

Invasion of Privacy
(Observing)
N.J.S.A. 2C:14-9(a)

Count ____ of the indictment charges the defendant with the crime of invasion of privacy.

[READ COUNT OF INDICTMENT.]

That section of our statutes provides in pertinent part:

A person commits a crime if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may **[Choose as appropriate: (expose intimate parts) (engage in sexual penetration) (engage in sexual contact)]**, he observes another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

To find defendant guilty of this offense, the State must prove beyond a reasonable doubt each of the following elements:

1. The defendant observed another person;
2. The defendant did so without that person's consent;
3. The defendant did so knowing that he/she is not licensed or privileged to do so;
4. The defendant did so under circumstances in which a reasonable person would know that another may **[Choose as appropriate: (expose intimate parts) (engage in sexual penetration) (engage in sexual contact)]**; and
5. The defendant did so under circumstances in which a reasonable person would not expect to be observed.

The first element the State must prove beyond a reasonable doubt is that defendant observed another person, in this case (name(s) of victim(s)).

The second element the State must prove beyond a reasonable doubt is that defendant observed (name(s) of victim(s)) without his/her consent. Consent in the law has a meaning very similar to its everyday meaning. Consent is a person's voluntary and serious agreement or

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submission to the alleged observation. Such consent must, of course, be given freely, and it must be legally effective.

[(Include if appropriate): Consent can never be legally effective in providing a defense to a criminal charge if:

[Choose appropriate factor(s)]:

(a) the victim was not legally competent to authorize the conduct charged to constitute the offense; or

(b) the victim(s) was(were) by reason of his/her [(choose appropriate factor(s): youth, mental disease or defect or intoxication)] either known by the defendant to be unable or was manifestly unable to make a reasonable judgment as to the nature of harmfulness of the conduct charged to constitute an offense; or

(c) the victim's consent was induced by force, duress or deception of a kind that the law defining the offense seeks to prevent.]

In determining whether the consent of the victim was freely and voluntarily given, you are advised that consent may be openly expressed, implied, or apparent from the victim's willing participation in the activity in question. Further, you may consider all that he/she said and did at the particular time and place, all of the surrounding circumstances, and whether a normal competent person would freely and seriously consent to the conduct with which the defendant is charged.¹

The third element the State must prove beyond a reasonable doubt is that defendant knew

¹ See Model Jury Charges (Criminal), "Consent (Which Negates an Element of the Offense)

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that he/she is not licensed or privileged to observe (name(s)) of victim(s)).

A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of the high probability of their existence. A person acts knowingly as to a result of his/her conduct if he/she is aware that it is practically certain that the conduct will cause such a result. Knowing, with knowledge, or equivalent terms have the same meaning.

Knowledge is a condition of the mind. It cannot be seen. It can only be determined by inferences from conduct, words or acts. Therefore, it is not necessary for the State to produce witnesses to testify that the defendant stated, for example, that he/she acted with knowledge when he/she had control over a particular thing. It is within your power to find that proof of knowledge has been furnished beyond a reasonable doubt by inference which may arise from the nature of the acts and the surrounding circumstances.²

[Charge if appropriate: For purposes of this act, a law enforcement officer, or a corrections officer or guard in a correctional facility or jail, who is engaged in the official performance of his duties shall be deemed to be licensed or privileged to make observations.³]

The fourth element the State must prove beyond a reasonable doubt is that the defendant observed (name(s) of victim(s)) under circumstances in which a reasonable person would know that another [**Choose as appropriate:** (may expose intimate parts)(may engage in sexual penetration)(may engage in sexual contact)].

[Choose appropriate definitions(s)]:

² (N.J.S.A. 2C:2-10)” (rev. 10/17/88).
³ See Model Jury Charges (Criminal), “Possession (N.J.S.A. 2:2-1)” (rev. 6/20/14).

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“Intimate parts” means a person’s sexual organs, genital area, anal area, inner thigh, groin, buttock(s) or breast(s).⁴

“Sexual penetration” means vaginal intercourse, cunnilingus, fellatio, anal intercourse, or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor’s instruction. Any amount of insertion, however slight, constitutes penetration; that is, the depth of insertion is not relevant.⁵

[Choose appropriate definition(s) of terms included in the definition of “sexual penetration”]:

“Vaginal intercourse” means the penetration of the vagina [or where appropriate: of the space between the labia majora or outer lips of the vulva⁶].

“Cunnilingus” means oral contact with the female sex organ. Cunnilingus does not require penetration.⁷

“Fellatio” means oral contact with the male sex organ. Fellatio does not require penetration.⁸

“Anal intercourse” is penetration of any depth into the anus.⁹]

“Sexual contact” means an intentional touching, either directly or through clothing, of intimate parts for the purpose of degrading, humiliating, or sexually arousing or sexually

³ N.J.S.A. 2C:14-9g.

⁴ N.J.S.A. 2C:14-1e.

⁵ N.J.S.A. 2C:14-1c.

⁶ State v. J.A., 337 N.J. Super. 114, 119-21 (App. Div.), certif. denied, 169 N.J. 606 (2001).

⁷ State v. Fraction, 206 N.J. Super. 532, 535-36 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986).

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

⁹ State v. Gallagher, 286 N.J. Super. 1, 13 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

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gratifying oneself or another.¹⁰ I have already defined “intimate parts” for you.

The law does not require proof that the victim actually [**Choose as appropriate:** (exposed intimate parts) (engaged in sexual penetration) or (engaged in sexual contact)] during the defendant’s observation. The State need only prove beyond a reasonable doubt that the defendant made his/her observations under circumstances in which a reasonable person would know that such conduct by the victim(s) may occur.

The fifth element the State must prove beyond a reasonable doubt is that the defendant observed the victim under circumstances in which a reasonable person would not expect to be observed.¹¹ In considering this question, the issue is not what the victim actually expected, but rather what a reasonable person under the circumstances would have expected.

[Charge if appropriate: It shall not be a violation of this section of our statutes to observe another person in the access way, foyer or entrance to a fitting room or dressing room operated by a retail establishment or to photograph, film, videotape, record or otherwise reproduce the image of such person, if the actor conspicuously posts at the entrance to the fitting room or dressing room prior notice of his/her intent to make the observations, photographs, films, videotapes, recordings or other reproductions.¹²]

[Charge if no affirmative defenses are alleged:] If you find that the State has proven to you all of these elements beyond a reasonable doubt, then you must find defendant guilty of this offense. If the State has failed to prove any of these elements beyond a reasonable doubt, then

¹⁰ N.J.S.A. 2C:14-1d.

¹¹ As an example, the statute states that “It shall be a violation of [this] subsection...to observe another person in a private dressing stall of a fitting room or dressing room operated by a retail establishment....” N.J.S.A. 2C:14-9f.

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you must find the defendant not guilty.

[Charge if the affirmative defense is alleged:] Defendant, as part of his/her denial of guilt, asserts that he/she posted or otherwise provided prior notice to the person of his/her intent to engage in the conduct and he/she did so with a lawful purpose.¹³ It is the State's burden to prove beyond a reasonable doubt that the defendant did not post or otherwise provide notice to the person of his/her intent to engage in the conduct, or that he/she did so with an unlawful purpose. Therefore, if you conclude that the State has proven all of the elements of this offense beyond a reasonable doubt, but you are still not satisfied beyond a reasonable doubt that the State has disproved either that the defendant's claim that the defendant did not post or otherwise provide notice to the person of his/her intent to engage in the conduct, or that he/she did so with an unlawful purpose, you must find defendant not guilty. However, if you find that the State has proven all of the elements of the offense, and has also proven beyond a reasonable doubt that the defendant did not post or otherwise provide notice to the person of his/her intent to engage in the conduct or that he/she did so with an unlawful purpose, then you must find the defendant guilty.

¹² N.J.S.A. 2C:14-9e(1).

¹³ N.J.S.A. 2C:14-9d.