

ENDANGERING THE WELFARE OF A CHILD
(PORNOGRAPHY)
(N.J.S.A. 2C:24-4(b)(3))

Defendant is charged in count _____ of the indictment with endangering the welfare of a child.

[READ COUNT OF INDICTMENT]

The statute under which this charge is based reads in pertinent part:

A person who causes or permits a child to engage in a prohibited sexual act or in the simulation of such an act [who] knows, has reason to know or intends that the prohibited act may be photographed, filmed, reproduced or reconstructed in any manner, including on the Internet, or may be part of an exhibition or performance, is guilty of a crime.

In order to convict defendant of this charge, the State must prove the following elements beyond a reasonable doubt:

1. That defendant knowingly caused or permitted a child to engage in a prohibited sexual act or in the simulation of such an act.
2. That defendant knew, had reason to know or intended that the prohibited act was to be photographed, filmed, reproduced or reconstructed in any manner or could be a part of an exhibition or performance.

The first element that the State must prove beyond a reasonable doubt is that defendant knowingly caused or permitted (the victim's name) to engage in a prohibited sexual act or in the simulation of such an act. A child means any person under the age of 16 years of age. The State must prove beyond a reasonable doubt that the child was under the age of 16 at the time of the offense. It is not a defense that the defendant did not know that the child was under the age of 16 or that the defendant believed that the child was 16 years old or older, even if such a mistaken belief was reasonable.¹

A prohibited sexual act means

[CHOOSE APPROPRIATE]

sexual intercourse, which is penetration, however slight, of the vagina by a penis.²

anal intercourse, which is penetration, however slight, into the anus.³

masturbation, which is stimulation of the genitals.⁴

¹ N.J.S.A. 2C:24-4b(6). See *State v. Perez*, 177 N.J. 540, 555 (2003).

² *Hice v. State*, 593 S.W.2d 57, 64 (Ark. 1980) and cases cited there.

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bestiality, which is a sexual connection between a person and an animal.⁵

sadism, which is sexual gratification dependent largely on the infliction of pain on others.⁶

masochism, which is sexual gratification dependent largely on the infliction of physical or mental abuse on the person.⁷

fellatio, which is oral contact with the male sexual organ.⁸

cunnilingus, which is oral contact with the female sex organ.⁹

nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction.

vaginal intercourse, which is the penetration of the vagina, or **[where appropriate]** of the space between the labia majora or outer lips of the vulva.¹⁰

sexual penetration, which is insertion of the hand, finger or object into the anus or vagina, either by the defendant or on the defendant's instructions.¹¹

sexual contact, which is an intentional touching by the victim or defendant, either directly or through clothing, of the victim's or defendant's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the defendant.¹²

To cause is to do something that produces an effect or result. To permit is to consent to formally or to give opportunity for or allow or admit of.¹³

A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that the conduct is of that nature or that such circumstances exist or the person is aware of a high probability of their existence. A person acts knowingly with respect to

³ State v. Gallagher, 286 N.J. Super. 1, 13 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

⁴ People v. Lamb, 90 Cal. Rptr.2d 565, 576 (Ct. App. 1999)

⁵ State v. Bonyne, 450 N.W.2d 331, 338 (Minn. Ct. App. 1990).

⁶ Ex Parte Anderson, 902 S.W.2d 695, 700 (Tex. Ct. App. 1995).

⁷ Id. at 700.

⁸ State in the Interest of S.M., 284 N.J. Super. 611, 616-19 (App. Div. 1995).

⁹ State v. Fraction, 206 N.J. Super. 532, 535-36 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986).

¹⁰ See State v. J.A., 337 N.J. Super. 114 (App. Div. 2001). The Appellate Division upheld the charge given by the trial court in that case which included the following language which can be used if the circumstances of the specific case are appropriate: "This means that if you find from all of the evidence presented beyond a reasonable doubt that there was [penile] penetration to the outer area of the vaginal opening, what is commonly referred to as the vaginal lips, that is sufficient to establish penetration under the law."

¹¹ N.J.S.A. 2C:24-4b(j) refers to "[a]ny act of sexual penetration or sexual contact as defined in N.J.S.A. 2C:14-1." Every other act of "penetration" referred to in N.J.S.A. 2C:14-1, except for vaginal intercourse, is set forth in the definition of prohibited sexual act.

¹² N.J.S.A. 2C:14-1d. See State v. J.A., 337 N.J. Super. 114 (App. Div. 2001). The Appellate Division upheld the charge given by the trial court in that case which included the following language which can be used if the circumstances of the specific case are appropriate: "This means that if you find from all of the evidence presented beyond a reasonable doubt that there was [penile] penetration to the outer area of the vaginal opening, what is commonly referred to as the vaginal lips, that is sufficient to establish penetration under the law."

¹³ State v. V.R. 387 N.J. Super. 342, 346 (App. Div. 2006).

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a result of the conduct if he/she is aware that it is practically certain that the conduct will cause a result. “Knowing,” “with knowledge,” or equivalent terms have the same meaning.

The second element that the State must prove beyond a reasonable doubt is that defendant knew, had reason to know or intended that the prohibited act might be photographed, filmed, reproduced, or reconstructed in any manner or might be part of an exhibition or performance. I have defined knowingly for you. A person has reason to know if a reasonably prudent person in his/her situation would have known. A person intends an act if he/she acts purposely. A person acts purposely with respect to the nature of his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if the individual is aware of the existence of such circumstances or the individual believes or hopes that they exist. “With purpose,” “designed,” “with design” or equivalent terms have the same meaning.

Knowledge and purpose are conditions of the mind. They cannot be seen and can only be determined by inference from defendant’s conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she did a particular thing. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of his/her acts and conduct and from all he/she said and did at the particular time and place and from all surrounding circumstances established by the evidence.

If you find that the State has proven every element beyond a reasonable doubt, then you must find defendant guilty. If you find that the State has failed to prove any element beyond a reasonable doubt, then you must find defendant not guilty.

[CHARGE IF FIRST DEGREE CRIME ALLEGED]

Ordinarily, endangering the welfare of a child is a crime of the second degree. However, it is a crime of the first degree if the defendant was a parent, guardian or other person who has been legally charged with the care or custody of the child by a court or public agency.¹⁴ Here, the State alleges that defendant was (victim’s name) [parent] [guardian] [other person]. If you find that the State has proven beyond a reasonable doubt that defendant was (victim’s name) [parent] [guardian] [other person], then you must find defendant guilty of first degree endangering the welfare of a child.

¹⁴ See *State v. McAllister*, 394 N.J. Super. 571, 576 (App. Div. 2007). Under the Appellate Division’s opinion, an individual who has informally assumed custody of the child cannot be charged with a first degree offense.

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If you find that the State has failed to prove beyond a reasonable doubt that defendant was (victim's name) [parent] [guardian] [other person], then you must find defendant guilty of second degree endangering the welfare of a child.