

KIDNAPPING

G.L. c. 265, § 26 (clauses 1 and 2)

The defendant is charged with kidnapping. To prove that the defendant is guilty of this charge, the Commonwealth must prove three things beyond a reasonable doubt:

***First:* That the defendant (forcibly confined or imprisoned) (secretly confined or imprisoned) [alleged victim] within the Commonwealth of Massachusetts;**

***Second:* That the defendant did so against [alleged victim's] will;**
and

***Third:* That the defendant was without lawful authority to do so.**

To prove the first element, the Commonwealth must prove that the defendant (forcibly confined or imprisoned) (secretly confined or imprisoned) [alleged victim] within the Commonwealth of Massachusetts. One acts “forcibly” toward another when one compels or constrains them to do something against their will. There need not be actual physical force used. It is sufficient if the person is subdued by a display of potential or threatened force.

Something is done “secretly” if it is done without the knowledge of anyone other than the defendant (and those assisting the defendant).

A person is “confined” if kept within bounds or limits, shut or kept in, or restricted in movement.

A person is “imprisoned” if detained in custody or if their liberty is restrained.

To prove the second element, the Commonwealth must prove that the defendant (forcibly confined or imprisoned) (secretly confined or imprisoned) [alleged victim] against their will. The force used may be actual or threatened. A thing is done “against a person’s will” if that person did not freely consent or agree to it. (If a person agrees because of fear, it is without consent.)

To prove the third element, the Commonwealth must prove that the defendant was without lawful authority (forcibly confined or imprisoned) (secretly confined or imprisoned) the person against their will. An act is taken without lawful authority if it is not authorized or otherwise allowed by law.

If the Commonwealth proved all the 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.

SUPPLEMENTAL INSTRUCTION

If alleged victim is a minor. Because [alleged victim] is a minor, they could not consent to being confined or imprisoned.

Commonwealth v. Colon, 431 Mass. 188, 189 (2000).

NOTES:

- 1. Definitions.** “[T]he concept of ‘confinement’ has been broadly interpreted to mean any restraint of person’s movement.” *Commonwealth v. Lent*, 46 Mass. App. Ct. 705, 710 (1999); accord *Commonwealth v. Titus*, 32 Mass. App. Ct. 216, 222 (1992) (the “essence [of kidnapping] is restraint, restraint of locomotion”). The term “forcibly” does not require physical force, but rather is satisfied by a display of potential force. *Titus*, 32 Mass. App. Ct. at 221 (“The judge correctly noted that there need not be physical force applied against the victim; if the victim is subdued by the ‘display of potential force, [that] is sufficient.’”) (quoting *Commonwealth v. Cavacciola*, 409 Mass. 648, 652 (1991)).
- 2. When specific intent is required.** “[T]he first clause of § 26 ‘states a crime which may be proved by objective facts concerning the use of force and confinement and does not require proving a specific criminal intent.’” *Commonwealth v. Bibby*, 54 Mass. App. Ct. 158, 161 (2002) (quoting *Commonwealth v. Saylor*, 27 Mass. App. Ct. 117, 121-122 (1989)). Proof of the third clause for the use of trickery or deceit (inveigle) requires proof of a specific intent. *Commonwealth v. Lent*, 46 Mass. App. Ct. 705, fn. at 709 (1999) and cases cited.
- 3. Aggravated versions.** Kidnapping may be aggravated by being armed “with a firearm, rifle, shotgun, machine gun or assault weapon.” G.L. c. 265, § 26, ¶ 2. In District Court, this changes the maximum penalty from two years in a house of correction to two and one-half years in a house of correction. See G.L. c. 218, § 26. This aggravator does not apply if the defendant is a parent of a minor victim. G.L. c. 265, § 26, ¶ 2. Kidnapping may also be aggravated by: (1) the intent to extort money or other valuable item; (2) being armed and inflicting serious bodily injury; (3) being armed and sexually assaulting the victim; or (4) the victim’s being under the age of 16 (if the defendant is not the victim’s parent). In each of these cases, the only permissible punishment is state prison and thus the crime is presumably outside the final jurisdiction of the District Court. G.L. c. 265, § 26; G.L. c. 218, § 26.

KIDNAPPING

Issued November 2021

4. Merger. Where the confinement is integral to another a crime, such as rape, it may merge into the other crime. *Commonwealth v. Kickery*, 31 Mass. App. Ct. 720, 723-724 (1991) (“any confinement of the victim during the rape itself did not exceed the restraint which was incident to the rape and did not constitute the separate crime of kidnapping, separate and apart from the rape”). Confinement beyond the minimum necessary to complete the other crime, however, may separately support a conviction for kidnapping. *Commonwealth v. Cobb*, 45 Mass. App. Ct. 271, 276 (1998) (tying the victim’s hands and feet and throwing a blanket over the victim’s head while searching for money and valuables was sufficient to support a conviction of kidnapping, in addition to convictions for home invasion and armed robbery).