [committed such act] [or] [involved such child in such act of [bestiality] [or] [sado-masochistic abuse] with the specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of the defendant, of such child, or of some other person.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-1508.

The words "lewd and lascivious" do not need to be defined for the jury. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976); and *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

The statute makes it illegal to do certain acts upon the body "of a minor or child under the age of sixteen (16) years." The meaning of this phrase is unclear. It may be

that the drafter of the statute believed that an emancipated person under the age of majority would not be a minor, so that the statute was intended to protect all unemancipated minors and everyone who is under the age of sixteen years. Another interpretation is that the words "under the age of sixteen (16) years" were intended to modify both "minor" and "child." The statute is generally applied in Idaho only if the victim is under sixteen years of age.

Arranging a meeting place and arriving there at the prearranged time are sufficient to constitute a "substantial step" in furtherance of the crime of attempted lewd conduct with a minor. *State v. Glass*, 139 Idaho 815, 87 P.3d 302 (Ct. App. 2003).

Under I.C. § 19-1414, the precise time at which the offense was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material offense. Time is not a material element of the crime of lewd and lascivious conduct with a minor. *State v. Jones*, 140 Idaho 41, 89 P.3d 881 (Ct. App. 2003).

Violation of I.C. § 18-1506 is an included offense when an individual is charged with violation of I.C. § 18-1508. *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990).

ICJI 930 LEWD CONDUCT-(TOUCHING)

INSTRUCTION NO.

To constitute lewd and lascivious conduct, it is not necessary that bare skin be touched. The touching may be through the clothing.

Comment

The naked body of the victim does not have to be touched. *State v. Madrid*, 74 Idaho 200, 259 P.2d 1044 (1953); and *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

ICJI 931 PASSIONS NEED NOT BE ACTUALLY AROUSED

INSTRUCTION NO.

The law does not require as an essential element of the crime that the lust, passions, or sexual desires of either the defendant or [name of victim] be actually aroused, appealed to, or gratified.

Comment

State v. Greensweig, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

ICJI 932 CONSENT OF VICTIM NO DEFENSE

INSTRUCTION NO.

You are instructed that it is not a defense to the crime of [name of offense] that [name of victim] may have consented to the alleged conduct.

Comment

This instruction would only apply when the defendant is alleged to have violated a statute prohibiting certain sexual conduct with persons under a specified age, *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976) (lewd and lascivious conduct).

ICJI 938 PROSTITUTION

INSTRUCTION NO.

In order for the defendant to be guilty of Prostitution, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
- [3. the defendant [name] [engaged in] [or] [offered or agreed to engage in] [sexual conduct] [or] [sexual contact] with another person, and
4. the defendant [was to] [or] [did] receive a fee for engaging in such [sexual conduct] [or] [sexual contact].]

[or]

- [3. the defendant [name] engaged in [sexual conduct] [or] [sexual contact] with another person,
4. the defendant received or was to receive a fee for engaging in such [sexual conduct] [or] [sexual contact], and
5. the defendant engaged in such [sexual conduct] [or] [sexual contact] in or through the agency of a house of prostitution.]

[or]

- [3. the defendant [name] loitered in or within view of any place to which the public or a substantial group of the public had access,
4. the defendant loitered in or within view of such place for the purpose of being hired to engage in sexual conduct or sexual contact.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5613.

A third or subsequent conviction for prostitution is a felony. I.C. § 18-5613(2). If so charged, see ICJI 942A.

ICJI 939 PROSTITUTION-DEFINITIONS

INSTRUCTION NO.

In these instructions, the following words have the meanings stated.

["Prostitution" means: (a) engaging in, or offering or agreeing to engage in, sexual conduct or sexual contact with another person in return for a fee; or (b) being an inmate of a house of prostitution; or (c) loitering in or within view of a public place for the purpose of being hired to engage in sexual conduct or sexual contact.]

["Sexual conduct" means sexual intercourse or deviate sexual intercourse.]

["Sexual contact" means any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.]

["House of prostitution" means a place where prostitution or promotion of prostitution is regularly carried on by one (1) or more persons under the control, management, or supervision of another.]

Comment

I.C. § 18-5613(1)& (3).

ICJI 940 PATRONIZING A PROSTITUTE

INSTRUCTION NO.

In order for the defendant to be guilty of Patronizing a Prostitute, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [paid or offered or agreed to pay a fee to another person] [or] [the defendant entered or remained in a house of prostitution] for the purpose of engaging in an act of sexual conduct or sexual contact.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5614.

ICJI 941 PATRONIZING A PROSTITUTE—ENHANCEMENT

INSTRUCTION NO.

Having found the defendant guilty of Patronizing a Prostitute, you must next decide whether the Defendant has pled guilty to or was found guilty of other charges of Patronizing a Prostitute. The state alleges:

1. The defendant [pled guilty to] [was found guilty of] a violation I.C. § 18-5614, Patronizing a Prostitute in [name of county], Idaho, Case No. _____[.] [,] and

2. The defendant [pled guilty to] [was found guilty of] a violation of I.C. § 18-5614, Patronizing a Prostitute in [name of county], Idaho, Case No. _____[.]

[3. (Add other prior offenses).]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5614(2).

ICJI 942A PROSTITUTION-SPECIAL VERDICT

PROSTITUTION, SPECIAL VERDICT INSTRUCTION-ENHANCEMENT

INSTRUCTION NO.

In this portion of the case you will return a verdict, consisting of a [series of] question[s] you should answer. Since the explanations on the form which you will have are part of my instructions to you, I will read the body of the verdict form to you.

"We, the Jury, duly impaneled and sworn to try the above entitled action, unanimously answer the question(s) submitted to us as follows:

QUESTION NO. 1: [Did the defendant plead guilty to] [or] [was the defendant found guilty of] a violation of I.C. § 18-5613, Prostitution, in [name of county], Idaho, Case No. ?

ANSWER: YES _____ NO _____

QUESTION NO. 2: [Did the defendant plead guilty to] [or] [was the defendant found guilty of] a violation of I.C. § 18-5613, Prostitution, in [name of county], Idaho, Case No. ?

ANSWER: YES _____ NO _____]

[QUESTION NO. 3: (Add other prior offenses)

ANSWER: YES _____ NO _____]

Once you have answered the questions, your presiding juror should date and sign the verdict form and advise the bailiff that you have reached a verdict.

Comment

See ICJI 224 for verdict form.

ICJI 942B PATRONIZING—SPECIAL VERDICT

PATRONIZING A PROSTITUTE, SPECIAL VERDICT INSTRUCTION—
ENHANCEMENT

INSTRUCTION NO.

In this portion of the case you will return a verdict, consisting of a [series of] question[s] you should answer. Since the explanations on the form which you will have are part of my instructions to you, I will read the body of the verdict form to you.

"We, the Jury, duly impaneled and sworn to try the above entitled action, unanimously answer the question(s) submitted to us as follows:

QUESTION NO. 1: [Did the defendant plead guilty to] [or] [was the defendant found guilty of] a violation of I.C. § 18-5614, Patronizing a Prostitute, in [name of county], Idaho, Case No. _____?

ANSWER: YES _____ NO _____

QUESTION NO. 2: [Did the defendant plead guilty to] [or] [was the defendant found guilty of] a violation of I.C. § 18-5614, Patronizing a Prostitute, in [name of county], Idaho, Case No. _____?

ANSWER: YES _____ NO _____]

[QUESTION NO. 3: (Add other prior offenses)

ANSWER: YES _____ NO _____]

Once you have answered the questions, your presiding juror should date and sign the verdict form and advise the bailiff that you have reached a verdict.

Comment

See ICJI 224 for verdict form.

ICJI 943 INTERSTATE TRAFFICKING IN PROSTITUTION

INSTRUCTION NO.

In order for the defendant to be guilty of Interstate Trafficking in Prostitution, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [imported] [exported] [induced] [enticed] [or] [procured] a person to come into or to leave the state of Idaho, and
4. the defendant did such act for the purpose of having such person engage in prostitution, and
5. the defendant knew that such person came into or left the state of Idaho for the purpose of engaging in prostitution.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5601.

ICJI 944 PROCUREMENT

INSTRUCTION NO.

In order for the defendant to be guilty of Procurement, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. [the defendant [name] [compelled] [induced], [enticed], [procured] [a person] [name of person] to engage in acts as a prostitute.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5602.

ICJI 945 RECEIVING PAY FOR PROCUREMENT

INSTRUCTION NO.

In order for the defendant to be guilty of Receiving Pay for Procurement, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] knowingly received money or any object of value, and
4. such money or object of value was received by the defendant to procure a prostitute.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5603.

ICJI 946 PAYING FOR PROCUREMENT

INSTRUCTION NO.

In order for the defendant to be guilty of Paying for Procurement, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] paid money or an object of value, and
4. such payment was made to procure [a person] [name of person] for the purpose of engaging in acts of prostitution.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5604.

ICJI 947 ACCEPTING EARNINGS OF A PROSTITUTE

INSTRUCTION NO.

In order for the defendant to be guilty of Accepting Earnings of a Prostitute, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] and [another person] [one or more other persons] [name of person(s)] entered into an agreement to carry out a single business enterprise involving one or more transactions for profit,
4. the business enterprise involved prostitution,
5. the defendant knew that the business enterprise involved prostitution, and
6. the defendant knowingly accepted, or appropriated money or item of value from such business enterprise.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5606.

ICJI 949 MAINTAINING (HARBORING) A HOUSE OF PROSTITUTION

INSTRUCTION NO.

In order for the defendant to be guilty of Maintaining a House of Prostitution, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [maintained] [controlled] [supported] a house used for the purpose of prostitution.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5608.

ICJI 950 INDUCING A MINOR INTO PROSTITUTION

INSTRUCTION NO.

In order for the defendant to be guilty of Inducing a Minor into Prostitution, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [induced] [attempted to induce] [a person] [name of person] to engage in prostitution while [such person] [name of person] was under the age of eighteen (18) years.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5609.

ICJI 952 ADMITTING A MINOR INTO HOUSE OF PROSTITUTION

INSTRUCTION NO.

In order for the defendant to be guilty of Admitting a Minor into a House of Prostitution, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
- [3. the defendant [name] was the proprietor, keeper, manager, conductor, or person having the control of a [house] [room] used for prostitution, and
4. the defendant admitted or kept a person under eighteen years of age in such [house] [room].]

[or]

- [3. the defendant [name] was the [father] [mother] of a child who was under eighteen years of age,
4. such child was admitted or kept in a [house] [room] used for prostitution, and
5. the defendant [admitted or kept] [or] [consented to the admission or keeping of] such child in such [house] [room].]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-5611.

ICJI 953 HUMAN TRAFFICKING -- ADDITIONAL FINDING

INSTRUCTION NO.

If you find that the defendant is guilty of [aggravated assault,] [aggravated battery,] [assault with intent to commit a serious felony,] [battery with intent to commit a serious felony,] [felonious administering of drugs,] [felony injury to child,] [felony injury to a vulnerable adult,] [felony exploitation of a vulnerable adult,] [sexual abuse or exploitation of a vulnerable adult,] [sexual abuse,] [ritualized abuse of a child,] [sexual exploitation of a child], [sexual battery, enticing of children over the internet,] [sale or barter of a child,] [grand theft,] [prostitution], [racketeering,] you must next consider whether the state has proven that the defendant engaged in [Sex trafficking in which a commercial sex act was induced by force, fraud or coercion, or in which the person induced to perform such act has not attained eighteen (18) years of age] [or] [the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery]. You must indicate on the verdict form whether or not this has been proven beyond a reasonable doubt.

Comment

I.C. §§ 18-8601, 18-8602, 18-8603. This instruction should be given where the defendant is charged with Human Trafficking in addition to one of the underlying offenses.

ICJI 960 ASSAULT WITH INTENT TO COMMIT RAPE

INSTRUCTION NO.

In order for the defendant to be guilty of Assault with Intent to Commit Rape, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
- [3. the defendant [name] committed an assault upon [name of victim], a female, and
4. when committing such assault the defendant had the specific intent to use such force as was necessary to cause his penis to penetrate, however slightly, her [oral] [anal] [or] [vaginal] opening[s] without her consent.]

[or]

- [3. the defendant [name] committed an assault upon [name of victim], a female,
4. when committing such assault, the defendant had the specific intent to cause his penis to penetrate, however slightly, her [oral] [anal] [or] [vaginal] opening[s] and
5. she was under eighteen (18) years of age.]

[or]

- [3. the defendant [name], a male, committed an assault upon [name of victim], another male, and
4. when committing such assault, the defendant had the intent to use such force as was necessary to cause his penis to penetrate, however slightly, the oral or anal opening of the other male for the purpose of sexual arousal, gratification, or abuse.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-909.

The first two alternatives would apply when the victim is a female. *State v. Andreason*, 44 Idaho 396, 257 P. 370 (1927); *State v. Neil*, 13 Idaho 539, 90 P. 860 (1907).

The third alternative would apply when a male defendant is alleged to have committed an assault with the intent to rape another male.

The crime of attempted rape is an included offense in the crime of assault with intent to commit rape. *State v. Hall*, 88 Idaho 117, 397 P.2d 261 (1964); See ICJI 225. Specific intent to commit the rape is an element of both attempted rape and assault with intent to commit rape where the rape itself is not consummated. *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984).

ICJI 961 ASSAULT WITH INTENT TO COMMIT INFAMOUS CRIME
AGAINST NATURE

INSTRUCTION NO.

In order for the defendant to be guilty of Assault with Intent to Commit the Infamous Crime Against Nature, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] committed an assault upon [name of victim], and
4. [when committing such assault the defendant had the intent to penetrate, however slightly, the [anal opening] [or] [oral opening] of [name of victim] with the defendant's penis.]

[or]

[when committing such assault the defendant had the intent to have the penis of [name of victim] penetrate, however slightly, the [anal opening] [or] [oral opening] of the defendant.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-909.

ICJI 962 ASSAULT WITH INTENT TO COMMIT LEWD CONDUCT

INSTRUCTION NO.

In order for the defendant to be guilty of Assault with Intent to Commit Lewd and Lascivious Conduct, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] committed an assault upon [name of victim],
4. [name of victim] was a child under sixteen (16) years of age, and
5. when committing such assault the defendant had the intent [to commit [an act of] [genital-genital contact] [or] [oral-genital contact] [or] [anal-genital contact] [or] [oral-anal contact] [or] [manual-anal contact] [or] [manual-genital contact] [or] [any [other] lewd or lascivious act] upon or with the body of such child] [or] [to involve such child in an act of [bestiality] [or] [sado-masochistic abuse] for the purpose of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of them.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-909.

ICJI 970 BATTERY WITH INTENT TO COMMIT RAPE

INSTRUCTION NO.

In order for the defendant to be guilty of Battery with Intent to Commit Rape, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
- [3. the defendant [name] committed a battery upon [name of victim], a female, and
4. when committing such battery the defendant had the intent to use such force as was necessary to cause his penis to penetrate, however slightly, her [vaginal] [oral] [or] [anal] opening[s], without her consent.]

[or]

- [3. the defendant [name] committed a battery upon [name of victim], a female,
4. when committing such battery, the defendant had the intent to cause his penis to penetrate, however slightly, her [vaginal] [oral] [or] [anal] opening[s], and
5. she was under eighteen (18) years of age.]

[or]

- [3. the defendant [name], a male, committed a battery upon [name of victim], another male, and
4. when committing such battery, the defendant had the intent to use such force as was necessary to cause his penis to penetrate, however slightly, the oral or anal opening of the other male for the purpose of sexual arousal, gratification, or abuse.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-911.

One of the first two alternatives would apply when the victim was a female. The third alternative would apply if

the defendant was charged with battery with intent to commit male rape.

Assault with intent to commit rape or battery with intent to commit rape is an included offense of rape and can be shown by proof of all the elements of rape except penetration. *State v. Bolton*, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991); See ICJI 225.

ICJI 971 BATTERY WITH INTENT TO COMMIT INFAMOUS CRIME
AGAINST NATURE

INSTRUCTION NO.

In order for the defendant to be guilty of Battery with Intent to Commit the Infamous Crime Against Nature, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] committed a battery upon [name of victim], and
4. [when committing such battery the defendant had the intent to penetrate, however slightly, the [anal opening] [or] [oral opening] of [name of victim] with the defendant's penis.]

[or]

[when committing such battery the defendant had the intent to have the penis of [name of victim] penetrate, however slightly, the [anal opening] [or] [oral opening] of the defendant.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-911.

ICJI 972 BATTERY WITH INTENT TO COMMIT LEWD CONDUCT

INSTRUCTION NO.

In order for the defendant to be guilty of Battery with Intent to Commit Lewd and Lascivious Conduct, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] committed a battery upon [name of victim],
4. [name of victim] was a child under sixteen (16) years of age, and
5. when committing such battery the defendant had the intent [to commit [an act of] [genital-genital contact] [or] [oral-genital contact] [or] [anal-genital contact] [or] [oral-anal contact] [or] [manual-anal contact] [or] [manual-genital contact] [or] [any [other] lewd or lascivious act] upon or with any part of the body of such child,) [or] [to involve such child in an act of [bestiality] [or] [sado-masochistic abuse],] for the purpose of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of them.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-911.

ICJI 980 EXPOSING ANOTHER TO HIV VIRUS

INSTRUCTION NO.

In order for the defendant to be guilty of Exposing Another to the HIV Virus, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
- [3. the defendant [name] exposed [name of victim] to the human immunodeficiency virus (HIV)
4. intending to infect that person with such virus.]

[or]

[3. the defendant [name] was afflicted with acquired immunodeficiency syndrome (AIDS), AIDS related complexes, or other manifestations of human immunodeficiency virus (HIV) infection, and

4. knowing that the defendant was so afflicted,
5. the defendant transferred or attempted to transfer any of the defendant's body fluid, body tissue or organs to another person.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 39-608.

ICJI 981 EXPOSING ANOTHER TO HIV VIRUS—DEFINITIONS

INSTRUCTION NO.

As used in these instructions:

"Body fluid" means [semen (whether or not spermatozoa is present)] [blood] [saliva] [vaginal secretion] [breast milk] [urine].

"Transfer" means [engaging in sexual activity by genital-genital contact, oral-genital contact, anal-genital contact] [or] [permitting the use of a hypodermic syringe, needle, or similar device without sterilization] [or] [giving (whether or not for value) blood, semen, body tissue, or organs to a person, blood bank, hospital, or other medical care facility for purposes of transfer to another person].

Comment

I.C. § 39-608(2).

ICJI 982 DEFENSE: EXPOSING ANOTHER TO HIV VIRUS-(MEDICAL
ADVICE)

INSTRUCTION NO.

The defendant cannot be guilty of Exposing Another to the HIV Virus if:

1. before the transfer of [body fluid] [body tissue] [organs] occurred,

2. the defendant had been advised by a licensed physician that the defendant was not infectious.

If you have a reasonable doubt as to whether it did occur, you must find the defendant not guilty. The state must prove beyond a reasonable doubt that this did not occur.

Comment

I.C. § 39-608(3)(b). This instruction should only be given if there is evidence supporting the defense.

ICJI 983 DEFENSE: EXPOSING ANOTHER TO HIV VIRUS-(CONSENT)

INSTRUCTION NO.

The defendant cannot be guilty of Exposing Another to the HIV Virus if [name of victim] consented to such exposure. [Name of victim] would have consented to being exposed to the HIV virus if:

1. the defendant and [name of victim] consented to engage in the sexual activity,
2. [name of victim] was at least eighteen years of age, and
3. before the sexual activity, the defendant made a full disclosure to [name of victim] of the risk of such activity.

The state must prove beyond a reasonable doubt that [name of victim] did not consent to being exposed to the HIV virus. If you have a reasonable doubt as to whether [name of victim] did consent, you must find the defendant not guilty.

Comment

I.C. § 39-608(3)(a). This instruction should only be given if there is evidence supporting the defense.

ICJI 984 SEXUAL CONTACT WITH PRISONER

INSTRUCTION NO.

In order for the defendant to be guilty of Sexual Contact with a Prisoner, the state must prove beyond a reasonable doubt:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name]
4. while [an employee of the Idaho Department of Correction,] [an employee of the Idaho Department of Juvenile Corrections,] an officer, employee, or agent of a [state, local or private correctional facility]
5. had sexual contact
6. with [name] who was not the defendant's spouse, and
7. who was at that time an [[in-state] [or] [out-of-state] prisoner] [or] [juvenile offender].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

As used in this instruction, "sexual contact" means sexual intercourse, or genital-genital contact, oral-genital contact, anal-genital, or oral-anal contact between persons of the same or opposite sex.

["Correctional facility" means a facility for the confinement of prisoners or juvenile offenders. The term shall be construed to include references to terms including, but not limited to, "prison," "state prison," "state penitentiary," "governmental detention facility," "penal institution (facility)," "correctional institution," "juvenile correctional center," "Idaho security medical program," "detention institution (facility)," "juvenile detention center (facility)," "county jail," "jail," "private prison (facility)," "private correctional facility," or those facilities that detain juvenile offenders pursuant to a contract with the Idaho department of juvenile corrections.]

["Local correctional facility" means a facility for the confinement of prisoners operated by or under the control of a county or city. The term shall include references to "county jail," or "jail." The term shall also

include a private correctional facility housing prisoners under the custody of the state board of correction, the county sheriff or other local law enforcement agency.]

["Private correctional facility" means a correctional facility constructed or operated in the state of Idaho by a private prison contractor.]

["In-state prisoner" means any person who has been charged with or convicted of a crime in the state of Idaho or who is being detained pursuant to a court order, and who is being housed in any state, local or private correctional facility, or who is being transported in any manner within or through the state of Idaho.]

["Out-of-state prisoner" means any person who is convicted of and sentenced for a crime in a state other than the state of Idaho, or under the laws of the United States or other foreign jurisdiction, and who is being housed in any state, local or private correctional facility in the state of Idaho, or who is being transported in any manner within or through the state of Idaho.]

["Juvenile offender" means a person younger than eighteen (18) years of age or who was younger than eighteen (18) years of age at the time of any act, omission, or status for which the person is being detained in a correctional facility pursuant to court order.]

Comment

I.C. § 18-6110.

ICJI 984A SEXUAL CONTACT WITH A PAROLEE OR PROBATIONER

INSTRUCTION NO.

In order for the defendant to be guilty of Sexual Contact with a Parolee or Probationer, the state must prove beyond a reasonable doubt:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name]
4. while a supervising officer
5. knowingly
6. had sexual contact
7. with [name of victim], who was not the spouse of the defendant, and
8. who was at that time a [parolee] [or] [probationer].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

As used in this instruction, "sexual contact" means sexual intercourse, or genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, between persons of the same or opposite sex.

"Supervising officer" means an employee of the Idaho department of correction who is charged with or whose duties include supervision of felony parolees or felony probationers.

"Parolee" means a person who has been convicted of a felony and who has been placed on parole by the Idaho commission for pardons and parole or similar body of another state, the United States, or a foreign jurisdiction, and who is not incarcerated in any state, local or private correctional facility, and who is being supervised by employees of the Idaho department of correction.

"Probationer" means a person who has been placed on felony probation by an Idaho court, or a court of another state, the United States, or a foreign jurisdiction, and who is not incarcerated in any state, local or private correctional facility, and who is being supervised by employees of the Idaho department of correction.

Comment

ICJI 985 FAILING TO REGISTER AS SEX OFFENDER

INSTRUCTION NO.

In order for the defendant to be guilty of Failing to Register as a Sex Offender, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] failed to register
4. with the sheriff of the county in which the defendant resided or was temporarily domiciled
5. within ten (10) days after the defendant came into that county, and
6. the defendant was at that time required to register under the Sex Offender Registration Act.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. §§ 18-8311, 18-8304, 18-8306 & 18-8307. See ICJI 987 for registration requirement.

The offenses which trigger the registration requirement are listed in IC § 18-8304.

ICJI 985A FAILING TO REGISTER ANNUALLY AS SEX OFFENDER

INSTRUCTION NO.

In order for the defendant to be guilty of Failing to Register Annually as a Sex Offender, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] failed to register
4. with the sheriff of the county in which the defendant resided or was temporarily domiciled
5. within ten (10) days after the Idaho State Police mailed a notice of annual registration to the defendant at [his] [her] last reported address, and
6. the defendant was at that time required to register under the Sex Offender Registration Act.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. §§ 18-8311, 18-8304, 18-8306 & 18-8307. See ICJI 987 for registration requirement.

The offenses which trigger the registration requirement are listed in IC § 18-8304.

ICJI 986 GIVING FALSE INFORMATION WHILE REGISTERING AS SEX
OFFENDER

INSTRUCTION NO.

In order for the defendant to be guilty of Giving False or Misleading Information While Registering as a Sex Offender, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name]
4. was required to register under the Sex Offender Registration Act, and
5. the defendant willfully furnished
6. false or misleading information
7. in such registration.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. §§ 18-8311 & 18-8303. See ICJI 987 for registration requirements.

The offenses which trigger the registration requirements are listed in IC § 18-8304.

ICJI 987 REQUIREMENT AND DURATION FOR REGISTRATION AS A SEX OFFENDER

INSTRUCTION NO.

A person who is required to register under the Sex Offender Registration Act must do so annually for life.

The defendant would have been required to register under the Sex Offender Registration Act if [:]

[after June 30, 1993, the defendant had pled guilty to or had been found guilty of [an attempt] [solicitation] [a conspiracy] [to commit] a violation of Idaho Code Section [state crime]] [;or]

[the defendant entered Idaho after June 30, 1993, and prior to entering Idaho the defendant had pled guilty to or had been found guilty of [an attempt] [solicitation] [a conspiracy] [to commit] a crime in [another state] [a territory] [a commonwealth] [any other jurisdiction] of the United States that is substantially equivalent to a violation of Idaho Code section [state crime]] [;or]

[prior to July 1, 1993, the defendant had pled guilty to or had been found guilty of [an attempt] [solicitation] [a conspiracy] [to commit] a violation of Idaho Code section [state crime]] and as a result of that offense the defendant was [incarcerated in a [county jail] [penal facility] [under [probation] [parole] supervision] after June 30, 1993].

Comment

I.C. § 18-8307.

ICJI 990 SEXUAL ABUSE OF A VULNERABLE ADULT

INSTRUCTION NO.

In order for the defendant to be guilty Of Sexual Abuse of a Vulnerable Adult, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. [the defendant [name] committed [an act of] [genital-genital contact] [or] [oral-genital contact] [or] [anal-genital contact] [or] oral-anal contact] [or] [manual-anal contact] [or] [manual-genital contact] [or] [any other] [a] [lewd or lascivious act] upon or with the body of [name of victim],]

[or]

[the defendant [name] involved [name of victim] in an act of [bestiality] [or] [sado-masochism]]

[or]

[the defendant [name] caused or had sexual contact with [name of victim]]

4. [name of victim] was a vulnerable adult, and
5. the defendant [committed such act] [or] [involved [name of victim] in such act of [bestiality] [or] [sado-masochistic abuse] [or] [caused or had sexual contact with [name of victim] with the specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of the defendant, of [name of victim], or of some other person.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

"Vulnerable adult" means a person 18 years of age or older who is unable to protect himself or herself from abuse, neglect or exploitation due to physical or mental impairment which affects the person's judgment or behavior to the extent he or she lacks sufficient understanding or capacity to make or communicate or implement decisions regarding his or her person.

["Sexual contact" means any physical contact between a vulnerable adult and any person or between vulnerable adults, which is caused by the actor, or the actor causing the vulnerable adult to have self-contact.]

Comment

I.C. § 18-1505B.

ICJI 991 SEXUAL EXPLOITATION OF A VULNERABLE ADULT

INSTRUCTION NO.

In order for the defendant to be guilty Of Sexual Exploitation of a Vulnerable Adult, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
- [3. [the defendant [name] caused, induced or permitted [name of victim] to engage in or be used in any explicit sexual conduct]
4. for any commercial purpose
5. [name of victim] was a vulnerable adult.]

[or]

- [3. the defendant [name] [prepared,] [arranged for,] [published,] [produced,] [promoted,] [made,] [sold,] [financed,] [offered,] [exhibited,] [advertised,] [dealt in,] [possessed] [or] [distributed] sexually exploitative material depicting a vulnerable adult [engaged in,] [observing,] [or] [being used for] explicit sexual conduct
4. for any commercial purpose.]

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

"Vulnerable adult" means a person 18 years of age or older who is unable to protect himself or herself from abuse, neglect or exploitation due to physical or mental impairment which affects the person's judgment or behavior to the extent he or she lacks sufficient understanding or capacity to make or communicate or implement decisions regarding his or her person.

"Commercial purpose" means the intention, objective, anticipation or expectation of monetary gain or other material consideration, compensation, remuneration or profit.

"Explicit sexual conduct" means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, sexual excitement, or bestiality.

["Sexually exploitative material" means any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, chemically reproduced visual material which depicts a vulnerable adult engaged in, participating in, observing, or being used for explicit sexual conduct.]

Comment

I.C. § 18-1505B. The jury should be instructed on the appropriate definition of additional terms contained in I.C. § 18-1507.