

**OBSCENITY FOR PERSONS UNDER 18**  
**(PROMOTING OBSCENE MATERIAL)**  
**N.J.S.A. 2C:34-3b(1)**

Defendant is charged in count \_\_\_\_\_ of the indictment with promoting obscene material to [a] minor[s].

**[READ COUNT OF INDICTMENT]**

The statute under which this charge is based reads in pertinent part:

A person who knowingly sells, distributes, rents or exhibits to a person under 18 years of age obscene material is guilty of a crime.

In order to convict defendant of this charge, the State must prove the following elements beyond a reasonable doubt:

1. That defendant knowingly [sold] [distributed] [rented] [or] [exhibited] material;
2. That the material defendant [sold] [distributed] [rented] [or] [exhibited] was obscene material;
3. That defendant [sold] [distributed] [rented] [or] [exhibited] obscene material to a person under 18 years of age; and
4. That defendant knew the character and content of the obscene material [**CHARGE IF APPROPRIATE**: or should have known the character and content of the obscene material].

The first element that the State must prove beyond a reasonable doubt is that defendant knowingly [sold] [distributed] [rented] [or] [exhibited] material.

A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that the conduct is of that nature or that such circumstances exist or the person is aware of a high probability of their existence. A person acts knowingly with respect to a result of the conduct if he/she is aware that it is practically certain that the conduct would cause a result. "Knowing," "with knowledge," or equivalent terms have the same meaning.

Knowledge is a condition of the mind. It cannot be seen and can only be determined by inference from defendant's conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused

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said that he/she had a certain state of mind when he/she did a particular thing. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of his/her acts and conduct and from all he/she said and did at the particular time and place and from all the surrounding circumstances established by the evidence.<sup>1</sup>

[Sold] [distributed] [and] [rented] [has its] [have their] common ordinary meaning. [Exhibited means the sale of admission to view obscene material.]<sup>2</sup>

The second element that the State must prove beyond a reasonable doubt is that the material defendant [sold] [distributed] [rented] [or] [exhibited] was obscene material.

Obscene material means any description, narrative account, display, depiction of a specified anatomical area or specified sexual activity contained in, or consisting of, a picture or other representation, publication, sound recording, live performance or film, which by means of posing, composition, format or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the area or activity.<sup>3</sup>

The third element that the State must prove beyond a reasonable doubt is that the person to whom defendant [sold] [distributed] [rented] [or] [exhibited] the obscene material was under 18 years of age.

The fourth element that the State must prove beyond a reasonable doubt is that defendant had knowledge of the character and content of the material [or failed to exercise reasonable inspection which would have disclosed its character or content.]<sup>4</sup>

The requisite knowledge with regard to the character and content of the material

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<sup>1</sup> N.J.S.A. 2C:34-3a(5) defines knowingly as: “(a) Having knowledge of the character and content of the material or film described herein; or (b) Having failed to exercise reasonable inspection which would disclose its character and content.” The definition under subsection (b) is tantamount to a negligent mens rea and it creates the possibility that persons charged with violating N.J.S.A. 2C:34-3b(1) and/or N.J.S.A. 34-3c(1) can be convicted of a third-degree crime based solely on the (b) definition. Therefore, the Committee has imported the culpable mental state of knowingly, as defined in N.J.S.A. 2C:2-2b(2), for offenses charged under N.J.S.A. 2C:34-3b(1).

<sup>2</sup> N.J.S.A. 2C:34-3a(6).

<sup>3</sup> N.J.S.A. 2C:34-3a(1).

<sup>4</sup> N.J.S.A. 2C:34-3a(5). The Committee wishes to point out, the statute, as codified, has a self-contained definition of “knowingly,” which states a person may be considered to have acted “knowingly” for this statute if the defendant had knowledge of the character and content of the material or film alleged to be obscene, N.J.S.A. 2C:34-3(a)(5)(a), or if the defendant failed to “exercise reasonable inspection which would disclose its material.” N.J.S.A. 2C:34-3(a)(5)(b). This definition of “knowingly” is broader than the definition of “knowingly” found at N.J.S.A. 2C:2-2(b)(2).

If subsection (b) is relied upon, the court should make sure that appropriate cautionary instructions are given to the jury as to the particular meaning of “knowingly” that the jury should use in the context of the case.

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and of the age of the person may be inferred when an actor [sells] [distributes] [rents] [or] [exhibits] obscene material to a person under 18 years of age.

An inference is a deduction of fact that may be drawn logically and reasonably from another fact or group of facts established by the evidence. Whether or not an inference should be drawn is for you to decide using your own common sense, knowledge and everyday experience. Ask yourselves, is it probable, logical and reasonable? However, you are never required or compelled to draw an inference. You alone decide whether the facts and circumstances shown by the evidence support an inference and you are always free to draw or not to draw an inference. If you draw an inference, you should weigh it in connection with all the other evidence in the case, keeping in mind that the burden of proof is upon the State to prove all the elements of the crime beyond a reasonable doubt.

If after a consideration of all the evidence, you are convinced beyond a reasonable doubt that the State has proved all of the elements of the crime then your verdict must be guilty.

If, however, after a consideration of all the evidence, you find that the State has failed to prove each and every element of the crime beyond a reasonable doubt, your verdict must be not guilty.

**[CHARGE WHERE APPROPRIATE]**

It is an affirmative defense to a prosecution of this offense, which the defendant must prove by a preponderance of the evidence, that:

- (a) The person under age 18 falsely represented in or by writing that he/she was age 18 or over; and<sup>5</sup>
- (b) The person's appearance was such that an individual of ordinary prudence would believe him/her to be age 18 or over; and
- (c) The sale, distribution, rental or exhibition to the person was made in good faith relying upon such written representation and appearance and in the reasonable belief that he/she was actually age 18 or over.

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<sup>5</sup> See State v. Blecker, 155 N.J. Super. 93, 102 (App. Div. 1978) (holding that a similar statutory defense within the predecessor statute, N.J.S.A. 2A:115-1.8, required that "a defendant must establish not some but all of the factual elements enumerated in the enactment relating thereto." Cf. Sportsman 300 v. Nutley Bd. Of Comm'rs, 42 N.J. Super. 488, 493 (App. Div. 1956).)

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The term “preponderance of the evidence” means that amount of evidence that causes you to conclude that the affirmative defense is probably true. To prove an affirmative defense by the preponderance of the evidence, the defendant must convince you that it is more probable than not.

If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence. Therefore, the party having the burden of proving that issue has failed with respect to that particular issue.

Keep in mind, however, that although the burden rests upon the defendant to establish the affirmative defense by a preponderance of the credible evidence, the burden to establish the defendant guilty of the offense charged here beyond a reasonable doubt is always on the State, and that burden never shifts.

If after a consideration of all the evidence, you find that the State has not proven beyond a reasonable doubt all the elements of the offense, then you must find the defendant not guilty of promoting obscene material.

If after a consideration of all the evidence, you find that the State has proven beyond a reasonable doubt all the elements of the offense, and if you also find that the defendant has not established the affirmative defense by a preponderance of the evidence, then you must find the defendant guilty of promoting obscene material.

If after a consideration of all the evidence, you find that the State has proven beyond a reasonable doubt all the elements of the offense, and if you also find that the defendant has established the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of promoting obscene material.