

## **11.26 UNAUTHORIZED PROMOTION OF A SEXUALLY EXPLICIT IMAGE**

§ 836.14(4), Fla. Stat.

**To prove the crime of Unauthorized Promotion of a Sexually Explicit Image, the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Defendant) willfully promoted a sexually explicit image through the use of [print media] [or] [an Internet website or other electronic means].**
- 2. (Defendant) promoted the sexually explicit image without the consent of the person(s) depicted in the image**
- 3. (Defendant) did so for the purpose of pecuniary or other financial gain.**

*Definitions.*

**“Willfully” means knowingly, intentionally, and purposely.**

**“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.**

**“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. 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.**

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

**Lesser Included Offense**

**UNAUTHORIZED PROMOTION OF A SEXUALLY EXPLICIT IMAGE— 836.14(4)**

| <b>CATEGORY ONE</b> | <b>CATEGORY TWO</b> | <b>FLA. STAT.</b> | <b>INS. NO.</b> |
|---------------------|---------------------|-------------------|-----------------|
| None                |                     |                   |                 |
|                     | 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.