

## Sex Trafficking<sup>1</sup>

DFT is charged with trafficking AVM for sex.<sup>2</sup> To prove DFT guilty of this offense, the Commonwealth must prove the following two elements beyond a reasonable doubt:

1. That DFT subjected, recruited, enticed, harbored, transported, provided, or obtained AVM by any means<sup>3</sup> [attempted to subject, recruit, entice, harbor, transport, provide, or obtain AVM by any means]<sup>4</sup> to engage in commercial sexual activity, [a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272],<sup>5</sup> or caused AVM to engage in

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<sup>1</sup> G.L. c. 265, § 50 states: "(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished....

"(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished ...."

<sup>2</sup> Although the Commonwealth must prove beyond a reasonable doubt that there was a victim, it need not prove the identity of that person as an element of the offense. *Commonwealth v. Fan*, 490 Mass. 433, 448 (2022).

<sup>3</sup> The first element may be proved in a number of different ways. The judge should charge on the theories pressed at trial and delete the others. The judge would be well advised to discuss the theories of the defendant's potential culpability during the charge conference.

<sup>4</sup> In *Fan* the Supreme Judicial Court noted that "enabling" or "causing" prostitution are "short-hand means of describing the various ways in which a person may violate the human trafficking statute as enumerated in G.L. c. 265, § 50(a)." 490 Mass. at 448 citing *Commonwealth v. Dabney*, 478 Mass. 839, 857 (2019). A judge may choose to use the "enabling" or "causing" language in describing the first element, and then use the statutory language to define those terms.

<sup>5</sup> Where appropriate, the judge should instruct the jury on the elements of the alleged crime involving child pornography or obscene adult pornography pursuant to G.L. c. 272, as shown below. Both of these crimes are defined by statute, as follows:

<continued...>

commercial sexual activity [a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272], or that DFT received money or anything of value as a result of AVM engaging in commercial sexual activity [a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272];<sup>6</sup> [and]

2. That DFT did so knowingly.<sup>7</sup>

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G.L. c. 272, § 29C defines child pornography as a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom a person knows or reasonably should know to be under the age of 18 years of age and such child is:

- (i) actually or by simulation engaged in any act of sexual intercourse with any person or animal;
- (ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
- (iii) actually or by simulation engaged in any act of masturbation;
- (iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal;
- (v) actually or by simulation engaged in any act of excretion or urination within a sexual context;
- (vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
- (vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child.

Pornography depicting persons over 18 is unlawful only if it "obscene." See G.L. c. 272, § 29. Matter is "obscene" if taken as a whole it:

- (1) appeals to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed;
- (2) depicts or describes sexual conduct in a patently offensive way; and
- (3) lacks serious literary, artistic, political or scientific value.

See G.L. c. 272, § 31.

<sup>6</sup> *Commonwealth v. Dabney*, 478 Mass. 839, 856-857, cert. denied, 139 S. Ct. 127 (2018).

<sup>7</sup> A judge may choose to define knowingly after defining "obtain" below as follows: An act is done knowingly if it was done voluntarily or intentionally and not by accident or mistake.

As used here:

- "Subject" means to cause;
- "Recruit" means to hire or otherwise obtain someone to perform services;<sup>8</sup>
- "Entice" means making an attractive offer;<sup>9</sup>
- "Harbor" means to shelter or to conceal;
- "Transport" means to take or convey;
- "Provide" means to make available; and
- "Obtain" means to acquire or get. [; and]
- [An act is done "knowingly" if it was done voluntarily or intentionally and not by accident or mistake.]

***< If the case involves commercial sexual activity, add the next two paragraphs.>***

Commercial sexual activity is any sexual act involving physical contact for which anything of value is given, promised to, or received by any person.<sup>10</sup>

Sexual conduct is: "[H]uman masturbation, sexual intercourse actual or simulated, normal or perverted, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship. Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the

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<sup>8</sup> *Dabney*, 478 Mass. at 856 (2018), quoting Webster's Third New International Dictionary at 1899 (1993).

<sup>9</sup> *Id.*

<sup>10</sup> G. L. c. 265, § 49; *McGhee*, 472 Mass. at 419. In a case where the issues of the lack of evidence of force or coercion are raised by the defendant a judge may consider giving the following instructions: The Commonwealth does not have to prove that DFT used "coercion" or "force" to compel AVM to engage in commercial sexual activity. *Dabney*, 478 Mass. at 763.

consummation of sexual intercourse, which gives the appearance of the consummation of sexual intercourse, normal or perverted."<sup>11</sup>

*<If the case involves a sexually-explicit performance, add the next four paragraphs.>*

A sexually-explicit performance is an unlawful<sup>12</sup> live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interestsof patrons<sup>13</sup>

A sexually explicit performance is unlawful if it is "obscene." An "obscene" performance is one that depicts sexual conduct in a patently offensive way. Offensiveness is to be determined with reference to contemporary community norms. While nude dancing is protected speech, it may lose its protected status when it involves "hard-core" sexual conduct. Conduct which has been found obscene by courts include patrons grabbing at a dancer, lewd exposure of the genitals, particularly when accompanied by lewd conduct, and masturbation or fondling oneself.<sup>14</sup>

Sexual conduct is: "[H]uman masturbation, sexual intercourse actual or simulated, normal or perverted, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female,

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<sup>11</sup> G.L. c. 272, § 31.

<sup>12</sup> A sexually explicit performance is unlawful if it is "obscene" as defined in G.L. c. 272, § 31. See G.L. c. 272, § 29. An "obscene" performance is one that depicts sexual conduct in a patently offensive way. Offensiveness is to be determined with reference to contemporary community norms. While nude dancing is protected speech, it may lose its protected status when it involves "hard-core" sexual conduct. Conduct which has been found obscene by courts include patrons grabbing at a dancer, lewd exposure of the genitals, particularly when accompanied by lewd conduct, and masturbation or fondling oneself. *New Palm Gardens v. Alcoholic Beverages Control Commission*, 11 Mass. App. Ct. 785, 794–795 (1981); *Commonwealth v. Kocinski*, 11 Mass. App. Ct. 120, 122–122 (1981); see also G.L. c. 272, § 31 (definition of "obscene").

<sup>13</sup> G. L. c. 265, § 49.

<sup>14</sup> *New Palm Gardens v. Alcoholic Beverages Control Commission*, 11 Mass. App. Ct. 785, 794–795 (1981); *Commonwealth v. Kocinski*, 11 Mass. App. Ct. 120, 122–123 (1981); see also G.L. c. 272, § 31 (definition of "obscene").

whether alone or between members of the same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship. Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, which gives the appearance of the consummation of sexual intercourse, normal or perverted."<sup>15</sup>

A "prurient interest is a shameful or morbid interest in nudity, sex, or excretion, an unhealthy interest about sexual matters which is repugnant to prevailing moral standards."<sup>16</sup>

***< If the case involves production of child pornography, add the next paragraph and whichever of the subsequent bullets are relevant.<sup>17</sup> >***

Child pornography is unlawful. Child pornography includes negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom a person knows or reasonably should know to be under the age of 18 years of age and such child is:

- actually or by simulation engaged in any act of sexual intercourse with any person or animal;
- actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
- actually or by simulation engaged in any act of masturbation;
- actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal;

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<sup>15</sup> G.L. c. 272, § 31.

<sup>16</sup> Massachusetts District Court Jury Criminal Instruction 7.180.

<sup>17</sup> The judge should charge only on the theory pressed at trial.

- actually or by simulation engaged in any act of excretion or urination within a sexual context;
- actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
- depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child.

***< If the case involves production of unlawful adult pornography, add the following paragraph.>***

Pornography is unlawful if it is obscene. Matter is "obscene" if, taken as a whole it: (1) appeals to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed; (2) depicts or describes sexual conduct in a patently offensive way; and (3) lacks serious literary, artistic, political, or scientific value. A "prurient" interest is a shameful or morbid interest in nudity, sex, or excretion, an unhealthy interest about sexual matters which is repugnant to prevailing moral standards.<sup>18</sup>

***< The following three paragraphs apply in all human sex trafficking cases.>***

The Commonwealth is not required to prove that DFT used force or coercion in committing the alleged acts.<sup>19</sup>

The Commonwealth is not required to prove that AVM did not consent. It is irrelevant whether or not AVM consented to engage in commercial sexual activity, [a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272].<sup>20</sup>

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<sup>18</sup> Massachusetts District Court Jury Criminal Instruction 7.180.

<sup>19</sup> *Dabney*, 478 Mass. at 852-854; *McGhee*, 472 Mass. at 415-416.

<sup>20</sup> *McGhee*, 472 Mass. at 416.

To act knowingly means to act with an awareness of the unlawful act. For example, a taxi driver who transports a woman to a hotel where she engages in commercial sexual activity does not “knowingly” transport the woman to engage in commercial sexual activity unless the taxi driver actually knows that the woman was going to the hotel to engage in the commercial sexual activity.

**Sex Trafficking of a Person Under 18 <supplemental instruction><sup>21</sup>**

Sex trafficking of a person under 18 has one additional element to those required for sex trafficking.

3. AVM was under 18 years of age.

This last element is self-explanatory.

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<sup>21</sup> G.L. c. 265, § 50(b) states: “Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished.”