

CRIMINAL HARASSMENT

G.L. c. 265, § 43A

The defendant is charged with criminal harassment.

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

***First:* That the defendant committed at least three separate acts;**

***Second:* That the defendant intended to target [the alleged victim] with each act;**

***Third:* That the defendant committed each act willfully and maliciously;**

***Fourth:* That the acts, taken as a whole, seriously alarmed the [the alleged victim]; and**

***Fifth:* That the acts, taken as a whole, would cause a reasonable person to suffer substantial emotional distress.**

Commonwealth v. McDonald, 462 Mass. 236, 240 (2012) (listing elements).

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant committed at least three separate acts. An act may be based on conduct, speech or both. The acts must be separate, distinct, and separated by at least a

brief period of time.

“The phrase ‘pattern of conduct or series of acts’ requires the Commonwealth to prove three or more incidents of harassment.” *Commonwealth v. Bigelow*, 475 Mass. 554, 561 (2016). “[O]ne continuous act cannot be divided into multiple discrete acts in order to satisfy the requirements of G.L. c. 258E, § 1.” *F.K. v. S.C.*, 481 Mass. 325, 333 (2019). See also *Orla O. v. Patience P.*, 100 Mass. App. Ct. 126, 128 (2021) (one continuous event over a very brief period of time cannot serve as the basis for a harassment prevention order); *Smith v. Mastalerz*, 467 Mass. 1001 (2014) (driving by the plaintiff’s home three times within a very short period of time was one continuous act).

“Period of time” means the passage of time and does not denote a particular time interval. “As long as the acts are separate, distinct, and separated by some interval, they occur over a period of time within the meaning of the statute.” *Commonwealth v. Valentin*, 91 Mass. App. Ct. 515, 523 (2017) (construing stalking statute, G.L. c. 265, § 43).

Where the acts are based on speech alone. **If an act is based on speech, the Commonwealth must prove beyond a reasonable doubt that the speech was a true threat or contained “fighting words” and therefore not protected by the First Amendment.**

A true threat is one that either threatens imminent physical harm to the alleged victim, or that caused and was intended to cause the alleged victim to fear physical harm at the time or in the future. To determine whether the statement is a true threat, you may consider the context or circumstances in which the statement was made.

“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 meets the definition of a true threat or fighting words, the alleged speech cannot be the basis for one (or more) of the three required acts of harassment. You may consider, however, whether it gives context to other acts.

O'Brien v. Borowski, 461 Mass. 415, 422-425 (2012). See also *Virginia v. Black*, 538 U.S. 343, 359-360 (2003); *Commonwealth v. Chou*, 433 Mass. 229, 236 (2001).

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant intended to target [the alleged victim] with each act. By target, I mean that each act was directed at [the alleged victim], and that the defendant intended that [the alleged victim] know that each act was directed at them.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant acted willfully and maliciously. An act is “willful” if it is done intentionally and by design, and not by mistake or accident. The defendant acted willfully if the defendant intended the conduct. An act is done with “malice” if

the defendant's conduct was intentional and without justification or mitigation, and any reasonably prudent person would have foreseen the actual harm that resulted to [the alleged victim].

Commonwealth v. Ecker, 92 Mass. App. Ct. 216, 221–22 (2017). See also note 1 below.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that [the alleged victim] was seriously alarmed by the conduct. The Commonwealth is required to prove only that the cumulative effect of the defendant's conduct seriously alarmed [the alleged victim], but it is not required to prove that each individual act did so.

Commonwealth v. Brennan, 481 Mass. 146, 152 (2018), citing *Commonwealth v. Walters*, 472 Mass. 680, 699 (2015).

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the acts, taken as a whole, would cause a reasonable person to suffer substantial emotional distress. By substantial emotional distress, I mean distress that is considerable, of importance, solid and real. The offending conduct must be such as would produce a considerable or significant amount of emotional distress in a reasonable person; it must be something markedly greater than the level of uneasiness, nervousness,

unhappiness or the like which is commonly experienced in day to day living.

The term “substantial emotional distress” is defined as “considerable in amount”, or “of real worth and importance.” *Commonwealth v. Robinson*, 444 Mass. 102, 107-108 (2005) (“emotional distress that is merely trifling or passing is *not* enough to satisfy this element, but must be markedly greater than that commonly experienced as part of ordinary living”). See also *Commonwealth v. Paton*, 63 Mass. App. Ct. 215, 221 (2005); *Commonwealth v. Clemens*, 61 Mass. App. Ct. 915, 916 (2004).

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

SUPPLEMENTAL INSTRUCTION

Communications covered by statute. **The conduct, acts or threats may be communicated by any means, including but not limited to** (mail) (telephone) (facsimile transmission) (e-mail) (internet communications) (telecommunications device) (electronic instant messages) (any electronic communication device including any devise that transfers signs) [signals] [writing] [images] [sounds] [data] or [intelligence of any nature] transmitted in whole or in part by a [wire] [radio] [electromagnetic system] [photo-electronic system] [photo-

optical system]).

NOTES:

1. **Willful and Malicious conduct.** Willful conduct must be intentional (as opposed to negligent) but does not require that the defendant intend its harmful consequences as well. *Commonwealth v. O'Neil*, 67 Mass. App. Ct. 284, 290-293 (2006). The modern definition of "malice" does not require any showing of "cruelty, hostility or revenge, nor does it require an actual intent to cause the required harm, but merely that the conduct be "intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual harm that resulted." *Id.* Accord *Commonwealth v. Lehan*, 100 Mass. App. Ct. 246, 252 (2021); *Commonwealth v. Ecker*, 92 Mass. App. Ct. 216, 221-222 (2017); *Commonwealth v. Paton*, 63 Mass. App. Ct. 215, 219 (2005). Prior to the *O'Neil* decision, this instruction included language that: "An act is done maliciously if it is done out of cruelty or hostility or revenge, or other wrongful motive." In the context of criminal stalking, "malice can be inferred even in instances of largely innocuous conduct, if the entire course of conduct lends those acts a more sinister air." *Lehan*, 100 Mass. App. Ct. at 253. See *Commonwealth v. Paton*, 63 Mass. App. Ct. 215, 219 (2005) (frequently visiting a bar at which the victim worked and staring at the victim without speaking -- had been imbued with "an ominous, menacing, [and] even sinister quality" in the context of the defendant's full course of conduct). However, the Commonwealth is not precluded from proceeding under a theory that the defendant acted with "cruelty, hostility or revenge" because such proof would presumably also satisfy the requirement that the defendant's acts were "intentional and without justification or mitigation, and any reasonably prudent person would have foreseen the actual harm that resulted." See e.g., *O'Neil*, 67 Mass. App. Ct. at 291, 293.

2. **First Amendment: harassing conduct does not encompass protected speech.** Although the statute reaches harassing speech, it does not reach protected speech. Specifically, it reaches only "fighting words" and "true threats." See *O'Brien v. Borowski*, 461 Mass. 415, 422-423 (2012). "Fighting words" are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace and words plainly likely to cause a breach of the peace by the addressee" *Commonwealth v. Bigelow*, 475 Mass. 554, 566 (2016). However, "[v]ulgar, profane, offensive or abusive speech is not, without more, subject to criminal sanction." *Commonwealth v. A Juvenile*, 368 Mass. 580, 589 (1975), citing *Cohen v. California*, 403 U.S. 15, 23 (1971). "Fighting words" thus have two components: they must be a direct personal insult addressed to a person, and they must be inherently likely to provoke violence." *O'Brien v. Borowski*, 461 Mass. at 423. "The words must also be directed at a specific person with the sense being that they are a face-to-face personal insult." *Commonwealth v. Braica*, 68 Mass. App. Ct. 244, 246 (2007). A true threat includes "not only... direct threats of imminent physical harm, but [also] 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. at 425.

3. **Harassing letters.** A judge should not exclude otherwise-admissible harassing letters sent by the defendant to the complainant, because they are repetitive or unduly prejudicial. *Commonwealth v. Matsos*, 421 Mass. 391, 392, n.3 (1995). The Commonwealth is entitled to present to the jury the totality of the defendant's conduct, since it must prove the victim's alarm or annoyance, and the likelihood that a reasonable person in the victim's position would suffer substantial emotional distress. *Id.*

4. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration “shall include in the record of the case specific reasons for not imposing a sentence of imprisonment,” which shall be a public record. G.L. c. 265, § 41.