

11.21 TRANSMISSION OF MATERIAL HARMFUL TO MINORS BY ELECTRONIC DEVICE OR EQUIPMENT

§ 847.0138(2), Fla. Stat.*

To prove the crime of Transmission of Material Harmful to Minors by Electronic Device or Equipment, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **knowingly sent an image, information or data that [he] [she] knew or believed to be “harmful to minors.”**
2. (Defendant) **sent the image, information or data to a specific individual who was either actually known by [him] [her] to be a minor or believed by [him] [her] to be a minor.**
3. (Defendant) **sent the image, information or data via electronic mail.**

Give if applicable.

A mother’s breastfeeding of her baby is not under any circumstance “harmful to minors.”

Definitions. Give as applicable. § 847.001, Fla. Stat.

An image, information, or data that is “harmful to minors” means any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- a. **Predominately appeals to a prurient, shameful, or morbid interest;**
- b. **Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and**
- c. **Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.**

A “prurient interest” in sex is a shameful or morbid interest in sex, nudity, or excretion. Material does not appeal to a prurient interest if the average person today can view the material candidly, openly, and with a normal interest in sex.

“Morbid interest” means diseased, dwelling on the gruesome, or sick.

“Minor” means any person, whose identity is known or unknown, younger than 18 years of age.

“Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below

the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. [A mother's breastfeeding of her baby does not under any circumstance constitute "nudity," irrespective of whether or not the nipple is covered during or incidental to feeding.]

"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.

"Sexual excitement" means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

Give if applicable. § 775.0862, Fla. Stat.

Reclassification for sexual offense against student by school authority figure.

If you find that (defendant) **committed the crime of Transmission of Material Harmful to Minors 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 Offenses

TRANSMISSION OF MATERIAL HARMFUL TO MINORS BY ELECTRONIC DEVICE OR EQUIPMENT — 847.0138(2)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Unlawful Use of a Two-way Communication Device		934.215	29.26
	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.”

§ 847.0138, Fla. Stat., does not define “electronic mail.” The courts have determined “electronic mail” includes a text message sent from a cell phone and instant messaging. *See Allen v. State*, 82 So. 3d 118 (Fla. 4th DCA 2012); *Duclos-Lasnier v. State*, 192 So. 3d 1234 (Fla. 2d DCA 2016). “Electronic mail” does not, however, include subscription-based transmissions such as list servers. *See*

§ 847.0138, Fla. Stat. A trial court may wish to provide the jury with a special instruction defining “electronic mail.”

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 in 2018 [257 So. 3d 370], 2020 [290 So. 3d 864], on January 29, 2021, and on December 21, 2022.