

11.20 TRANSMISSION OF CHILD PORNOGRAPHY BY ELECTRONIC DEVICE OR EQUIPMENT

§ 847.0137(2) and (3), Fla. Stat.**

To prove the crime of Transmission of Child Pornography by Electronic Device or Equipment, the State must prove the following two elements beyond a reasonable doubt:

Give 1a or 1b as applicable.

§ 847.0137(2), Fla. Stat.

- 1. a. (Defendant), when in the State of Florida, transmitted child pornography to another person.**

§ 847.0137(3), Fla. Stat.

- b. (Defendant), when not in the State of Florida, transmitted child pornography to any person who was in the State of Florida.**
- 2. (Defendant) knew or reasonably should have known that [he] [she] transmitted child pornography.**

§ 847.0137(1), Fla. Stat.

“Transmit” means the act of sending and causing to be delivered, including the act of providing access for receiving and causing to be delivered, any image, information, or data over or through any medium, including the internet or an interconnected network, by use of any electronic equipment or device.

§ 847.001, Fla. Stat. *Give if applicable.*

“Child pornography” means:

(a) any image depicting a minor engaged in sexual conduct or

(b) any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engage in sexual conduct.

“Minor” means any person younger than 18 years of age.

“Identifiable minor” means a person:

(a) who was a minor at the time the image was created, altered, adapted, or modified, or whose image as a minor was used in the creating, altering, adapting, or modifying of the image; and

(b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.

The term may not be construed to require proof of the actual identity of the identifiable minor.

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. [A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”]

“Simulated” means the explicit depiction of conduct described in the definition of “sexual conduct” which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

“Sexual bestiality” means any sexual act, actual or simulated, between a person and an animal involving the sex organ of the one and the mouth, anus, or female genitals** of the other.

“Sadomasochistic abuse” means flagellation or torture by or upon a person or animal, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction, or satisfaction brought about as a result of sadistic violence, from inflicting harm on another or receiving such harm oneself.

“Sexual Battery” means oral, anal, or female genital** penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object[; however, “sexual battery” does not include an act done for a bona fide medical purpose. “Bona fide” means genuine].

“Female genitals”** includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

“An object” includes a finger.

Give if applicable. § 775.0862, Fla. Stat.

Enhancement for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Transmission of Child Pornography by Electronic Device or Equipment, you must also determine

whether the State has proved beyond a reasonable doubt that (defendant) was an authority figure at a school and (victim) was a student at the same school.

“Authority figure” means a person 18 years of age or older who is employed by, volunteering at, or under contract with a school.

“School” means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, [or other public school level authorized under the rules of the State Board of Education]. The term “school” does not include facilities dedicated exclusively to the education of adults. If needed, insert appropriate definitions from § 775.0862(1)(b), Fla. Stat. for “private school” or “voluntary prekindergarten education program” or “early learning program” or “public school as described in s. 402.3025(1)” or “the Florida School for the Deaf and the Blind” or the “Florida Virtual School” or the “K-8 Virtual School.”

“Student” means a person younger than 18 years of age who is enrolled at a school.

Lesser Included Offense

TRANSMISSION OF CHILD PORNOGRAPHY BY ELECTRONIC DEVICE OR EQUIPMENT – 847.0137(2) AND (3)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

*Effective October 1, 2022, the Legislature changed “vagina” to “female genitals” in sex crimes-related statutes. Judges should ensure the jury instructions contain correct statutory terms, which will depend on the date alleged in the charging document. *Flores v. State*, -- So. 3d -- (Fla. 4th DCA 2024) is an example of an appellate court finding fundamental error when the trial judge expanded the definition of “vaginal penetration” by instructing on “female genital penetration.”

**As of November 2022, it was unclear whether acts done for bona fide medical purposes or a mother’s breastfeeding of her baby should be treated as affirmative defenses or as elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 2015 [163 So. 3d 478] and amended on December 21, 2022.