

ANNOYING AND ACCOSTING PERSONS

G.L. c. 272, § 53

The defendant is charged with annoying and accosting a person.

To prove the defendant guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

***First:* That the defendant acted, spoke, or communicated in an offensive manner to another person;**

***Second:* That those actions or words were disorderly;**

***Third:* That the defendant intended to direct those actions or words to [the alleged victim];**

***Fourth:* That [the alleged victim] was aware of the defendant's actions or words; and**

***Fifth:* That those actions or words would be considered both offensive and disorderly to a reasonable person.**

To prove the first element of the offense, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly acted offensively by engaging or attempting to engage in sexual

conduct or by using sexual language.

To be offensive, the sexual conduct or sexual language must be repugnant to contemporary standards of decency, and causes *[the alleged victim]* real displeasure, anger, or resentment. It must have a sexual connotation, either explicit or implicit, that is contrary to the prevailing sense of what is decent and moral. Implicit sexual conduct or language is behavior that a reasonable person would understand as having a sexual connotation.

To prove the second element of the offense, the Commonwealth must prove beyond a reasonable doubt that those actions or words were also disorderly.

“Disorderly” is defined in two ways. It is either:

- 1) conduct that is fighting or threatening or violent or tumultuous; *or***
- 2) conduct that creates a hazardous or physically offensive condition without any legitimate purpose.**

Threatening behavior or language may take many forms. It may be an act or a communication that would make a reasonable person fearful, not just uncomfortable. The Commonwealth is not required

to prove that the defendant intended a threat to be immediately followed by actual violence or physical force, so long as the circumstances would justify a reasonable person's fear or apprehension from such acts or communications.

See *Chou*, 433 Mass. at 234.

Where the conduct alleged is threatening speech. **Where the only conduct is speech, the Commonwealth must prove beyond a reasonable doubt that the speech was a true threat or fighting words and therefore not protected by the First Amendment.**

A true threat either threatens imminent physical harm to the alleged victim or causes and was intended to cause the alleged victim to fear physical harm now or in the future. To determine whether the statement is a true threat, you may consider the context or circumstances in which the statements were made.

If sexually explicit language is involved. **Sexually explicit language may be inherently threatening when it is directed at particular individuals in**

settings in which such communications are inappropriate and likely to cause severe distress.

“Fighting words” are face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction.

If the Commonwealth has not proven beyond a reasonable doubt that the alleged speech is a true threat or fighting words, then the speech cannot be the basis for the alleged offense.

The regulation of threatening speech has been held not to violate the First Amendment where the speech is a “true threat.” Such speech is unprotected as “its purpose is to cause injury rather than to add to, or to comment on, the public discourse.” *Commonwealth v. Chou*, 433 Mass. 229, 236 (2001). “[T]he “true threat” doctrine applies not only to direct threats of imminent physical harm, but to words or actions that—taking into account the context in which they arise—cause the victim to fear such harm now or in the future and evince intent on the part of the speaker or actor to cause such fear.” *O’Brien v. Borowski*, 461 Mass. 415, 425 (2012); see also *Virginia v. Black*, 538 U.S. 343, 359-360 (2003). “Sexually explicit and aggressive language directed at and received by an identified victim may be threatening, notwithstanding the lack of evidence that the threat will be immediately followed by actual violence or the use of physical force.” *Chou*, 433 Mass. 229 at 235. Compare *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9, 10, 21-22 (2007) (defendant staring at complainant at swimming pool and singing that he “fell in love with a little girl” insufficient to infer that he intended her to fear that harm would befall her).

A “physically offensive condition” can include physical contact between the defendant and the alleged victim. However,

actual physical contact is not required, so long as the conduct created a condition that would cause a reasonable person to fear imminent physical harm.

See *Commonwealth v. Sullivan*, 469 Mass. 621, 627 (2014), citing *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9, 18 (2007), See also *Commonwealth v. Cahill*, 446 Mass. 778, 781 (2006); *Commonwealth v. Chou*, 433 Mass. 229, 235 (201).

To prove the third element of the offense, the Commonwealth must prove beyond a reasonable doubt that the defendant intended to direct those actions or words to [the alleged victim].

See *Chou*, 433 Mass. at 235, n.5. If further instruction on intent is required, see Instruction 3.120. “In determining whether acts of harassment are directed at a person, we look not only to statements and conduct of the defendant but to the nature of the act and the natural consequence of the act.” *Commonwealth v. Brennan*, 481 Mass. 146, 152 (2018). See also *Commonwealth v. Johnson*, 470 Mass. 300, 312-313 (2014) (defendant’s act of posting on Craigslist was directed at victims because ensured that victims would be harassed by others; it was the “equivalent of the defendants recruiting others to harass the victims”).

To prove the fourth element of the offense, the Commonwealth must prove beyond a reasonable doubt that [the alleged victim] was aware of the defendant’s actions or words.

To prove the fifth element of the offense, the Commonwealth must prove beyond a reasonable doubt that those actions or words would be considered both offensive and disorderly to a reasonable person.

Commonwealth v. Cahill, 446 Mass. 778, 781, 783 (2006) (Commonwealth must prove that defendant's behavior was offensive and disorderly to a reasonable person).

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

NOTES:

1. Offensive and disorderly are distinct elements. The Commonwealth must prove both that the conduct was offensive and disorderly. *Commonwealth v. Lombard*, 321 Mass. 294, 296 (1947).

2. A single act sufficient. The statute originally penalized “persons who with offensive and disorderly act or language accost or annoy persons of the opposite sex.” In 1983, the word “act” was changed to “acts.” St. 1983, c. 66, § 1. Nevertheless, “the change had no impact on the statute’s meaning,” *Commonwealth v. Moran*, 80 Mass. App. Ct. 8, 13 (2011), and proof of a single disorderly and offensive act is sufficient.

3. Opposite sex not required. In 2014, the Legislature removed the requirement that the victim be of the opposite sex of the defendant. St. 2014, c. 417 (effective March 24, 2015).

4. Invasion of privacy need not be extreme. The word “extreme” was deleted from this instruction after the decision in *Commonwealth v. Cahill*, 446 Mass. 778, 782 (2006) (statute not limited to extreme invasions of personal privacy), rev’g *Commonwealth v. Cahill*, 64 Mass. App. Ct. 911 (2005).

5. “Physically offensive condition.” If the act was physically offensive, it need not also be threatening, *Commonwealth v. Cahill*, 446 Mass. 778, 783 (2006), and vice versa, *Commonwealth v. Chou*, 433 Mass. 229, 234 (2001) (distribution of sexually derogatory flyers concerning victim was not physically offensive but was threatening). “Offensive acts are those that cause ‘displeasure, anger or resentment; esp., repugnant to the prevailing sense of what is decent or moral.’” *Cahill*, 446 Mass. at 781, quoting Black’s Law Dictionary 1113 (8th ed. 2004). Conduct is physical when it is “of or relating to the body.” *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9, 17 (2007), quoting Merriam-Webster’s Collegiate Dictionary 935 (11th ed. 2005). Physical contact with a victim’s person is not necessary to render one’s actions physically offensive, however. *Cahill*, 446 Mass. at 782, citing *Commonwealth v. LePore*, 40 Mass. App. Ct. 543, 549 (1996) (physically offensive conduct where defendant removed screen from bedroom window of ground floor apartment wherein woman lay sleeping and stood there smoking cigarettes), rev. denied, 423 Mass. 1104 (1996)); cf. *Ramirez*, 69 Mass. App. Ct. at 16 (no physically offensive conduct where defendant merely stared at complainant at swimming pool and sang that he “fell in love with a little girl”).

6. **Public or private.** The offense may be committed in public or in private. See *Commonwealth v. Cahill*, 446 Mass. 778, 782 n.6 (2006); *Commonwealth v. Chou*, 433 Mass. 229, 233 (2001).

7. **“Offensive” conduct must have sexual context.** “Offensive acts are those that cause ‘displeasure, anger or resentment; esp., repugnant to the prevailing sense of what is decent or moral.’” *Commonwealth v. Cahill*, 446 Mass. 778, 781 (2006), quoting from Black’s Law Dictionary 1113 (8th ed. 2004). “We interpret the ‘offensive’ acts or language element of G. L. c. 272, § 53, as requiring proof of sexual conduct or language, either explicit or implicit.” *Commonwealth v. Sullivan*, 469 Mass. 621, 625-26 (2014). “By implicit sexual conduct or language, we mean that which a reasonable person would construe as having sexual connotations.” *Id.* at 626.