

11.22 GIVING OBSCENE MATERIAL TO A MINOR

§ 847.0133, Fla. Stat.*

To prove the crime of Giving Obscene Material to a Minor, the State must prove the following element beyond a reasonable doubt:

(Defendant) **knowingly [sold] [rented] [loaned] [gave away] [distributed] [transmitted] [showed] obscene material to a person under the age of 18 years.**

Give if applicable. § 847.001, Fla. Stat.

A mother's breastfeeding of her baby is not under any circumstance "obscene."

§ 847.012(1), Fla. Stat.

"Knowingly" means having the general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- a. The character and content of any material described in this section which is reasonably susceptible of examination by the defendant; and**
- b. The age of the minor.**

§ 847.0133(1), Fla. Stat.

"Obscene Material" means any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose.

§ 847.001, Fla. Stat.

"Obscene" means the status of material which:

- a. The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;**
- b. Depicts or describes, in a patently offensive way, sexual conduct; and**
- c. Taken as a whole, lacks serious literary, artistic, political, or scientific value.**

"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.

“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.

“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].

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).

The definition of “an object” includes a finger.

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

“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.

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

Lesser Included Offense

GIVING OBSCENE MATERIAL TO A MINOR — 847.0133			
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 2016 [199 So. 3d 234] and amended on December 21, 2022.