

ENDANGERING THE WELFARE OF A CHILD
(PORNOGRAPHY)

Applies to crimes committed after August 14, 2013
N.J.S.A. 2C:24-4b(5)(a)(iii)

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 by any means including but not limited to the Internet knowingly stores or maintains an item depicting the sexual exploitation or abuse of a child using a file-sharing program which is designated as available for searching by or copying to one or more other computers 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 by any means including but not limited to the Internet knowingly stored or maintained an item depicting the sexual exploitation or abuse of a child,
and
2. That defendant did so using a file sharing program which is designated as available for searching by or copying to one or more other computers.

The first element that the State must prove beyond a reasonable doubt is that defendant, by any means, including but not limited to the Internet knowingly stored or maintained an item depicting the sexual exploitation or abuse of a child.

A child means any person under the age of 18 years of age. The State must prove beyond a reasonable doubt that the child[ren] was [were] under the age of 18 at the time of the offense. A person who is depicted as or presents the appearance of being under the age of 18 in any photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction may be inferred to be under the age of 18.¹

¹ The statute states that there is a rebuttable presumption that the child is under the age of 18, but it should be charged as an inference. N.J.R.E. 303.

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It is not a defense that the defendant did not know that the child[ren] was [were] under the age of 18 or that the defendant believed that the child[ren] was [were] 18 years old or older, even if such a mistaken belief was reasonable.²

[USE IF DEFENDANT ASSERTS “VIRTUAL CHILD” DEFENSE]

A child means any person under the age of 18 years of age. The State must prove beyond a reasonable doubt that the [child][children] [was] [were] under the age of 18 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] [children] and that defendant knew that the images were of [a] real [child][children].³ A person who is depicted as or presents the appearance of being under the age of 18 in any photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction may be inferred to be under the age of 18.⁴

It is not a defense that the defendant did not know that the [child][children] [was] [were] under the age of 18 or that the defendant believed that the [child][children] [was] [were] 18 years old or older, even if such a mistaken belief was reasonable.⁵

[RESUME MAIN CHARGE]

To store means to keep or put in computer memory. To maintain means to keep in a certain condition. The Internet means the international computer network of both federal and non-federal interoperable packet switched data networks.

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.

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

³ State v. May, 362 N.J. Super. 572, 588 (App. Div. 2003).

⁴ The statute states that there is a rebuttable presumption that the child is under the age of 18, but it should be charged as an inference. N.J.R.E. 303.

⁵ N.J.S.A. 2C:24-4b(6). See State v. Perez, 177 N.J. 540, 555 (2003).

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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.

An item depicting the sexual exploitation or abuse of a child means any photograph, film, video, an electronic, electromagnetic or digital recording, an image stored or maintained in a computer program or file or in a portion of a file, or any other reproduction or reconstruction which depicts a child engaging in a prohibited sexual act or in the simulation of such an act.⁶ Here, the State alleges that the item was a (list item).

A prohibited sexual act means:

[CHOOSE APPROPRIATE]

sexual intercourse, which is penetration, however slight, of the vagina by a penis.⁷

anal intercourse, which is penetration, however slight, into the anus.⁸

masturbation, which is stimulation of the genitals.⁹

bestiality, which is a sexual connection between a person and an animal.¹⁰

sadism, which is sexual gratification dependent largely on the infliction of pain on others.¹¹

masochism, which is sexual gratification dependent largely on the infliction of physical or mental abuse on the person.¹²

⁶ See N.J.S.A. 2C:24-4b(1).

⁷ Hice v. State, 593 S.W.2d 57, 64 (Ark. 1980) and cases cited there.

⁸ State v. Gallagher, 286 N.J. Super. 1, 13 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

⁹ People v. Lamb, 90 Cal. Rptr.2d 565, 576 (Ct. App. 1999).

¹⁰ State v. Bonyne, 450 N.W.2d 331, 338 (Minn. Ct. App. 1990).

¹¹ Ex Parte Anderson, 902 S.W.2d 695, 700 (Tex. Ct. App. 1995).

¹² Id. at 700.

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fellatio, which is oral contact with the male sexual organ.¹³

cunnilingus, which is oral contact with the female sex organ.¹⁴

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.¹⁵

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.¹⁶

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.¹⁷

The second element that the State must prove beyond a reasonable doubt is that defendant in storing or maintaining an item depicting the sexual exploitation or abuse of a child did so using a file sharing program which is designated as available for searching by or copying to one or more other computers. A file sharing program means a computer program, application, software or operating system that allows the user of a computer on which such program, application, software or operating

¹³ State in the Interest of S.M., 284 N.J. Super. 611, 616-19 (App. Div. 1995).

¹⁴ State v. Fraction, 206 N.J. Super. 532, 535-36 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986).

¹⁵ 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."

¹⁶ N.J.S.A. 2C:24-4b(1)(j) refers to "[a]ny act of sexual penetration or sexual contact as defined in N.J.S. 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.

¹⁷ 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."

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system is installed to designate files as available for searching by or copying to one or more other computers, to transmit such designated files directly to one or more other computers, and to request the transmission of such designated files directly from one or more other computers. The term file sharing program includes but is not limited to a computer program, application or software that enable a computer user to participate in a peer to peer network. A peer-to-peer network means a connection of computer systems through which files are shared directly between the systems on a network without the need of a central server.¹⁸

The State does not have to prove that an item depicting the sexual exploitation or abuse of a child actually was searched, copied, transmitted or viewed by another user of the file sharing program or by any other persons or that the defendant was aware that the item depicting the sexual exploitation or abuse of a child was available for searching, or copying to one or more other computers. It is not a defense that the defendant did not intend to distribute the item to another user of the file sharing program or to any other person. Distribute means to sell, or to manufacture, give, provide, lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the Internet or by any other means, whether for pecuniary gain or not. It also includes an agreement¹⁹ or attempt²⁰ to distribute.

If you find that the State has proven every element 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.

[CHARGE THE FOLLOWING IF THE STATE ALLEGES THAT THERE WERE 25 OR MORE ITEMS DEPICTING THE SEXUAL EXPLOITATION OR ABUSE OF A CHILD]

If you have found defendant guilty of the offense, then you must go on to decide whether the State has proven beyond a reasonable doubt that defendant distributed 25 items or more depicting the sexual exploitation or abuse of a child. Each depiction of the sexual exploitation or abuse of a child

¹⁸ See N.J.S.A. 2C:24-4b(1).

¹⁹ If the State is alleging an agreement to distribute, the court should charge the jury on conspiracy.

²⁰ If attempt is alleged, use the Model Jury Charge on Attempt.

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is considered a separate item, whether the act or acts were to the same person or several persons or occurred at different times²¹ (so long as each individual act was committed during the statute of limitations).

If you find that the State has proven beyond a reasonable doubt that there were 25 or more items depicting the sexual exploitation or abuse of a child, then you must answer “yes” on the verdict sheet. If you find that the State has failed to prove beyond a reasonable doubt that there were 25 or more items or more depicting the sexual exploitation or abuse of a child, then you must answer “no” on the verdict sheet.

²¹ The statute requires that these acts for aggregation purposes occur within the applicable statute of limitations. If this is an issue, the jury charge should indicate that the jury is to find that the acts occurred within a specified period of time.