

11.23 PROMOTION OF AN ALTERED SEXUAL DEPICTION

§ 836.13, Fla. Stat.

To prove the crime of Promotion of an Altered Sexual Depiction, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **willfully and maliciously promoted an altered sexual depiction of an identifiable person.**
2. (Defendant) **did so without the consent of the identifiable person(s) depicted.**
3. **At the time, (defendant) knew or reasonably should have known the depiction was an altered sexual depiction.**

Definitions.

“Willfully” means knowingly, intentionally, and purposely.

As of November 2022, the courts had not determined whether this statute requires actual malice or legal malice. The explanation of the two can be found in Seese v. State, 955 So. 2d 1145 (Fla. 4th DCA 2007). In the absence of clarification, trial judges must choose one of the following:

“Maliciously” means intentionally and without any lawful justification.

“Maliciously” means with ill will, hatred, spite, or an evil intent.

“Promoted” means to issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, advertise, or offer or agree to do the same.

“Altered Sexual Depiction” means any visual depiction that, as a result of any type of digital, electronic, mechanical, or other modification, alteration, or adaptation, depicts a realistic version of an identifiable person: (1) with the nude body parts of another person as the nude body parts of the identifiable person; (2) with computer-generated nude body parts as the nude body parts of the identifiable person; or (3) engaging in sexual conduct in which the identifiable person did not engage.

“Visual Depiction” includes, but is not limited to, a photograph, picture, image, motion picture, film, video, or other visual representation.

“Identifiable person” means that a person 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.

“Nude Body Parts” means the human male or female genitals, pubic area, or buttocks with less than fully opaque covering; or 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. [The term

“nude body parts does not under any circumstances include a mother’s breastfeeding her baby.]

Many of these terms have their own definition. Give those definitions as appropriate. § 847.001, Fla. Stat.

“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.

Give if appropriate.

The presence of a disclaimer within an altered sexual depiction which notifies a viewer that the person or persons depicted did not consent to, or participate in, the creation or promotion of the material, or that the person or persons depicted did not actually perform the actions portrayed, is not a defense to the crime of Promotion of an Altered Sexual Depiction.

Lesser Included Offense

PROMOTION OF AN ALTERED SEXUAL DEPICTION — 836.13			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comments

§ 836.13(6), Fla. Stat., contains exemptions from the criminal penalties in this statute. It is likely those exemptions would be treated as an affirmative defense. Regardless of whether the defense would need to prove the exemption applies or the State would need to prove the exemption does not apply, a special instruction will be necessary if the exemption is at issue.

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 on December 21, 2022.