

16.10 POSSESSION OF CHILD PORNOGRAPHY WITH INTENT TO PROMOTE

§ 827.071(4), Fla. Stat.*

To prove the crime of Possession of a Child Pornography with Intent to Promote, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) possessed a[n] [photograph] [motion picture] [exhibition] [show] [representation] [presentation].**
- 2. The [photograph] [motion picture] [exhibition] [show] [representation] [presentation] included, in whole or in part, child pornography.**
- 3. At the time, (defendant) had the intent to promote the [photograph] [motion picture] [exhibition] [show] [representation] [presentation].**

Give if applicable.

The possession of three or more copies of such [photographs] [motion pictures] [exhibitions] [shows] [representations] [presentations] may justify a finding of an intent to promote.

Possession.

To prove (defendant) possessed a[n] [photograph] [motion picture] [exhibition] [show] [representation] [presentation] that included sexual conduct by a child, the State must prove beyond a reasonable doubt that [he] [she] a) knew of the nature of the material in the [photograph] [motion picture] [exhibition] [show] [representation] [presentation] and b) intentionally exercised control over that [photograph] [motion picture] [exhibition] [show] [representation] [presentation].

Control can be exercised over an item whether the item is carried on a person, near a person, or in a completely separate location. Mere proximity to an item does not establish that the person intentionally exercised control over the item in the absence of additional evidence. Control can be established by proof that (defendant) had direct personal power to control the item or the present ability to direct its control by another.

Joint possession. Give if applicable.

Possession may be sole or joint, that is, two or more persons may possess a[n] [photograph] [motion picture] [exhibition] [show] [representation] [presentation].

§ 827.071(1), Fla. Stat.

“Child pornography” means:

- 1. Any image depicting a minor engaged in sexual conduct;**
- or**
- 2. Any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct.**

“Identifiable minor” means a person:

- 1. Who was a minor at the time the image was created, altered, adapted, or modified, or whose image as a minor was used in the creating, altering, adapting, or modifying of the image;**
- and**
- 2. Who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.**

The term may not be construed to require proof of the actual identity of the identifiable minor.

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

“Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, or advertise or to offer or agree to do the same.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

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

“Sadomasochistic abuse” means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically

restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself.

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

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

Give if applicable.

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

“An object” includes a finger.

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

“Union” means contact.

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

§ 827.071(1), Fla. Stat.

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

Lesser Included Offenses

POSSESSION OF CHILD PORNOGRAPHY WITH INTENT TO PROMOTE — 827.071(4)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Possession (do not include “intentional viewing” unless charged) of a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, was known by defendant to include child pornography		827.071(5)(a)	16.11
	Attempt	777.04(1)	5.1

Comments

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

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

This instruction was adopted in 2008 [995 So. 2d 489] and amended in 2018 [238 So. 3d 182] and on December 21, 2022.