

OBSCENITY FOR PERSONS UNDER 18
(ADMITTING TO EXHIBITION OF AN OBSCENE FILM)
N.J.S.A. 2C:34-3c(1)

Defendant is charged in count _____ of the indictment with admitting [a] minor[s] to the exhibition of an obscene film.

[READ COUNT OF INDICTMENT]

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

Any person who knowingly admits a person under 18 years of age to a theater then exhibiting an obscene film 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 admitted a person to the exhibition of a film;
2. That the film was an obscene film;
3. That the person[s] [was] [were] under 18 years of age; and
4. That defendant knew or should have known the character and content of the obscene film.

The first element that the State must prove beyond a reasonable doubt is that defendant knowingly admitted a person to the exhibition of a film. 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 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

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all he/she said and did at the particular time and place and from all the surrounding circumstances established by the evidence.¹

The second element that the State must prove beyond a reasonable doubt is that the film was an obscene film.

Obscene film means any motion picture film or preview or trailer to a film, not including newsreels portraying actual current events or pictorial news of the day, in which a scene, taken by itself:

- (a) Depicts a specified anatomical area or specified sexual activity, or the simulation of a specified sexual activity, or verbalization concerning a specified sexual activity; and
- (b) Emits sensuality sufficient, in terms of the duration and impact of the depiction, to appeal to prurient interest.²

“Specified anatomical area” means:

- (a) Less than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola; or
- (b) Human male genitals in a discernibly turgid state, even if covered.³

“Specified sexual activity” means:

- (a) Human genitals in a state of sexual stimulation or arousal; or
- (b) Any act of human masturbation, sexual intercourse or deviate sexual intercourse; or
- (c) Fondling or other erotic touching of covered or uncovered human genitals, pubic

¹ 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 2C:34-3b(1) and/or 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 2C:34-3b(1) and 34-3c(1).

² N.J.S.A. 2C:34-3a(2).

³ N.J.S.A. 2C:34-3a(3).

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region, buttock or female breast.⁴

The third element that the State must prove beyond a reasonable doubt is that the person[s] whom defendant admitted to the exhibition of an obscene film was under 18 years of age.

The fourth element that the State must prove beyond a reasonable doubt is that defendant either had knowledge of the character and content of the film, or failed to exercise reasonable inspection which would have disclosed its character or content.

The requisite knowledge with regard to the character and content of the film and of the age of the person may be inferred in the case of an actor who admits to a film, obscene for a person under 18 years of age, a person who is under 18 years of age.⁵

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 proven 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 AFFIRMATIVE DEFENSE[S] RAISED]

It is an affirmative defense to a prosecution of this offense, which the defendant must prove

⁴ N.J.S.A. 2C:34-3a(4).

⁵ N.J.S.A. 2C:34-3d.

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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
- (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 admission of 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.⁶

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, a party 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.⁷

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.

[CHARGE WHERE APPROPRIATE]

It is [also] a defense to a prosecution of this offense, which the State must disprove beyond a reasonable doubt, that the defendant was an employee in a motion picture theater who had no financial interest in that motion picture other than his/her wages and had no decision-making authority or responsibility with respect to the selection of the motion picture show which was

⁶ 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).")

⁷ Model Civil Jury Charge 1.12H.

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exhibited.⁸

If after a consideration of all the evidence, you find that the State has not proven beyond a reasonable doubt any of the elements of the offense, then you must find the defendant not guilty of admitting [a] person[s] under the age of 18 to the exhibition of an obscene film.

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 **[CHOOSE APPROPRIATE OR BOTH]** [that the defendant has not established by a preponderance of the evidence the affirmative defense relating to the age of the person admitted to the exhibition of an obscene film] [and] [the State has disproved beyond a reasonable doubt that defendant was merely an employee of the theater without financial interest and decision making authority], then you must find the defendant guilty of admitting [a] person[s] under the age of 18 to the exhibition of an obscene film.

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 **[CHOOSE APPROPRIATE OR BOTH]** [that the defendant has established by a preponderance of the evidence the affirmative defense relating to the age of the person admitted to the exhibition of an obscene film], [or] [that the State has not disproved beyond a reasonable doubt that defendant was merely an employee of the theater without financial interest and decision making authority], then you must find the defendant not guilty of admitting [a] person[s] under the age of 18 to the exhibition of an obscene film.

⁸ N.J.S.A. 2C:34-3e(2)