

Harmful to Minors Statute, Exemptions and Case Law—Indiana

STATUTES:

Ind. Code §35-49-2-2 When matters or performances are harmful to minors.

A matter or performance is harmful to minors for purposes of this article if:

- (1) it describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;
- (2) considered as a whole, it appeals to the prurient interest in sex of minors;
- (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what it is suitable matter for or performance before minors; and
- (4) considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

Ind. Code §35-49-3-3: Dissemination of matter or conducting performance harmful to minors

Sec. 3. (a) Except as provided in subsection (b), a person who knowingly or intentionally:

- (1) disseminates matter to minors that is harmful to minors;
- (2) displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by the minor's parent or guardian;
- (3) sells, rents, or displays for sale or rent to any person matter that is harmful to minors within five hundred (500) feet of the nearest property line of a school or church;
- (4) engages in or conducts a performance before minors that is harmful to minors;
- (5) engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by the minor's parent or guardian;
- (6) misrepresents the minor's age for the purpose of obtaining admission to an area from which minors are restricted because of the display of matter or a performance that is harmful to minors;
or
- (7) misrepresents that the person is a parent or guardian of a minor for the purpose of obtaining admission of the minor to an area where minors are being restricted because of display of matter or performance that is harmful to minors; commits a Level 6 felony.

(b) This section does not apply if a person disseminates, displays, or makes available the matter

described in subsection (a) through the Internet, computer electronic transfer, or a computer network unless:(1) the matter is obscene under IC 35-49-2-1;(2) the matter is child pornography under IC 35-42-4-4; or(3) the person distributes the matter to a child less than eighteen (18) years of age believing or intending that the recipient is a child less than eighteen (18) years of age.

Ind. Code §35-49-3-4 Defense to prosecution for dissemination of matter or conducting performance harmful to minors (Exemptions)

Sec. 4. (a) It is a defense to a prosecution under section 3 of this chapter for the defendant to show:

- (1) that the matter was disseminated or that the performance was performed for legitimate scientific or educational purposes;
- (2) that the matter was disseminated or displayed to or that the performance was performed before the recipient by a bona fide school, museum, or public library that qualifies for certain property tax exemptions under IC 6-1.1-10, or by an employee of such a school, museum, or public library acting within the scope of the employee's employment;
- (3) that the defendant had reasonable cause to believe that the minor involved was eighteen (18) years of age or older and that the minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that the minor was eighteen (18) years of age or older; or
- (4) that the defendant was a salesclerk, motion picture projectionist, usher, or ticket taker, acting within the scope of the defendant's employment and that the defendant had no financial interest in the place where the defendant was so employed.

CASES

Harmful to Minors Definition:

- *Lewis v. State*, 726 N.E.2d 836 (Ind. Ct. App. 2000): The Indiana Court of Appeals upheld Lewis' conviction for disseminating material harmful to minors and conducting a performance harmful to minors based upon: Lewis showed a videotape to the fourteen-year-old niece of his girlfriend. The videotape showed Lewis on a bed naked. It then showed a woman entering the room, and Lewis and the woman began kissing. The victim did not want to watch the tape, and she fell asleep on the floor. Thereafter, Lewis called the victim's name, and she awoke. Lewis was standing over her and exposing his penis.

Lewis challenged the conviction on the grounds that the State did not properly

prove that the actions violated community standards for what is considered patently offensive to children because the state did not provide an expert witness. The Court said that Indiana's appellate courts have not yet decided whether the State must provide evidence of community standards in prosecutions for dissemination of matter or conducting performances harmful to minors, and so looked at the standards for whether material is obscene. Under those cases, the jury must consider community standards but the State need not present any evidence regarding community standards. *Saliba v. State*, 475 N.E.2d 1181, 1184–85 (Ind.Ct.App.1985). Rather, the obscenity determination may be based on the jury's viewing of the allegedly offensive matter alone.

Lewis also argued that the evidence was insufficient to support his conviction for disseminating matter harmful to minors because the videotape he showed the victim does not fall within the definition of matter that is harmful to minors. Lewis argues that the evidence does not establish that the tape was a matter harmful to minors "nudity alone is not enough to make material legally obscene." 413 N.E.2d 652, 653 (Ind.Ct.App.1980), trans. denied (quoting *Jenkins v. Georgia*, 418 U.S. 153, 161, 94 S.Ct. 2750, 2755, 41 L.Ed.2d 642 (1974)). However, the tape here does not depict mere nudity. It shows a naked Lewis engaged in intimate activity with a woman near a bed. The evidence is sufficient to support the conclusion that Lewis disseminated matter to a minor that was harmful to minors.

- *Melton v. State*, 993 N.E.2d 253 (Ind. Ct. App. 2013)

Defendant's conduct, showing child victim pornographic videos and masturbating in front of her, was a harmful "performance," as required to support conviction for dissemination of matter harmful to minors; fact that conduct took place in defendant's private residence did not mean conduct was not a performance.