

POSSESSION OF CHILD PORNOGRAPHY

G.L. c. 272, § 29C

The defendant is charged with knowingly (purchasing) (possessing) (an image) (images) of a child engaged in sexual conduct.

To prove the defendant guilty of this offense, the Commonwealth must prove the following four things beyond a reasonable doubt.

***First:* That the defendant knowingly (purchased) (possessed) the image(s);**

***Second:* That the image is of a person under the age of eighteen who is:**

(actually or by simulation engaged in any act of sexual intercourse with any person or animal)];

(or) (actually or by simulation engaged in any act of sexual contact involving the [sex organs of the child] [mouth, anus or sex organs of the child and the sex organs of another person or animal]);

- (or) (actually or by simulation engaged in any act of masturbation);**
- (or) (actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal);**
- (or) (actually or by simulation engaged in any act of excretion or urination within a sexual context);**
- (or) (actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context);**
- (or) (depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, or buttocks);**
- (or) (a female depicted or portrayed in any pose, posture or setting involving lewd exhibition of a fully or partially developed unclothed breast of the child);**

***Third:* That the defendant knew or reasonably should have known the person in the image was under the age of eighteen; and**

***Fourth:* That the defendant knew of the nature or content of the image(s).**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly purchased or possessed the image(s). The word “knowingly” means intentionally as opposed to accidentally or negligently. A person possesses something if they have direct physical control or custody of it at a given time. A person possesses something even if it is not physically with the person only if three circumstances exist: the person has knowledge of the existence of the item; the person has the ability to exercise control over it either directly or through someone else; and the person has the intent to exercise control over it. Merely being present in the vicinity of the item, even if one knows that it is there, does not amount to possession.

For an instruction on joint possession, see the supplemental instruction in Instruction 3.220, Possession.

To prove the second element, the Commonwealth must prove that the image is of a person under the age of eighteen engaged in (an activity) (one of the activities) specified in the second element. Proof that an image contains nudity is not alone sufficient for a conviction. The image must be of (an activity) (one of the activities) I

previously described and must be in the form of a (photograph or other similar visual reproduction) (depiction by computer, which includes stored data accessible as a graphic image) (videotape) (book) (magazine) (film) (slide) (negative).

Commonwealth v. Hinds, 437 Mass. 54, 63-64 (2002) (depiction by computer).

Definition of “unclothed”:

In order to prove that a body part is unclothed, the Commonwealth must prove beyond a reasonable doubt that it allows a viewer to see the body part or parts to an extent comparable to the child being naked.

Commonwealth v. Graziano, 96 Mass. App. Ct. 601, 607 (2019).

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew or reasonably should have known that the child depicted was under eighteen years of age. It is not sufficient that one might guess or speculate that the child was under the age of eighteen; the evidence must establish that the defendant or a reasonable person in their position knew or

reasonably should have known the depiction was of a child under the age of eighteen.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew of the nature or content of the image(s). The law defines “knowledge” in this context as “a general awareness of the character of the matter.” You may consider any evidence of the defendant’s actions or words, and all the surrounding circumstances, to help you determine whether the defendant knew of the nature or content of the images.

If all of the elements have been proved beyond a reasonable doubt you should return a verdict of guilty. If any one of the elements has not been proved beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

Additional definitions. The term “masturbation” refers to manual erotic stimulation of one’s own genital organs.

The term “sex organs” refers to the genitals, the buttocks, or the breasts of a female.

The term “lewd” means indecent or offensive. In determining whether an image is lewd, you may consider (1) whether its focal point is on the child’s genitalia or pubic area, (2) whether the setting is sexually suggestive – that is, in a place or pose generally associated with sexual activity, (3) whether, considering the age of the child, the child is in an unnatural pose, or in inappropriate attire; (4) whether the child is fully or partially clothed, or nude, (5) whether the depiction suggests sexual coyness or a willingness to engage in sexual activity, and (6) whether the depiction is intended or designed to elicit a sexual response from the viewer.

See Commonwealth v. Kenney, 449 Mass. 840, 850 n.8 (2007); Commonwealth v. Sullivan, 82 Mass. App. Ct. 293, 302-303 (2012).

The term “sadistic abuse” refers to inflicting physical or mental pain on another to obtain sexual gratification.

The term “masochistic abuse” refers to inflicting pain or humiliation on oneself to obtain sexual gratification.

The term “sadomasochistic abuse” refers to inflicting physical or mental pain on others or on oneself to derive pleasure.

NOTES:

1. Elements. In a case involving photographs received on a cell phone, the Appeals Court described the following four elements of possession of child pornography: “The Commonwealth must present evidence that the defendant (1) knowingly possessed a photograph or other similar visual reproduction or depiction by computer; (2) depicting a child that the defendant knew or reasonably should have known was under the age of eighteen; (3) in a pose of a lewd or sexual nature as defined in the statute; and (4) with knowledge of the nature or content of the material.” *Commonwealth v. Hall*, 80 Mass. App. Ct. 317, 327 (2011).

2. Mere nudity. “The depiction of mere nudity is not enough to support a conviction under c. 272, § 29A.” *Commonwealth v. Bean*, 435 Mass. 708, 715 n.17 (2002).