

## **28-813.01.**

### **Sexually explicit conduct; visual depiction; unlawful; penalty; affirmative defense; forfeiture of property.**

(1) It shall be unlawful for a person nineteen years of age or older to knowingly possess any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers. Violation of this subsection is a Class IIA felony.

(2) It shall be unlawful for a person under nineteen years of age to knowingly and intentionally possess any visual depiction of sexually explicit conduct which has a child other than the defendant as one of its participants or portrayed observers. Violation of this subsection is a Class I misdemeanor. A second or subsequent conviction under this subsection is a Class IV felony.

(3) It shall be an affirmative defense to a charge made pursuant to subsection (2) of this section that:

(a)(i) The defendant was less than nineteen years of age; (ii) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older; (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (v) the visual depiction contains only one child; (vi) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; and (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction; or

(b)(i) The defendant was less than eighteen years of age; (ii) the difference in age between the defendant and the child portrayed is less than four years; (iii) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (iv) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (v) the visual depiction contains only one child; (vi) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; and (vii) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction.

(4) Any person who violates subsection (1) or (2) of this section and has previously been convicted of a violation of this section or section [28-308](#), [28-309](#), [28-310](#), [28-311](#), [28-313](#), [28-314](#), [28-315](#), [28-319](#), [28-319.01](#), [28-320.01](#), [28-833](#), [28-1463.03](#), or [28-1463.05](#) or subsection (1) or (2) of section [28-320](#) shall be guilty of a Class IC felony for each offense.

(5) In addition to the penalties provided in this section, a sentencing court may order that any money, securities, negotiable instruments, firearms, conveyances, or electronic communication devices as defined in section [28-833](#) or any equipment, components, peripherals, software, hardware, or accessories related to electronic communication devices be forfeited as a part of the sentence imposed if it finds by clear and convincing evidence adduced at a separate hearing in

the same prosecution, conducted pursuant to section [28-1601](#), that any or all such property was derived from, used, or intended to be used to facilitate a violation of this section.

(6) The definitions in section [28-1463.02](#) shall apply to this section.

## Source

- Laws 1988, LB 117, § 6;
- [Laws 2003, LB 111, § 1](#);
- [Laws 2009, LB97, § 15](#);
- [Laws 2015, LB605, § 45](#);
- [Laws 2016, LB1106, § 7](#);
- [Laws 2019, LB630, § 3](#).
- **Effective Date: September 1, 2019**

## Cross References

- **Registration of sex offenders**, see sections [29-4001](#) to [29-4014](#).

## Annotations

- A person knowingly possesses child pornography in violation of this section when he or she knows of the nature or character of the material and of its presence and has dominion or control over it. *State v. Mucia*, 292 Neb. 1, 871 N.W.2d 221 (2015).
- “Possess” under this section includes constructive possession. *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014).
- Where a person, using file-sharing software, intentionally searches for, downloads, views, and then deletes child pornography computer files, that person has “knowingly possess[ed]” child pornography. *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014).