

11.25 UNAUTHORIZED POSSESSION OF A SEXUALLY EXPLICIT IMAGE WITH THE INTENT TO PROMOTE

§ 836.14(3), Fla. Stat.

To prove the crime of Unauthorized Possession of a Sexually Explicit Image with the Intent to Promote, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **willfully possessed a sexually explicit image**
2. **At the time, (defendant) intended to promote the sexually explicit image for pecuniary or other financial gain.**
3. **At the time, (defendant) knew or should have known the sexually explicit image had been obtained by theft.**

“Willfully” means knowingly, intentionally, and purposely.

To prove (defendant) **“possessed a sexually explicit image,”** the State must prove beyond a reasonable doubt that [he] [she] a) knew of the existence of the sexually explicit image and b) intentionally exercised control over that image.

Control can be exercised over a sexually explicit image whether the image is carried on a person, near a person, or in a completely separate location. Mere proximity to a sexually explicit image does not establish that the person intentionally exercised control over the image in the absence of additional evidence. Control can be established by proof that (defendant) **had direct personal power to control the sexually explicit image or the present ability to direct its control by another.**

Joint possession. Give if applicable.

Possession of a sexually explicit image may be sole or joint, that is, two or more persons may possess an image.

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

“Identifiable person” means 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.

“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.

“Pecuniary Gain” means the receipt of, or the anticipation of receipt of, anything of value, whether monetary or in goods or services. The term pecuniary gain includes both monetary and barter transactions.

“Theft” is committed when a person knowingly obtains or uses, or endeavors to obtain or use, the property of another with the intent to, either temporarily or permanently deprive the other person of a right to, or benefit from, the property or to appropriate the property of another to his own use or to the use of any person not entitled to the use of the property.

Lesser Included Offense

UNAUTHORIZED POSSESSION OF A SEXUALLY EXPLICIT IMAGE WITH THE INTENT TO PROMOTE — 836.14(3)

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.