

POSSESSING A SEXUAL PERFORMANCE BY A CHILD
(E Felony)
PENAL LAW 263.16
(Committed on or after Nov. 1, 2003¹)

The _____ count is Possessing a Sexual Performance by a Child.

Under our law, a person is guilty of possessing a sexual performance by a child when, knowing the character and content thereof, he or she knowingly has in his or her possession or control any performance which includes sexual conduct by a child less than sixteen years of age.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "performance," "sexual conduct," "possession," "knowingly" and "knowing".

PERFORMANCE means any play, motion picture, photograph or dance. ["Performance" also means any other visual representation exhibited before an audience. ²]

SEXUAL CONDUCT means actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.³

"Simulated" means the explicit depiction of any sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals

¹ For the charge for this crime which was in effect prior to Nov. 1, 2003, see the Former Crimes section.

² Penal Law § 263.00(4).

³ Penal Law § 263.00(3).

or buttocks.⁴

“Oral sexual conduct” means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.⁵

“Anal sexual conduct” means conduct between persons consisting of contact between the penis and anus.⁶

“Sado-masochistic abuse” means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.⁷

A person KNOWINGLY has in his or her possession or control a performance which includes sexual conduct by a child less than sixteen years of age, when that person is aware that he or she is in possession of such performance.⁸ It is not an element of this crime, and thus the People are not required to prove beyond a reasonable doubt, that the defendant knew the child was less than sixteen years of age.⁹

[Add where appropriate:

⁴ Penal Law § 263.00(6).

⁵ Penal Law § 130.00(2)(a).

⁶ Penal Law § 130.00(2)(b).

⁷ Penal Law § 263.00(8), Penal Law § 235.20.

⁸ Penal Law § 15.05(2).

⁹ Penal Law § 15.05(3).

In order to determine whether the person who participated in a sexual performance was under the age of sixteen years, you may make such determination by

Select appropriate alternative(s):

personal inspection of the child,

inspection of a photograph [or motion picture] which constituted the sexual performance,

oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance,

expert medical testimony based upon the appearance of the child in the sexual performance.^{10]}

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the County of (county), the defendant, (defendant's name), knowingly had in his/ her possession or control a performance which included sexual conduct by a child less than sixteen years of age; and

2. That the defendant knew the character and content of such performance.

[NOTE: If the affirmative defense does not apply:

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the

¹⁰ Penal Law § 263.25. That statute also authorizes proof of the age of the child by "any other method authorized by any applicable provision of law or by the rules of evidence at common law."

defendant guilty of the crime of Possessing a Sexual Performance by a Child as charged in the _____ count.

On the other hand, if you find that the people have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Possessing a Sexual Performance by a Child as charged in the _____ count.]

[NOTE: If the affirmative defense does apply:

If you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Possessing a Sexual Performance by a Child as charged in the _____ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt both of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Possessing a Sexual Performance by a Child, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge of Possessing a Sexual Performance by a Child that

Select appropriate alternative:

the defendant in good faith reasonably believed the person appearing in the performance was sixteen years of age or older.¹¹

or

the defendant was a librarian engaged in the normal course of his employment, a motion picture projectionist, stage

¹¹ Penal Law § 263.20(1).

employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter or in any other non-managerial or non-supervisory capacity in a motion picture theatre; provided he/she has no financial interest, other than his/her employment, which employment does not encompass compensation based upon any proportion of the gross receipts, in the promotion of a sexual performance for sale, rental or exhibition or in the promotion, presentation or direction of any sexual performance, or is in any way responsible for acquiring such material for sale, rental or exhibition.¹²

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

Therefore, if you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven beyond a reasonable doubt both of the elements of Possessing a Sexual Performance by a Child, you must find the defendant guilty of that crime as charged in the _____ count.

¹² Penal Law § 263.20(2).

On the other hand, if you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of Possessing a Sexual Performance by a Child as charged in the _____ count.]