

**SECRETLY PHOTOGRAPHING, VIDEOTAPING, OR
ELECTRONICALLY SURVEILLING A PERSON'S
INTIMATE PARTS UNDER OR AROUND CLOTHING**

G.L. c. 272, § 105(b), ¶¶ 2 & 3¹

The defendant is charged with secretly photographing, videotaping or electronically surveilling a person's (child's) intimate parts under or around the person's (child's) clothing. 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 or electronically surveilled the intimate parts of a person (person under the age of 18);**

***Second:* that the defendant did so without the person's knowledge and consent;**

***Third:* that the defendant did so with the intent to secretly conduct or hide the activity;**

***Fourth:* that the defendant did so by photographing, videotaping, or electronically surveilling under or around the person's**

¹ G.L. c. 272, § 105(b) second par. addresses the surreptitious photographing or videotaping of a person's clothed private anatomy even when in public; § 105(b) third par. addresses the surreptitious photographing or videotaping of the private anatomy of a child under the age of eighteen even when in public.

clothing in order to view or attempt to view the person's intimate parts;

***Fifth:* that a reasonable person would believe that the person's intimate parts would not have been visible to the public.**

To prove the first element of the offense, the Commonwealth must prove the defendant photographed, videotaped, or electronically surveilled a person's (person under the age of eighteen's) intimate parts under or around their clothing.

To "electronically surveil" 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, television or other electronic device."²

The term "intimate parts" means the "genitals, buttocks, pubic area or female breast below a point immediately above the tip of the areola, whether or not covered by clothing or undergarments."³

The Commonwealth must also prove that the defendant acted willfully when recording or viewing. This requires you to make a

² G.L. c. 272, § 105(a).

³ G.L. c. 272, § 105(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.

Commonwealth v. Bohmer, 374 Mass. 368, 377 (1978).

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 the defendant intended to hide the activity or keep it secret. 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 choose to 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 defendant positioned the equipment in a way to gain a view under or around clothing that concealed sexual or intimate parts of the

body. This includes positioning the equipment at an angle that provides images of intimate parts that would not otherwise be readily visible.

To prove the fifth element, the Commonwealth must prove that a reasonable person would believe that the alleged victim's intimate parts would not have been visible to the public.

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. Victim must be clothed.** The charge must be brought under the first paragraph of G.L. c. 272, § 105(b) if the person is naked. *Commonwealth v. Wassilie*, 482 Mass. 562 (2019). The second paragraph of G.L. c. 272, § 105(b) requires that the viewing be under or around clothing. *Id.*