

STALKING IN VIOLATION OF A PROTECTION ORDER

G.L. c. 265, § 43(b)

The defendant is charged with stalking in violation of a court issued protection order.

To prove the defendant guilty of this offense, the Commonwealth must prove seven 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 alleged victim];

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

Sixth: That the defendant threatened [the alleged victim] with the intention of placing [the alleged victim] in imminent fear of death or bodily injury and that [the alleged victim's] fear was reasonable; and

Seventh, that the defendant knowingly violated a temporary or

permanent court issued protection order by this conduct.

See *Commonwealth v. Lehan*, 100 Mass. App. Ct. 246, 251–52 (2021) (stalking is comprised of the five elements of criminal harassment as well as the additional element that the defendant made a threat with the intent to place the person in imminent fear of death or bodily injury).

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.

Commonwealth v. Alphas, 430 Mass. 8, 15 (1999) (“repeatedly” in stalking statute requires more than two incidents); *Commonwealth v. Kwiatkowski*, 418 Mass. 543, 548 (1994) (same). See also *Commonwealth v. Lehan*, 100 Mass. App. Ct. 246, 252–253 (2021).

“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).

Where act is 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. 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.

Commonwealth v. Lehan, 100 Mass. App. Ct. 246, 253-254 (2021).

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 out of 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 7 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]. It is not required to prove that each individual act did so.

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).

To prove the sixth element, the Commonwealth must prove beyond a reasonable doubt that at least one of the acts included a threat made with the intention of placing [the alleged victim] in imminent fear of death or bodily injury and that [the alleged victim’s] fear was reasonable. To determine whether the fear was reasonable, you may consider the actions and words of the defendant in light of all the circumstances.

Commonwealth v. Walters, 472 Mass. 680, 692 (2015); *Commonwealth v. Cullen*, 79 Mass. App. Ct. 618, 621-622 (2011).

If the threat was made indirectly, give instruction Supplemental Instruction 1, “Threats made indirectly,” infra.

To prove the seventh element, the Commonwealth must prove that the defendant, by this conduct, knowingly violated a temporary or permanent protection order. This requires the Commonwealth to

prove three things:

First: That a court had issued a temporary or permanent protection order;

Second: That such order was in effect on the date when the alleged acts occurred; and

Third: That the defendant knowingly violated the order by committing the acts alleged.

If the jury has already been instructed on a separate charge of violation of a protection order (Instruction 6.720):

I have already instructed you on how the Commonwealth must prove those three elements. That same explanation applies here.

If the jury has not already been instructed on a charge of violating a protection order, give the following instruction:

A temporary or permanent order must have been issued pursuant to [chapter 208] [chapter 209] [chapter 209A] [chapter 209C] of our General Laws [or] [protection order issued by another jurisdiction] [or] [temporary restraining order or preliminary or permanent injunction issued by the superior court] which ordered the defendant:

(to refrain from abusing [name of plaintiff or child]);

*(to refrain from contacting [name of plaintiff or child]
(directly or indirectly) unless authorized by a court);*

*(to stay a particular distance away from the person who
requested the order [or that person's child]);*

*(to vacate and remain away from the household or
multiple family dwelling of [name of plaintiff or child]);*

*(to remain away from the workplace of [name of plaintiff
or child] [located at [address]]);*

To prove the defendant's knowledge of the order, the Commonwealth has to prove beyond a reasonable doubt that the defendant knew that the pertinent term(s) of the order (was) (were) in effect, either by having received a copy of the order or by having learned of the pertinent term(s) of the order in some other way. You should consider all of the evidence and any reasonable inferences you choose to draw from that evidence to determine the extent of the defendant's knowledge at the time it is alleged the order was violated.

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

SUPPLEMENTAL INSTRUCTIONS

1. Threat made indirectly. **The Commonwealth is not required to prove that the threat was communicated directly to [the alleged victim]. This element is satisfied if it is proved beyond a reasonable doubt that the defendant *intended* the threat to be conveyed to [the alleged victim]. It does not matter whether the threat was conveyed directly or indirectly through another person or by some other means as long as the defendant intended that the threat be conveyed to [the alleged victim].**

See Instruction 2.240 (Direct and Circumstantial Evidence). *Commonwealth v. Walters*, 472 Mass. 680, 693–94 (2015); *Commonwealth v. Lehan*, 100 Mass. App. Ct. 246, 254 (2021) (“The threat need not be a direct communication, but rather may be indirect or communicated through otherwise ambiguous behavior, as long as surrounding circumstantial evidence would allow a jury to infer that the defendant’s behavior was intended as a threat to the victim”); *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 435 (2004) (“the legal definition of threat requires ‘communication’ of the threat in the sense that it must be uttered, not idly, but to the target, to one who the defendant intends to pass it on to the target, or to one who the defendant should know will probably pass it on to the target”); *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 283 (2003); *Commonwealth v. Furst*, 56 Mass. App. Ct. 283, 284–285 (2002); *Commonwealth v. Meier*, 56 Mass. App. Ct.

278, 282 (2002).

2. Types of 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 device 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. **Stalking in violation of a court order.** General Laws c. 265, § 43(b) creates an aggravated form of this offense with a mandatory minimum penalty if it is committed in violation of a temporary or permanent vacate, restraining or no-contact order or judgment issued pursuant to G.L. c. 208, §§ 18, 34B or 34C, G.L. c. 209, § 32, G. L. c. 209A, §§ 3-5, or G.L. c. 209C, §§ 15 or 20, or a protection order issued by another jurisdiction, or a temporary restraining order or preliminary or permanent injunction issued by the Superior Court.

2. **Subsequent stalking offenses not within District Court jurisdiction.** General Laws c. 265, § 43(c) establishes a mandatory minimum penalty for repeat offenders. Subsequent offenses are not within the final jurisdiction of the District Court.

3. **Violation of c. 209A order is lesser included offense of stalking in violation of a restraining order.** Violation of a 209A order (G.L. c. 209A, § 7) is a lesser included offense of stalking in violation of a restraining order (G.L. c. 265, § 43(b)), and therefore a defendant who has been convicted of violating a c. 209A order may not be convicted of stalking in violation of a restraining order based upon the same conduct. *Edge v. Commonwealth*, 451 Mass. 74, 76-77, n.5 (2008), citing *Kuklis v. Commonwealth*, 361 Mass. 302, 307–309 (1972) (“The Commonwealth also could have chosen simultaneously to prosecute [the defendant] under both G.L. c. 209A and G.L. c. 265, § 43(b), for the same conduct. Had the Commonwealth so proceeded, and the jury returned guilty verdicts under both,

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the convictions pursuant to G.L. c. 209A would have been dismissed as duplicative.”).

4. **Stalking (G.L. c. 265, § 43(a)) is a lesser included offense of stalking in violation of a restraining order (G.L. c. 265, § 43(b)).** “[Section] § 43(a) is a lesser included offense of § 43(b)”. *Edge*, 451 Mass. at 76, citing *Commonwealth v. Alphas*, 430 Mass. 8, 12 n. 4 (1999).

5. **Criminal Harassment is a lesser included offense.** “The first element of criminal stalking comprises the lesser included offense of criminal harassment.” *Commonwealth v. Lehan*, 100 Mass. App. Ct. 246, 251 (2021), citing *Commonwealth v. McDonald*, 462 Mass. 236, 241 (2012).

6. **Harassing letters.** In a prosecution under § 43, a judge should not exclude otherwise-admissible harassing letters sent by the defendant to the complainant, because they are repetitive or unduly prejudicial. 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. *Commonwealth v. Matsos*, 421 Mass. 391, 392n.3 (1995).

7. **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) (criminal harassment). 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 *Paton*, 63 Mass. App. Ct. at 219 (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.

8. **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.

9. **Venue.** Violations of § 43 may be prosecuted wherever “an act constituting an element of the crime was committed.” G.L. c. 277, § 62B.

10. **First Amendment and True Threats.** Speech that qualifies as a threat under the stalking statute is by definition a true threat. “Comparing the definition of “true threat” to the threat component of the stalking statute, we conclude that any verbal or written communication that qualifies as a threat as defined in the statute is also a ‘true threat,’ and therefore is not entitled to protection under the First Amendment.” *Commonwealth v. Walters*, 472 Mass. 680, 691 (2015).

11. **Intent to Communicate Threat.** “[A]lthough communication of a threat to its intended victim is not expressly required under § 43(a)(2), ... evidence of the defendant’s intent to communicate the threat through direct or indirect means is necessary.” *Commonwealth v. Walters*, 472 Mass. 680, 693 (2015), citing *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 281–282 (2003). Where

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communication of the threat is indirect—for example, through an intermediary—the Commonwealth must prove beyond a reasonable doubt that the defendant intended the threat to reach the victim.” *Id.* (internal citation omitted). See also *Commonwealth v. Lehan*, 100 Mass. App. Ct. 246, 254 (2021); *Commonwealth v. Meier*, 56 Mass. App. Ct. 278, 279–282 (2002) (defendant’s letter to victim indicating belief that victim was responsible for recent collection efforts against defendant, combined with threatening statement to collection attorney regarding victim, supported inference that defendant intended statement to reach victim). Compare *Commonwealth v. Troy T.*, 54 Mass. App. Ct. 520, 527–528 (2002) (where third party overheard putative threat, but there was no evidence of defendant’s intent that third party would hear threat, jury could not infer intent to communicate threat to target).