

## ENTICING A CHILD UNDER 16

**The defendant is charged with violating the child enticement statute.**

*G.L. c. 265, § 26C.*

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

***First:* that the alleged victim was a child under the age of 16 or a person whom the defendant believed to be under the age of 16;**

***Second:* that the defendant enticed the alleged victim to (enter) (exit) (or) (remain within)**

**a (vehicle) (dwelling) (building) (or) (outdoor space);**

***Third:* that the defendant did so with the intent that he (she) or another person would commit the offense of:**

- **Indecent assault and battery (on a child under the age of 14) (on a person with an intellectual disability) (on a person 14 years or older)** *[G.L. c. 265, §§ 13B, 13F or 13H]*
- **Rape (of a child under 16 with force) (and abuse of a child under the age of 16)** *[G.L. c. 265, §§ 22, 22A or 23]*
- **Assault (on a child under 16) with intent to commit rape** *[G.L. c. 265, §§ 24 or 24B]*

- **Inducing a minor to become a prostitute** [G.L. c. 272, § 4A]
- **Open and gross lewdness** [G.L. c. 272, § 16]
- **Disseminating matter harmful to a minor** [G.L. c. 272, § 28]
- **Disseminating or possessing to disseminate obscene matter** [G.L. c. 272, § 29]
- **Posing or exhibiting a child under 18 in a state of nudity or sexual conduct** [G.L. c. 272, § 29A]
- **Knowingly purchasing or possessing visual material of a child under 18 in sexual conduct** [G.L. c. 272, § 29C]
- **Unnatural and lascivious acts with a child under 16** [G.L. c. 272, § 35A]
- **Accosting or annoying a person of the opposite sex** [G.L. c. 272, § 53]
- **Common nightwalker or streetwalker** [G.L. c. 272, § 53]
- **Disorderly conduct** [G.L. c. 272, § 53]
- **Disturbing the peace** [G.L. c. 272, § 53]
- **Indecent exposure** [G.L. c. 272, § 53]
- **Keeping a noisy and disorderly house** [G.L. c. 272, § 53]
- **Lewd, wanton and lascivious conduct** [G.L. c. 272, § 53]
- **Engaging in sexual conduct for a fee** [G.L. c. 272, § 53A]

- **(Paying) (procuring for) sexual conduct (with a child under 14)**

*[G.L. c. 272, § 53A]*

- *[Identify crime which has as an element the use of or attempted use of force].*

**To prove the first element of the offense, the Commonwealth must prove beyond a reasonable doubt that the alleged victim was a child who was under the age of 16 years, or a person who the defendant believed was a child under the age of 16 years.**

*If there is evidence that the alleged victim was not actually under 16.*

**You have**

**heard evidence that there never was a child under 16 years of age involved in this case. The Commonwealth is not required to prove that the defendant enticed a child who was actually under 16 years of age. It is sufficient if the Commonwealth proves beyond a reasonable doubt that the object of the defendant's enticement was a person whom he (she) believed to be a child under the age of 16.**

**To prove the second element of the offense, the Commonwealth must**

**prove beyond a reasonable doubt that the defendant enticed someone to (enter) (exit) (or) (remain within) a (vehicle) (dwelling) (building) (or) (some outdoor space). To “entice” means “to lure, induce, persuade, tempt, incite, solicit, coax or invite” someone. A person may entice someone with words, gestures or in other ways.**

**To prove the third element of the offense, the Commonwealth must prove beyond a reasonable doubt that, by this enticement, the defendant intended to commit the offense of \_\_\_\_\_ or intended that someone else commit the offense of \_\_\_\_\_.**

**The Commonwealth must prove each element of the offense beyond a reasonable doubt.**

*Here instruct on the elements of the offense which the defendant is alleged to have intended. Below is the list of the intended offenses covered by G.L. c. 265, § 26C, with statutory references and, where available, the corresponding model jury instruction.*

*If the intended offense is a strict liability offense, see note 1 below with regard to the defendant's knowledge that the alleged victim was underage.*

<u>Statute</u>	<u>Offense</u>	<u>Model Jury Instruction</u>
G.L. c. 265, § 13B	Indecent assault and battery on a child under 14	6.520
G.L. c. 265, § 13F	Indecent assault and battery on a person with an intellectual disability	
G.L. c. 265, § 13H	Indecent assault and battery on a person 14 or older	6.500
G.L. c. 265, § 22	Rape; Aggravated rape	
G.L. c. 265, § 22A	Rape of a child under 16 with force	
G.L. c. 265, § 23	Rape and abuse of a child under 16 (statutory rape)	
G.L. c. 265, § 24	Assault with intent to rape	
G.L. c. 265, § 24B	Assault on a child under 16 with intent to rape	
G.L. c. 272, § 4A	Inducing a minor to prostitution	
G.L. c. 272, § 16	Open and gross lewdness	7.400
G.L. c. 272, § 28	Disseminating matter harmful to a minor	

G.L. c. 272, § 29	Disseminating or possessing to disseminate obscene matter	7.180
G.L. c. 272, § 29A	Posing or exhibiting child under 18 in a state of nudity or sexual conduct	

<u>Statute</u>	<u>Offense</u>	<u>Model Jury Instruction</u>
G.L. c. 272, § 29C	Possessing child pornography	
G.L. c. 272, § 35A	Unnatural act with child under 16	
G.L. c. 272, § 53	Accost or annoy person of opposite sex	6.600
	Common nightwalker	7.120
	Common streetwalker	
	Disorderly conduct	7.160
	Disturbing the peace	7.200
	Indecent exposure	7.340
	Keeping a noisy and disorderly house	
	Lewd, wanton and lascivious conduct	7.380
G.L. c. 272, § 53A	Sexual conduct for a fee	7.480
	Paying or procuring for sexual conduct	7.480
	Paying or procuring for sexual conduct with a child under 14	
[Various statutes]	"Any offense that has as an element the use or attempted use of force"	

NOTES:

1. **Age of child.** To satisfy the first element of the offense, the Commonwealth must prove that the defendant enticed a victim who was under the age of sixteen, or a victim who the defendant believed was under the age of sixteen. In addition, the third element of the offense requires a specific intent to commit one of the enumerated crimes. Where the intended crime is a strict liability offense such as rape or indecent assault of a child, to satisfy the third element the Commonwealth must prove that the defendant specifically intended to have sexual relations with (or commit indecent assault on) an underage victim. The Commonwealth need not prove that the defendant knew the exact age of the victim, but must prove that the defendant intended to direct his sexual advances to an underage victim, i.e., to do a criminal act. Intending to have consensual sexual relations with another adult would not provide the requisite criminal specific intent for the third element, even if it turned out that the object of the defendant's advances was in fact a child. *Commonwealth v. Filopoulos*, 451 Mass. 234, 884 N.E.2d 514 (2008); *Commonwealth v. Disler*, 451 Mass. 216, 884 N.E.2d 500 (2008).

2. **Consent not a defense.** A child under the statutory age is incapable of consenting to any of the enumerated offenses that are strict liability offenses.

3. **Speech alone.** The statute does not require an overt act but does require proof of specific intent to commit one or more of the enumerated crimes. It does not criminalize the mere sending of sexually explicit messages or indecent language, even to minors; in fact, the statute can be violated by enticing a child without making any verbal reference to sexual matters at all. *Commonwealth v. Disler*, 451 Mass. 216, 884 N.E.2d 500 (2008). In a prosecution for enticing a child with intent to kidnap, merely offering the victim a ride and then saying in a "more demanding" and "sort of loud" voice "Get in the truck" were insufficient to prove that the defendant intended to forcibly confine the victim. *Commonwealth v. LaPlante*, 73 Mass. App. Ct. 199, 897 N.E.2d 78 (2008).