

ENDANGERING THE WELFARE OF A CHILD
(PORNOGRAPHY)
(Applies to crimes committed after August 14, 2013)
N.J.S.A. 2C:24-4b(5)(b)

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 knowingly possesses, knowingly views, or knowingly has under his control, through any means, including the Internet, an item depicting the sexual exploitation or abuse of a child 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 knowingly [possessed] [viewed] [had under his/her control] 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. 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.¹

[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].²

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

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

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

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reconstruction may be inferred to be under the age of 18.³ 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.⁴

[RESUME MAIN CHARGE]

The word “possess” means a knowing, intentional control of a designated thing, accompanied by a knowledge of its character. In other words, to “possess” within the meaning of the law, the defendant must knowingly procure or receive the item possessed or be aware of his/her control thereof for a sufficient period of time to have been able to relinquish his/her control if he/she chose to do so. To view means to see or look at. To have under one’s control means to be able to direct. Possession includes receiving, viewing or having under one’s control through any means, including the Internet. The Internet means the international computer network of both federal and non-federal interoperable packet switched data networks.⁵

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.

A person is in actual possession of a particular article or thing when he/she knows what it is: that is, he/she has knowledge of its character. A person who, with knowledge of its character, knowingly has direct physical control over a thing, at a given time, is in actual possession of it.

Constructive possession means possession in which the possessor does not physically have the item on his or her person but is aware that the item is present and is able to and has the intention to exercise control over it. So, someone who has knowledge of the character of an item and knowingly has both the power and the intention at a given time to exercise control over it, either directly or through another person or persons, is then in constructive possession of that item.

³ 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.

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

⁵ See N.J.S.A. 2C:24-4b(1).

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Possession may be sole or joint. If one person alone has actual or constructive possession of an item, possession is sole. If two or more persons share actual or constructive knowing possession of an item, possession is joint.

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

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

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

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abuse on the person.¹²

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

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

[CHARGE THE FOLLOWING IF THE STATE ALLEGES THAT THERE WERE 100 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

¹² Id. at 700.

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

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State has proven beyond a reasonable doubt that there were 100 or more items depicting the sexual exploitation or abuse of a child. Each depiction of the sexual exploitation or abuse of a child is considered a separate item, whether the possession of the item occurred at the same time or at different times¹⁸ (so long as each individual act was committed during the statute of limitations).

under the law.”

¹⁸ 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.