

N.C.P.I.—Crim. 238.10A.1

DISSEMINATING OBSCENITY INTENTIONALLY IN THE PRESENCE OF A
MINOR (LIVE PERFORMANCES). FELONY.

GENERAL CRIMINAL VOLUME

MARCH 2024

N.C. Gen. Stat. § 14-190.1(a)(2) and (g)

238.10A.1 DISSEMINATING OBSCENITY INTENTIONALLY IN THE PRESENCE
OF A MINOR (LIVE PERFORMANCES). FELONY.

The defendant has been charged with disseminating obscenity intentionally in the presence of a minor.

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

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

Second, that the defendant intentionally¹ disseminated obscenity by [[presenting] [directing] a [play] [dance] [performance]] (or) [participating directly in that portion of a [play] [dance] [performance] which makes it obscene].

Third, that the performance the defendant disseminated was obscene. 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.

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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 performances, if any, may be determined by you based on the viewing of the alleged obscene performance. 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 a certain performance is obscene, you should consider the entire performance as a whole and not part by part. You may also consider whether the predominant theme and purpose of the performance, 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 performance, taken as a whole, lacks serious literary, artistic, political or scientific value.⁴

Fourth, that the defendant knew the nature and content of the performance⁵ that *he* intentionally disseminated. (It is not necessary that the defendant intended or believed the performance to be obscene.)

And Fifth, that the defendant knowingly did so in the presence of a minor under 18 years of age.

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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 intentionally disseminated obscenity by [[presenting] [directing] an obscene [play] [dance] [other performance]] (or) [[participating directly in that portion of a [play] [dance] [other performance] which makes it obscene], that the performance was obscene, that the defendant knew the nature and content of the performance, and that defendant did so knowingly in the presence of a minor under 18 years of age, 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. For definition of intentionally see N.C.P.I.—Crim. 120.10.

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).

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