

AFFRAY

G.L. c. 277, § 39

The defendant is charged with violating the law by engaging in an affray with others. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

***First:* That the defendant fought with one or more other persons;**

***Second:* That the fighting took place in a public place; and**

***Third:* That at least one person who was lawfully present in the public place was put in fear as a result of the fighting that occurred.**

With regard to the first element, fighting is the use of physical force or violence or any threat to immediately use such force or violence.

NOTES:

1. **Lawful presence.** Affray is a common law offense, but the term “affray” is defined by G.L. c. 277, § 39: “Affray. – Fighting together of two or more persons in a public place to the terror of the persons lawfully there.” Lawful presence in the public place of the person placed in fear is a required element of proof of affray. The purpose for which any person is present is irrelevant. *Commonwealth v. Nee*, 83 Mass. App. Ct. 441, 447 (2013) (victims placed in fear were lawfully present). See *District Attorney for Norfolk Dist. v. Quincy Div. of Dist. Court Dep’t*, 444 Mass. 176, 180-181 (2005).

2. **Self-defense.** “Nothing in the definition of affray precludes a defendant so charged from asserting self-defense or defense of another in justification of his conduct.” *Nee*, 83 Mass. App. Ct. at 449 n.8. See “Self-Defense” (Instruction 9.260).

3. **Sentencing.** Since the General Laws do not specify a penalty for common law affray, a convicted defendant should be punished under G.L. c. 279, § 5, which provides for “such sentence, according to the nature of the crime, as conforms to the common usage and practice in the commonwealth.” See *Nee*, 83 Mass. App. Ct. at 445 n.4.

4. **Alignment.** The Commonwealth is not required to prove that the defendant and other participants were on the same or opposing sides. *Nee*, 83 Mass. App. Ct. at 447.