

11.24 THEFT OF A SEXUALLY EXPLICIT IMAGE WITH INTENT TO PROMOTE

§ 836.14(2), Fla. Stat.

To prove the crime of Theft of a Sexually Explicit Image with Intent to Promote, the State must prove the following three elements beyond a reasonable doubt. The first two elements are a definition of Theft.

1. (Defendant) **knowingly and unlawfully obtained or endeavored to obtain a sexually explicit image, the property of (victim).**
2. (Defendant) **did so with the intent to either temporarily or permanently deprive (victim) of [his] [her] right to the image or to appropriate the image to [his] [her] own use or to the use of any person not entitled to it.**
3. **At the time (defendant) committed the Theft, [he] [she] had the intent to promote the sexually explicit image.**

“Sexually explicit image” means any image depicting an identifiable person portraying nudity or engaged in sexual conduct.

“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. It is not necessary for the State to prove the identity of the person depicted in the image.

“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.]

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.

“Promote” 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.

Lesser Included Offense

THEFT OF A SEXUALLY EXPLICIT IMAGE WITH INTENT TO PROMOTE — 836.14(2)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Petit Theft	812.014(3)(a)	14.1
	Attempt	777.04(1)	5.1

Comments

§ 836.14(7), Fla. Stat., contains certain 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.