

N.C.P.I.—Crim. 238.12
ADVERTISING OR PROMOTING SALE OF MATERIAL AS OBSCENE. FELONY.
GENERAL CRIMINAL VOLUME
REPLACEMENT MARCH 2024
N.C. Gen. Stat. § 14-190.1(f)

238.12 ADVERTISING OR PROMOTING SALE OF MATERIAL AS OBSCENE.
FELONY.

The defendant has been charged with [advertising] [promoting] the sale of material [represented] [held out] by *him* as obscene.

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 [advertised] [promoted] the sale of material.

And Third, that the defendant [represented] [held out] the material as obscene.¹ 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*).² 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.³ Both of these tests of obscenity that I have related to you must be considered and judged with reference to the

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 as [advertised] [promoted] is obscene, you should consider the entire material 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 [advertisement] [promotion] of the material taken as a whole lacks serious literary, artistic, political or scientific value.⁴

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 [advertised] [promoted] the sale of material, and that the defendant [represented] [held out] that material as obscene, 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.

1. N.C. Gen. Stat. § 14-190.1(f) does not require proof that the material advertised or promoted was in fact obscene. All that is necessary is that the defendant represents or holds out the material as obscene.

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2. 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.”

3. 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.

4. Sections a, b, and c of the third 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).