

## **16.11 [POSSESSION] [CONTROL] [INTENTIONAL VIEWING] OF CHILD PORNOGRAPHY**

§ 827.071(5)(a), Fla. Stat.\*

**To prove the crime of [Possession] [Control] [Intentional Viewing] of Child Pornography, the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Defendant) [knowingly possessed] [knowingly controlled] [intentionally viewed] a[n] [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation].**
- 2. The [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation] included, in whole or in part, child pornography.**
- 3. (Defendant) knew that the [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation] included child pornography.**

*Possession. Give if applicable.*

**To prove (defendant) possessed a[n] [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [presentation] that included child pornography, 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] [image] [data] [computer depiction] [presentation]; and b) intentionally exercised control over that [photograph] [motion picture] [exhibition] [show] [representation] [image] [data] [computer depiction] [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] [image] [data] [computer depiction] [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.**

**“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.**

**“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.**

**“Intentionally view” means to deliberately, purposefully, and voluntarily view. Proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation over any period of time.**

#### Lesser Included Offense

#### [POSSESSION] [CONTROL] [INTENTIONAL VIEWING] OF CHILD PORNOGRAPHY — § 827.071(5)(a)

| CATEGORY ONE | CATEGORY TWO | FLA. STAT. | INS. NO. |
|--------------|--------------|------------|----------|
| None         |              |            |          |
|              | 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 2013 [131 So. 3d 720] and 2018 [238 So. 3d 182] and on December 21, 2022.