

**SECRETLY PHOTOGRAPHING OR VIDEOTAPING
A NUDE OR PARTIALLY NUDE PERSON**

G.L. c. 272, § 105(b), ¶ 1¹

The defendant is charged with secretly (photographing) (videotaping) (electronically surveilling) a nude or partially nude person. In order to prove the defendant guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

***First:* That the defendant willfully (photographed) (videotaped) (electronically surveilled) the alleged victim;**

***Second,* That the defendant did so without the alleged victim's knowledge and consent;**

***Third:* That the defendant intended to secretly conduct or hide such activity;**

***Fourth,* the the alleged victim was nude or partially nude; and**

¹ This instruction applies to an allegation that the person photographed or videotaped was nude or partially nude. See *Commonwealth v. Wassilie*, 482 Mass. 562 (2019). Allegations that the defendant photographed, videotaped, or electronically surveilled a person's intimate parts under or around their clothing must be brought pursuant to G.L. c. 272, § 105(b), ¶ 2 (adult), or ¶ 3 (person under eighteen). *Id.*

***Fifth, That* the alleged victim had a reasonable expectation of privacy in not being so (photographed) (videotaped) (electronically surveilled).**

The term “electronically surveils” means “to view, obtain or record a person’s visual image by the use or aid of a camera, cellular or other wireless communication device, computer, telephone or other electronic device.”²

The Commonwealth must also prove that the defendant acted willfully when recording or viewing. This requires you to make a decision about the defendant’s state of mind at the time – whether his (her) actions were intentional and not accidental or due to inadvertence or inattention.³

To prove the second element, the Commonwealth must prove that the alleged victim did not know of or consent to the surveillance.

To prove the third element, the Commonwealth must prove that the defendant intended to secretly conduct or hide such activity. A person’s intent is his or her purpose or objective.

² G.L. c. 272, § 105(a).

³ Definition of “willful” from *Commonwealth v. Bohmer*, 374 Mass. 368, 377 (1978).

This requires you to make a decision about the defendant’s state of mind at that time. In our everyday affairs, we often must decide from the actions of others what their state of mind is. You should consider all the evidence, and any reasonable inferences you draw from the evidence, in determining whether the defendant acted with the intent to secretly conduct or hide his (her) activity.

To prove the fourth element, the Commonwealth must prove that the alleged victim was nude or partially nude. One is partially nude when the genitals, buttocks, pubic area or female breast below a point immediately above the top of the areola is exposed. The “areola” is the area of dark-colored skin on the breast that surrounds the nipple.

To prove the fifth element, the Commonwealth must prove the alleged victim had a reasonable expectation of privacy in not being (photographed) (videotaped) (electronically surveilled). Whether such an expectation is reasonable under the circumstances of this case is to be measured by common understanding and practices.

If the Commonwealth proved all five elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth failed to prove any element beyond a reasonable doubt, you must find the defendant not guilty.

NOTE:

1. **Reasonable expectation of privacy.** “A person does not lose all reasonable expectation of privacy in his or her covered ‘sexual or intimate parts’ simply by being in public.” *Commonwealth v. Nascimento*, 91 Mass. App. Ct. 665, 667 (2017). “Instead, that expectation must be measured against current mores, taking into account the totality of the circumstances.” *Id.* Location certainly is a factor to be considered when assessing what an objectively reasonable expectation would be at a particular moment, but is not the only factor nor is it dispositive. Similarly, a person’s state of dress or undress is a factor to be considered, but it too is not dispositive. *Id.*

2. **Proof by circumstantial evidence.** A conviction under G.L. c. 272, § 105(b) does not require the Commonwealth to produce an image depicting another person who is nude or partially nude. *Commonwealth v. Cooper*, 100 Mass. App. Ct. 345, 349 (2021). *Id.* Unlike § 105(c), which penalizes dissemination of a “visual image” obtained in violation of §105(b), the harm sought to be proscribed by §105(b) is the violation of an individual’s privacy, not the possession of the image itself. *Id.* Circumstantial evidence, such as the alleged victim’s testimony, is sufficient to establish the defendant’s guilt. *Id.* at 350.