

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

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:

Any person who photographs or films a child in a prohibited sexual act or in the simulation of such an act or who uses any device, including a computer, to reproduce or reconstruct the image of a child in a prohibited sexual act or in the simulation of such an act is guilty of a crime.

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

1. That defendant

[CHOOSE APPROPRIATE]

photographed or filmed a child in a prohibited sexual act or in the simulation of such an act, and

OR

used any device, including a computer, to reproduce or reconstruct the image of a child in a prohibited sexual act or in the simulation of such an act, and

2. That defendant did so knowingly.

The first element that the State must prove beyond a reasonable doubt is that defendant [photographed or filmed] [used any device, including a computer, to reproduce or reconstruct the image of] a child[ren] 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[ren] was [were] 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[ren] was [were] under the age of 16 or that the defendant believed that the child[ren] was [were] 16 years old or older, even if such a mistaken belief was reasonable.¹

[USE IF DEFENDANT ASSERTS “VIRTUAL CHILD” DEFENSE]

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

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A child means any person under the age of 16 years of age. The State must prove beyond a reasonable doubt that the child[ren] was [were] under the age of 16 at the time of the offense. Moreover, the State must prove beyond a reasonable doubt that the images in question were of [a] real child[ren] and that defendant knew that the images were of [a] real child[ren].²

It is not a defense that the defendant did not know that the child[ren] was [were] under the age of 16 or that the defendant believed that the child [children] was [were] 16 years old or older, even if such a mistaken belief was reasonable.³

A prohibited sexual act means

[CHOOSE APPROPRIATE]

sexual intercourse, which is penetration, however slight, of the vagina by a penis.⁴

anal intercourse, which is penetration, however slight, into the anus.⁵

masturbation, which is stimulation of the genitals.⁶

bestiality, which is a sexual connection between a person and an animal.⁷

sadism, which is sexual gratification dependent largely on the infliction of pain on others.⁸

masochism, which is sexual gratification dependent largely on the infliction of physical or mental abuse on the person.⁹

fellatio, which is oral contact with the male sexual organ.¹⁰

cunnilingus, which is oral contact with the female sex organ.¹¹

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.¹²

sexual penetration, which is insertion of the hand, finger or object into the anus or vagina, either by

² State v. May, 362 N.J. Super. 572, 588 (App. Div. 2003).

³ N.J.S.A. 2C:24-4b(6). See State v. Perez, 177 N.J. 540, 555 (2003).

⁴ Hice v. State, 593 S.W.2d 57, 64 (Ark. 1980) and cases cited there.

⁵ State v. Gallagher, 286 N.J. Super. 1, 13 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

⁶ People v. Lamb, 90 Cal. Rptr.2d 565, 576 (Ct. App. 1999)

⁷ State v. Bonyng, 450 N.W.2d 331, 338 (Minn. Ct. App. 1990).

⁸ Ex Parte Anderson, 902 S.W.2d 695, 700 (Tex. Ct. App. 1995).

⁹ Id. at 700.

¹⁰ See State in the Interest of S.M., 284 N.J. Super. 611, 616-19 (App. Div. 1995).

¹¹ State v. Fraction, 206 N.J. Super. 532, 535-36 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986).

¹² 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

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the defendant or on the defendant's instructions.¹³

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.¹⁴

Reproduction means, but is not limited to, computer generated images.

The second element that the State must prove beyond a reasonable doubt is that defendant knowingly [photographed or filmed a child in a prohibited sexual act or in the simulation of such an act] [used any device, including a computer, to reproduce or reconstruct the image of a child in a prohibited sexual act or in the simulation of such an act, and photographed].

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 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.

Knowledge is a condition of the mind. It 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 the elements of the offense beyond a reasonable doubt, then you must find defendant guilty. If you find that the State has failed to prove any element of the offense beyond a reasonable doubt, then you must find defendant not guilty.

sufficient to establish penetration under the law."

¹³ 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 the N.J.S.A. 2C:14-1, except for vaginal intercourse, is set forth in the definition of prohibited sexual act.

¹⁴ 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."