

**INTIMIDATING A WITNESS, JUROR,
COURT OFFICIAL OR LAW ENFORCEMENT OFFICER**

The defendant is charged with (attempting to influence) (influencing) (attempting to intimidate) (intimidating) a person in order to interfere with a criminal investigation, criminal trial or other criminal proceeding. Section 13B of chapter 268 of our General Laws provides as follows:

“Whoever, directly or indirectly, willfully

(threatens, . . . attempts or causes physical injury, emotional injury, economic injury or property damage to)

(or) (conveys a gift, offer or promise of anything of value to)

(or) (misleads, intimidates or harasses another person who is)

(a witness or potential witness in a criminal investigation or proceeding . . .)

(or) (a person . . . aware of a violation of a criminal statute, or a violation of conditions of probation, parole or bail)

(or) a (judge) (juror) (grand juror) (prosecutor) (police officer) (federal agent) (investigator) (defense attorney) (court clerk) (court officer) (probation officer) (parole officer)

**(or) a person furthering a criminal investigation . . . or other
criminal proceeding of any type)**

**(or) a person who . . . was attending or had made known his
intention to attend a . . . criminal proceeding . . .)**

**with the intent to impede, obstruct, delay, harm, punish or otherwise
interfere thereby with a criminal investigation . . . or other
criminal proceeding . . .**

shall be punished”

**In order to prove the defendant guilty of this offense, the
Commonwealth must prove three things beyond a reasonable doubt:**

- First:* That the defendant, either directly or indirectly,**
- (made a threat to another person)**
 - (or) ([attempted to cause] [or] [caused], [physical injury]
[economic injury] [emotional injury] [property damage] to
another person);**
 - (or) (made a gift, offer or promise of anything of value to another
person);**
 - (or) (made an effort to mislead, intimidate, or harass another
person);**

Second: That the other person was:

(a witness or potential witness at any stage of a criminal investigation, grand jury proceeding, trial or other criminal proceeding)

(or) (a person who was aware of information, records, documents or objects that relate to a violation of a criminal statute, or a violation of conditions of probation, parole or bail)

(or) (a judge, juror, grand juror, prosecutor, police officer, federal agent, investigator, defense attorney, court clerk, court officer, probation officer or parole officer)

(or) (a person furthering a criminal investigation, grand jury proceedings, trial or other criminal proceeding)

(or) (a person attending or who had made known his (her) intention to attend a grand jury proceeding, trial or other criminal proceeding);

and **Third:** That the defendant did so willfully with the specific intent to (impede), (obstruct), (delay), (harm), (punish) or otherwise interfere with a (criminal investigation) (grand jury) (trial) (criminal proceeding, namely:

_____.)

To prove the third element, the Commonwealth must prove that the defendant specifically intended to impede, obstruct, delay, harm, punish or otherwise interfere with a (criminal investigation) (grand jury) (trial) (criminal proceeding). That is, it must prove the purpose or objective of any behavior of the defendant. Obviously, it is impossible to look directly into the defendant's mind. But in our everyday affairs, we often decide from the actions of others what their state of mind is. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine what his (her) intent was at the time.

If the Commonwealth has proved each of the three elements of the crime beyond a reasonable doubt, you should return a verdict of guilty. If any element of the crime has not been proved beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. *“Investigator.”*

An “investigator” is defined by our law to mean an individual or group of individuals lawfully authorized by (a department or agency of the federal government, or any

political subdivision thereof) (or) (a department or agency of the Commonwealth) (or) (a political subdivision of the Commonwealth, such as a city or town) to conduct or engage in an investigation of, prosecution for, or defense of an alleged violation of law.

G.L. c. 268, § 13B(2).

2. "Harass."

To "harass" means to engage in any act directed at a specific person or person, which act seriously alarms or annoys such person or persons and would cause a reasonable person to suffer substantial emotional distress. Such act shall include, but not be limited to, an act conducted by mail, electronic mail, internet communications, facsimile communications or other telephonic or telecommunications device.

G.L. c. 268, § 13B(3).

NOTES:

1. **Effective date.** The model instruction applies to G.L. c. 268, § 13B as amended by St. 2006, c. 48, effective March 30, 2006. The prior statute punished willfully endeavoring to interfere with a witness, a juror, or "any person furnishing information to a criminal investigator . . ." or retaliating against a witness or person furnishing such information.

2. **Related statutes.** See G.L. c. 268, §§ 13 (bribing or attempting to bribe juror), 13A (picketing court to obstruct or influence), 13C (disrupting court proceedings), 14 (juror accepting bribe).

3. **Attempt to intimidate need not succeed.** In a prosecution for attempted intimidation it is immaterial that the witness had already recanted her testimony against the defendant before receiving his threatening telephone calls. *Commonwealth v. Robinson*, 444 Mass. 102, 109, 825 N.E.2d 1021, 1028 (2005); *Commonwealth v. Pagels*, 69 Mass. App. Ct. 607, 614-615, 870 N.E.2d 645, 652 (2007).

4. **“Criminal proceeding.”** The trial does not end when the verdict is announced. *Commonwealth v. Cathy C.*, 64 Mass. App. Ct. 471, 474, 833 N.E.2d 1189, 1191 (2005). When a show cause hearing was held and the application was either allowed or no decision had yet been announced, the proceeding was still ongoing. *Commonwealth v. Robinson*, *supra*.

5. **“Intimidation”** in G.L. c. 268, § 13B does not require that the victim be placed in fear or apprehension of actual harm. *Commonwealth v. Gordon*, 44 Mass. App. Ct. 233, 235, 694 N.E.2d 2, 5-6 (1998). It is not necessary that the defendant’s statement or conduct refer directly to a pending court case in order to constitute intimidation. *Commonwealth v. Drumgoole*, 49 Mass. App. Ct. 87, 91, 726 N.E.2d 440, 443 (2000). The jury may infer that the act of pointing a cellular telephone camera at a witness waiting to testify in a criminal proceeding, and making a physical gesture consistent with taking a photograph of the witness, while not overtly threatening, falls within the meaning of intimidation. *Commonwealth v. Casiano*, 70 Mass. App. Ct. 705, 708-709, 876 N.E.2d 475, 478 (2007). Photographing the victim’s family near the victim’s home on the day of a court hearing is sufficient for the jury to infer intent to intimidate. *Commonwealth v. Robinson*, 444 Mass. 102, 110, 825 N.E.2d 1021, 1028 (2005). Intent to intimidate is inferable from the defendant’s bizarre telephone call during stalking trial, though its content was similar to earlier calls. *Commonwealth v. Potter*, 39 Mass. App. Ct. 924, 926, 655 N.E.2d 1288, 1289-1290 (1995). It is not required that the defendant specifically articulated a warning against speaking to the police or other criminal investigator. The fact finder may evaluate the circumstances in which a statement was made, including its timing, to determine whether the defendant in fact intended to intimidate the victim. *Commonwealth v. King*, 69 Mass. App. Ct. 113, 120, 866 N.E.2d 938, 944 (2007) (inferable that defendant’s statement that “[i]f he saw [the victim] on [TV] News he was going to come back and kill him was a shorthand warning against reporting a robbery to the police).

6. **“Witness.”** The statute is applicable to any potential witness, whether or not actually called to testify, who has any relevant and material information, whether or not it bears directly on an essential element of the crime. *Commonwealth v. Burt*, 40 Mass. App. Ct. 275, 277-278, 663 N.E.2d 271, 273-274 (1996). A court interpreter is not a “witness” within the meaning of § 13B. *Commonwealth v. Belete*, 37 Mass. App. Ct. 424, 426, 640 N.E.2d 511, 512 (1994).

7. **Evidence of acquittal in underlying proceeding.** It is in the judge’s discretion whether to admit evidence that the underlying criminal proceeding ended in acquittal. *Commonwealth v. Orton*, 4 Mass. App. Ct. 593, 595, 355 N.E.2d 925, 926 (1976).

8. **Future cooperation with police.** There is no requirement that the victim must be furnishing information on the day that the intimidating action is taken or statement made. *King*, 69 Mass. App. Ct. at 121, 866 N.E.2d at 945. It is enough that the jury reasonably conclude from the surrounding circumstances that “it was likely that the victim would furnish to an official investigating authority information pertaining to the crime and that the defendant intended to discourage that communication.” *Id.*

9. **Consciousness of guilt.** A threat made against a witness *after* the witness has already testified should not be admitted as consciousness of guilt. When a threat is too late to have any effect on the course of the trial, its probative value is outweighed by its inflammatory potential. *United States v. Pina*, 844 F.2d 1, 9 (1st Cir. 1988).

10. **Separate threats or inducements in same communication.** Separate and distinct threats or inducements may be charged as separate offenses even if they are contained within a single telephone call, letter or personal confrontation. *Commonwealth v. Lester*, 70 Mass. App. Ct. 55, 68, 872 N.E.2d 818, 829 (2007) (a “person seeking to influence a witness may, in one telephone call, threaten physical harm to the witness, threaten to kill a family member, or offer varying inducements”).