

N.C.P.I.—Crim. 238.11

CREATING, BUYING, PROCURING, OR POSSESSING OBSCENE MATERIAL WITH THE INTENT TO DISSEMINATE. FELONY.

GENERAL CRIMINAL VOLUME

REPLACEMENT MARCH 2024

N.C. Gen. Stat. § 14-190.1(e)

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238.11 CREATING, BUYING, PROCURING, OR POSSESSING OBSCENE MATERIAL WITH THE INTENT TO DISSEMINATE. FELONY.

The defendant has been charged with [creating] [buying] [procuring] [possessing] obscene material, with the intent to disseminate.

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant was a [person 18 years or older] [firm] [corporation].

Second, that the defendant knowingly [created] [bought] [procured] [possessed] obscene material.

Material is obscene when judged with reference to ordinary adults:

a. The average person applying contemporary community standards would find that the material depicts or describes sexual conduct in a patently offensive way (*define sexual conduct pertinent to the case as set out by the statute*<sup>1</sup>). Material is patently offensive when, taken as a whole, it affronts contemporary community standards relating to the description or representation of sexual matters.

b. And, the average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex. A prurient interest is an unhealthy, abnormal, lascivious, shameful or morbid sexual interest.

Contemporary community standards must be interpreted as the current standards here in your community.<sup>2</sup> Both of these tests of obscenity that I have related to you must be considered and judged with reference to the

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average adult in this community, rather than the most tolerant or the most prudish.

The obscene character of the materials, if any, may be determined by you, based on the viewing of the alleged obscene material. In addition to considering all of the evidence presented, you are entitled to draw on your understanding and knowledge of the views of the average adult person in this community and of the tolerance of the average adult person in this community in making the required determinations which are necessary for the resolution of this case.

In determining whether certain material is obscene, you should consider the entire (*describe material, e.g., "film"*) as a whole and not part by part. You may also consider whether the predominant theme and purpose of the material, when viewed as a whole and not part by part, is an appeal to the prurient interest of the average adult person in your community.

c. And, applying the reasonable person standard, you find that the material taken as a whole lacks serious literary, artistic, political or scientific value.<sup>3</sup>

And Third, that the defendant acted with the purpose and intent<sup>4</sup> of disseminating the obscene material unlawfully, and that the defendant knew the nature and content of the material.<sup>5</sup> (It is not necessary that *he* intended or believed the material to be obscene.)

Material is disseminated by:

- a. [selling] [offering to sell] [agreeing to sell]
- b. [delivering] [offering to deliver] [agreeing to deliver]
- c. [providing] [offering to provide] [agreeing to provide]

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d. [presenting] [directing] a [play] [dance] [performance] or  
[participating directly in that portion of a [play] [dance]  
[performance] which makes it obscene]

e. [publishing] [exhibiting] or [making available]

- f.
1. [exhibiting] [offering to exhibit] [agreeing to exhibit]
  2. [presenting] [offering to present] [agreeing to present]
  3. [renting] [offering to rent] [agreeing to rent]
  4. [selling] [offering to sell] [agreeing to sell]
  5. [delivering] [offering to deliver] [agreeing to deliver]
  6. [providing] [offering to provide] [agreeing to provide]

any [writing] [picture] [record] [representation or embodiment] [still  
(or) motion picture] [film] [filmstrip] [projection slide] [sound recording]  
[sound tape] [sound track].

If you find from the evidence beyond a reasonable doubt that on or  
about the alleged date the defendant was a [person 18 years or older] [firm]  
[corporation], that the defendant knowingly [created] [bought] [procured]  
[possessed] obscene material and that the defendant acted intentionally with  
the purpose of disseminating such obscene material unlawfully, it would be  
your duty to return a verdict of guilty. If you do not so find or have a  
reasonable doubt as to one or more of these things, it would be your duty to  
return a verdict of not guilty.

*NOTE WELL: Simple possession or purchase of obscenity does not  
violate the statute. A violation occurs when the possession or the  
purchase is with the intent and for the purpose of disseminating  
obscenity.*

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1. N.C. Gen. Stat. § 14-190.1(c) defines “sexual conduct” as “(1) vaginal, anal or oral intercourse, whether actual or simulated, normal or perverted; or (2) masturbation, excretory functions, or lewd exhibition of uncovered genitals; or (3) an act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.”

2. See *S. v. Mayes*, 323 N.C. 159 (1988), holding that the trial judge need not specify the geographic limits of the community, nor must the jury reach a consensus as to the community's boundaries.

3. Sections a, b, and c of the second element conform with the three-prong test for obscenity in *Miller v. California*, 413 U.S. 15 (1973), as modified by *Smith v. U.S.*, 431 U.S. 291 (1977) and *Pope v. Illinois*, 107 S.Ct. 1918 (1987).

4. For further definition of intent, see N.C.P.I.—Crim. 120.10.

5. *Smith v. California*, 361 U.S. 147 (1959).