

VIOLATION OF A HARASSMENT PREVENTION ORDER

G.L. c. 258E, § 9

The defendant is charged with knowingly violating a harassment prevention order issued by a court.

In order to prove the defendant guilty of this offense, the Commonwealth must prove the following four things beyond a reasonable doubt.

***First:* That a court had issued an order pursuant to chapter 258E of our General Laws which ordered the defendant:**

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

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

(to stay a particular distance away from [name of plaintiff])

(to remain away from the household or multiple family dwelling of [name of plaintiff])

(to remain away from the workplace of [name of plaintiff])

[located at [address]]);

Second: That such order was in effect on the date when its violation allegedly occurred;

Third: That the defendant violated the order by:

(abusing or harassing [name of plaintiff])

(contacting [name of plaintiff] (directly or indirectly) unless authorized by a court)

(failing to stay a particular distance away from [name of plaintiff])

(failing to vacate or remain away from the household or multiple family dwelling of [name of plaintiff])

(failing to remain away from the workplace of [name of plaintiff]

[located at [address]]); and

Fourth: 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 when it is alleged the order was violated.

SUPPLEMENTAL INSTRUCTIONS

1. "Abuse" By "abuse" the law means: causing or attempting to cause another person physical harm, or placing another person in fear of immediate serious physical harm.

2. "Harass" By "harass" the law means: a willful or malicious act aimed at [name of plaintiff] committed with the intent to cause fear, intimidation, abuse, or damage to property, or an act that by force, threat or duress causes another to involuntarily engage in sexual relations, or an act that constitutes the crime of: indecent assault and battery on a child; indecent assault and battery on a person with an intellectual disability; indecent assault and battery; rape; forcible rape of a child; statutory rape; assault with intent of rape; assault with intent to rape a child; enticement of a child; criminal stalking; criminal harassment; drugging for sexual intercourse.

A person acts willfully if (he) (she) intends both the conduct and its harmful consequences.

A person acts maliciously if the act is characterized by cruelty, hostility, or revenge.

G.L. c. 258E, § 1

3. “Remain away” An order to stay away or remain away from a particular location (e.g., residence, workplace) is violated by (1) entering the property on which the (residence) (workplace) is located; (2) taking actions that directly intrude on the (residence) (workplace); or (3) being in a position sufficiently near to the property identified in the order such that the defendant would be able to (abuse or harass) (contact)¹ the plaintiff, in the event that the plaintiff were on the property, or entering or leaving it. However, merely being in the vicinity of the particular location without more is not a violation.

A person enters property when he (she) goes onto a piece of property or into a structure on it. A person intrudes on a piece of property when he (she) takes actions nearby that have a direct

¹ If the order contains both a “no abuse or harass” and “no contact” provision, both “abuse or harass” and “contact” should be referenced in this instruction. If the order contains a “no abuse or harass” provision but not a “no contact” provision, only “abuse or harass” should be referenced. “Abuse” is defined in supplemental instruction No. 1. “Harass” is defined in supplemental instruction No. 2.

impact on or inside the property identified in the order. A person is sufficiently near a piece of property when he (she) could (abuse or harass) (contact) the plaintiff in the event the plaintiff were on the property, or entering or leaving it. Such conduct constitutes a violation even if the plaintiff is not present.

Commonwealth v. Telcinord, 94 Mass. App. Ct. 232 (2018); *Commonwealth v. Watson*, 94 Mass. App. Ct. 244 (2018) *Commonwealth v. Goldman*, 94 Mass. App. Ct. 222 (2018); *Commonwealth v. Habenstreit*, 57 Mass. App. Ct. 785 (2003).

The following supplemental instructions, citations and notes arose under G.L. c 209A. They appear to be relevant to cases arising under G.L. c. 258E, but have not been so held.

4. Accidental Contact

If there is evidence that suggests that the alleged (contact) (encounter) may have occurred by accident, the commonwealth must prove one of two things beyond a reasonable doubt: either that the alleged (contact) (encounter) did not occur by accident or, if it did occur by accident, that the defendant failed to take reasonable steps to end the accidental (contact) (encounter).

An accident is an unexpected happening that occurs without intention or design on a person's part. A (contact) (encounter) was accidental if the defendant did not have reason to know or believe that [name of plaintiff] would be present at that time or place.

If a (contact) (encounter) occurred by accident, the defendant is required to take reasonable steps to end the (contact) (encounter). The defendant must be found not guilty unless the Commonwealth proves beyond a reasonable doubt that (he) (she) could have taken steps to terminate the accidental (contact) (encounter) but unreasonably delayed or failed to do so.

The Commonwealth is not required to prove that the defendant intended to violate the abuse prevention order. It must prove only that (he) (she) intended the act which would constitute the violation.

So if the evidence raises the possibility that the defendant did not know or could not reasonably have known that [name of plaintiff] would be present at the time and place alleged, then the Commonwealth must prove beyond a reasonable doubt either that the (contact) (encounter) was *not* accidental or, if it was accidental, that the defendant failed to take reasonable steps to end it.

If the Commonwealth has proved beyond a reasonable doubt each element of the offense and also proved beyond a reasonable doubt either that the (contact) (encounter) was not accidental or that the defendant did not take reasonable steps to end an accidental encounter, you should return a verdict of guilty.

If the Commonwealth failed to prove beyond a reasonable doubt any element of the offense, you must return a verdict of not guilty. In addition, if the Commonwealth failed to prove beyond a reasonable doubt either that the (contact) (encounter) was *not* accidental or that the defendant unreasonably delayed in ending an accidental (contact) (encounter), you must return a verdict of not guilty.

If a person subject to an abuse prevention order happens upon a protected person whom he or she did not and could not reasonably know to be present at the time and place, the party subject to the order must make reasonable efforts to terminate the accidental encounter. *Commonwealth v. Stoltz*, 73 Mass. App. Ct. 642, 644-46 (2009), citing *Commonwealth v. Kendrick*, 446 Mass. 72, 76 (2006). When there is evidence that fairly raises the issue of accident, the burden falls on the Commonwealth to disprove it. See *Commonwealth v. Zezima*, 387 Mass. 748, 756 (1982); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 583 (1991) (“Where the evidence raises the possibility of accident, the defendant is, as a matter of due process, entitled upon request to a jury instruction that the Commonwealth has the burden of proving beyond a reasonable doubt that the act was not accidental”).

5. Incidental Contact

If there is evidence that the alleged conduct may have been incidental to a legitimate, lawful activity such as [e.g., going to work, going to school] , then the Commonwealth must prove beyond a reasonable doubt that the alleged violation was not incidental to that permitted activity. Conduct that is incidental to legitimate, lawful activity is conduct which is connected to that activity – conduct which is purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity.

So, for example, if a person subject to a harassment prevention order waited in the only public hallway of a courthouse for the start of a hearing, and the person protected by that order was waiting somewhere else in that same public hallway, that conduct would be incidental to a legitimate, lawful activity – attending the court hearing. Although there might be a no contact order in effect, there would be no violation of that order because the conduct was purely a natural and reasonable outgrowth of the scheduling of the hearing.

On the other hand, if the defendant entered the public hallways and intentionally stood directly next to the plaintiff when the defendant could have stood elsewhere, that would violate the order because it was not incidental or necessary to the lawful activity.

The Commonwealth may prove that the defendant's conduct was not incidental to a lawful activity by proving that the alleged violation was not purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity. Put another way, the Commonwealth must prove that the defendant's conduct was not a good faith attempt by the defendant to do that which was permitted.

In deciding whether there was any contact which violated the abuse prevention order, you may consider any evidence relevant to:

(1) the nature and purpose of any contact; (2) the number of contacts over time; (3) the length of any contact; and (4) the substance and character of any statements made during any contact.

You should consider all the evidence in the case to decide whether any contact was made in good faith for a legitimate reason or whether that reason was merely a pretext or excuse for contacting the protected party.

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also that the violation was not committed incidental to a legitimate, lawful activity, you should return a verdict of guilty. If the Commonwealth has failed to prove beyond a reasonable doubt any of the elements of the offense or failed to prove beyond a reasonable doubt that the contact(s) was (were) not incidental to a legitimate, lawful activity, you must returned a verdict of not guilty.

Compare Commonwealth v. Collier, 427 Mass. 385, 391 (1998) with *Commonwealth v. Silva*, 431 Mass. 194, 200 (2000).

Compare Commonwealth v. Stewart, 52 Mass. App. Ct. 755, 761 (2001) with *Commonwealth v. Leger*, 52 Mass. App. Ct. 232, 238 (2001).

6. Violation through third party

If there is evidence that the conduct by which the defendant is alleged to have violated the abuse prevention order resulted from the action of a third person, the Commonwealth must prove beyond a reasonable doubt that the defendant had an intent, or shared an intent with the third person, to do an act that could result in a violation of the protective order. The defendant is not guilty unless he (she) had such an intent or shared intent. The defendant cannot be found guilty for an act of another person which he (she) did not intend and over which he (she) had no control.

The Commonwealth is not required to prove that the defendant specifically intended to violate the abuse prevention order. It is required only to prove that the defendant intended, or shared an intent with the third party, that an act be done which violated the order.

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also that the defendant had an intent or shared intent with a third person to do an act that could result in a violation of a protected order, you should return a verdict

of guilty. If the Commonwealth failed to prove beyond a reasonable doubt any element of the offense or failed to prove beyond a reasonable doubt that the defendant intended or shared the intent of a third party to commit such an act, you must return a verdict of not guilty.

Commonwealth v. Collier, 427 Mass. 385, 389 (1998) (where act constituting violation was committed by third party, Commonwealth must prove act was intended by defendant but not that defendant intended to violate order). See also *Commonwealth v. Russell*, 46 Mass. App. Ct. 307 (1999).

If appropriate, here instruct on inferences (Instruction 3.100).

Notes (involving G.L. c. 209A cases):

1. **Attempted physical harm requires an overt act.** The nature of an attempt to cause a person physical harm, “like criminal attempt, is predicated on an unsuccessful but affirmative effort at commission of the underlying offense.” *Commonwealth v. Fortier*, 56 Mass. App. Ct. 116 (2002). “Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd.” *Id.* at 122, citing *Commonwealth v. Kennedy*, 170 Mass. 18, 20-21 (1897).

2. **Service or knowledge of extended order.** A defendant may be prosecuted for violating an order that was extended unchanged after a “10-day” hearing, despite not being served with the extended order, if he had been served with the prior *ex parte* temporary order, which provided sufficient notice that his failure to attend the scheduled hearing would result in the continuation of the temporary order by operation of law. *Commonwealth v. Delaney*, 425 Mass. 587 (1997). However, the same is not true of successive annual extensions of the order; failure to serve the copy of the current extended order is fatal where there have been successive annual extension unless the Commonwealth proves constructive knowledge of the extension. *Commonwealth v. Molloy*, 44 Mass. App. Ct. 306 (1998).

3. **Intent to violate order.** The statute does not require any specific mens rea or intent to violate the order, merely knowledge of and violation of the order. *Commonwealth v. Delaney*, 425 Mass. 587 (1997).