

ENDANGERING THE WELFARE OF A CHILD
(PORNOGRAPHY)
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:

Any person who knowingly possesses or knowingly views any photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction which depicts a child engaging 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 elements beyond a reasonable doubt:

1. That defendant [possessed] [viewed] any [choose appropriate] photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction of a child.
2. That defendant knowingly [possessed] [viewed] any [choose appropriate] photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction of a child.
3. That the [child] [children] depicted in the [choose appropriate] photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction [was] [were] engaging in a prohibited sexual act or in the simulation of such an act.
4. That defendant knew that the [child] [children] depicted in the [choose appropriate] photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction [was] [were] engaging in a prohibited sexual act or in the simulation of such an act.

The first element that the State must prove beyond a reasonable doubt is that defendant [possessed] [viewed] any [choose appropriate] photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction of a child.

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

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that the child was 16 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 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. Moreover, the State must prove beyond a reasonable doubt that the images in question were of real children and that defendant knew that the images were of real children.²

It is not a defense that the defendant did not know that the [child] [children] [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

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 possessed] [viewed] any [choose appropriate] photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction of a child.

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.

[WHERE POSSESSION ALLEGED, CHARGE FOLLOWING]

To “possess” an item under the law, one must have a knowing, intentional control of that

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).

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

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item accompanied by a knowledge of its character. So, a person who possesses an item such as **(IDENTIFY RELEVANT ITEM(S))** must know or be aware that he/she possesses it, and he/she must know what it is that he/she possesses or controls **(that it is _____)**.

[WHERE APPLICABLE, charge: Possession cannot merely be a passing control, fleeting or uncertain in its nature.] In other words, to “possess” an item, one must knowingly procure or receive an item 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.

The State must prove beyond a reasonable doubt that a possessor acted knowingly in possessing the item. I have already defined knowingly for you. A person may possess (an item) even though it was not physically on his/her person at the time of the arrest, if he/she had in fact, at some time prior to his/her arrest, had control and over it.

Possession means a conscious, knowing possession, either actual or constructive.

[CHARGE THOSE FOLLOWING PARAGRAPHS AS APPLY TO YOUR CASE]

ACTUAL POSSESSION

A person is in actual possession of an item when he/she first, knows what it is: that is, he/she has knowledge of its character, and second, knowingly has it on his/her person at a given time.

CONSTRUCTIVE POSSESSION⁴

Possession may be constructive instead of actual. As I just stated, a person who, with knowledge of its character, knowingly has direct physical control over an item 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.

JOINT POSSESSION

⁴ In State v. Spivey, 179 N.J. 229 (2004), the New Jersey Supreme Court affirmed a conviction under N.J.S.A. 2C:39-4.1(a), Possession of a Firearm While Committing Certain Drug Offenses. There, the Court noted that the statute suggested a temporal and spatial link between possession of the firearm and the drugs. The Court held: “The evidence must permit the jury to infer that the firearm was accessible for use in the commission of the [drug] crime.” In the appropriate case, therefore, the possession charge may be supplemented by this language.

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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.

[CHARGE IN ALL CASES]

The third element that the State must prove beyond a reasonable doubt is that the [child] [children] depicted in the photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction [was] [were] engaging in a prohibited sexual act or in the simulation of such an act.

A prohibited sexual act means:

[CHOOSE APPROPRIATE]

sexual intercourse, which is penetration, however slight, of the vagina by a penis.⁵

anal intercourse, which is penetration, however slight, into the anus.⁶

masturbation, which is stimulation of the genitals.⁷

bestiality, which is a sexual connection between a person and an animal.⁸

sadism, which is sexual gratification dependent largely on the infliction of pain on others.⁹

masochism, which is sexual gratification dependent largely on the infliction of physical or mental abuse on the individual.¹⁰

fellatio, which is oral contact with the male sexual organ.¹¹

cunnilingus, which is oral contact with the female sex organ.¹²

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.¹³

⁵ Hice v. State, 593 S.W.2d 57, 64 (Ark. 1980) and cases cited there.

⁶ State v. Gallagher, 286 N.J. Super. 1, 13 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

⁷ People v. Lamb, 90 Cal. Rptr.2d 565, 576 (Ct. App. 1999)

⁸ State v. Bonyng, 450 N.W.2d 331, 338 (Minn. Ct. App. 1990).

⁹ Ex Parte Anderson, 902 S.W.2d 695, 700 (Tex. Ct. App. 1995).

¹⁰ Id. at 700.

¹¹ State in the Interest of S.M., 284 N.J. Super. 611, 616-19 (App. Div. 1995).

¹² State v. Fraction, 206 N.J. Super. 532, 535-36 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986).

¹³ 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

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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.¹⁴

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.¹⁵

The fourth element that the State must prove beyond a reasonable doubt is that defendant knew that the [child] [children] depicted in the photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction [was] [were] engaging in a prohibited sexual act or in the simulation of such an act. I already defined "knowingly" for you.

If you find that the State has proven each 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.

referred to as the vaginal lips, that is sufficient to establish penetration under the law."

¹⁴ 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.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.

¹⁵ 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."