

DISTRIBUTION OF PARTIALLY NUDE, NUDE, OR SEXUAL IMAGES

G.L. c. 265, § 43A(b)(2)

The judge should inquire of the prosecutor as to which theory or theories the Commonwealth intends to pursue and instruct on one or both accordingly.

The defendant is charged with distributing visual material which shows a person who is nude, partially nude, or engaged in sexual conduct.

Intentional Conduct

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

***First:* That the defendant knowingly distributed visual material;**

***Second:* That the visual material depicted [the alleged victim] who was (nude) (partially nude) (engaged in sexual conduct);**

***Third:* That the distribution caused [the alleged victim] physical injury, economic injury, or substantial emotional distress; and**

***Fourth:* That the defendant distributed it with the specific intent to harm, harass, intimidate, threaten, coerce, or cause substantial emotional distress to [the alleged victim].**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly distributed

visual material. This requires you to decide both whether the defendant distributed visual material and what the defendant's state of mind was at the time. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine the defendant's state of mind and the extent of the defendant's knowledge at that time.

You should consider all of the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant acted with the knowledge that they were distributing the visual material.

Visual material includes a photograph, film, video or digital image or recording, whether produced by electronic, mechanical or other means, or any part, representation or reproduction of a photograph, film, video or digital image or recording.

[In cases where digitization is alleged]: **This includes visual material produced by digitization. Digitization means the creation or alteration of visual material including, but not limited to, through the use of computer-generated images,**

in a manner that would falsely appear to a reasonable person to be an authentic representation of the person depicted.

To distribute visual material means to give, sell, transfer, disseminate, publish, upload, circulate, broadcast or engage in any other form of transmission, electronic or otherwise of the visual material.

To publish means (i) to disseminate an image with the intent that it be made available by any means to any person or other legal entity; (ii) to disseminate an image with the intent that it be sold by another person or legal entity; (iii) to post, present, display, exhibit, circulate, advertise or allow access to an image by any means so as to make such image available to the public; or (iv) to disseminate an image with the intent that it be posted, presented, displayed, exhibited, circulated, advertised or made accessible by any means and available to the public.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the visual material depicted the alleged

victim] (nude) (partially nude) (engaged in sexual conduct).

The alleged victim must either be identifiable in the visual material or have been identified by the defendant. A person is identifiable if they are recognizable from the visual material itself or from information offered in connection with the visual material.

A person is partially nude when the (fully uncovered buttocks) (all or part of the human genitals) (all or part of the female nipple or areola) is exposed.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the distribution caused [the alleged victim] physical injury, economic injury or 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. Walters*, 472 Mass. 680, 692 (2015); *Commonwealth v. Cullen*,

79 Mass. App. Ct. 618, 621-622 (2011); *Commonwealth v. Paton*, 63 Mass. App. Ct. 215, 221 (2005); *Commonwealth v. Clemens*, 61 Mass. App. Ct. 915, 916 (2004).

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that: the defendant distributed the visual material with the specific intent to harm, harass, intimidate, threaten, coerce or cause substantial emotional distress to [the alleged victim].

To prove the defendant's intent, the Commonwealth must prove the purpose or objective of any behavior of the defendant. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine what their intent was at the time they distributed it.

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

Reckless Conduct

[If both intentional and reckless conduct are alleged]

There is a second way in which a person may be guilty of distributing material of a person who is (nude) (partially nude)

(engaged in sexual conduct). Instead of intentional conduct, it arises from reckless conduct.

[If only reckless conduct alleged]

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

First: That the defendant knowingly distributed visual material;

Second: That the visual material depicted [the alleged victim] who was (nude) (partially nude) (engaged in sexual conduct);

Third: That the distribution caused [the alleged victim] physical injury, economic injury, or substantial emotional distress; and

Fourth: That the defendant distributed it with reckless disregard for:

- 1) the likelihood that [the alleged victim] would suffer harm, harassment, intimidation, threat, coercion or substantial emotional distress;
- 2) [the alleged victim's] lack of consent to the distribution of the visual material; and
- 3) [the alleged victim's] reasonable expectation that the visual material would remain private.

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly distributed visual material. This requires you to decide both whether the defendant distributed visual material and what the defendant's state of mind was at the time. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine the defendant's state of mind and the extent of the defendant's knowledge at that time.

You should consider all of the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant acted with the knowledge that they were distributing the visual material.

Visual material includes a photograph, film, video or digital image or recording, whether produced by electronic, mechanical or other means, or any part, representation or reproduction of a photograph, film, video or digital image or recording.

[In cases where digitization is alleged]: **This includes visual material**

produced by digitization. Digitization means the creation or alteration of visual material including, but not limited to, through the use of computer-generated images, in a manner that would falsely appear to a reasonable person to be an authentic representation of the person depicted.

To distribute visual material means to give, sell, transfer, disseminate, publish, upload, circulate, broadcast or engage in any other form of transmission, electronic or otherwise of the visual material.

To publish means (i) to disseminate an image with the intent that it be made available by any means to any person or other legal entity; (ii) to disseminate an image with the intent that it be sold by another person or legal entity; (iii) to post, present, display, exhibit, circulate, advertise or allow access to an image by any means so as to make such image available to the public; or (iv) to disseminate an image with the intent that it be posted, presented, displayed, exhibited, circulated, advertised or made accessible by any means and available to the public.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the visual material depicted [*the alleged victim*] (nude) (partially nude) (engaged in sexual conduct). The alleged victim must either be identifiable in the visual material or have been identified by the defendant. A person is identifiable if they are recognizable from the visual material itself or from information offered in connection with the visual material.

A person is partially nude when the (fully uncovered buttocks) (all or part of the human genitals) (all or part of the female nipple or areola) is exposed.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the distribution caused [*the alleged victim*] physical injury, economic injury or 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. Walters*, 472 Mass. 680, 692 (2015); *Commonwealth v. Cullen*, 79 Mass. App. Ct. 618, 621-622 (2011); *Commonwealth v. Paton*, 63 Mass. App. Ct. 215, 221 (2005); *Commonwealth v. Clemens*, 61 Mass. App. Ct. 915, 916 (2004).

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant distributed the visual material with reckless disregard for:

- 1) the likelihood that [the alleged victim] would suffer harm, harassment, intimidation, threat, coercion or substantial emotional distress;**
- 2) [the alleged victim’s] lack of consent to the distribution of the visual material; and**
- 3) [the alleged victim’s] reasonable expectation that the visual material would remain private.**

To prove that the defendant acted recklessly, it is not enough for the Commonwealth to prove that the defendant acted in a way that a reasonably careful person would not. The Commonwealth must prove that the defendant knew, or should have known the following three things:

First, that such actions were very likely to cause [the alleged victim] to

suffer harm, harassment, intimidation, threat, coercion or substantial emotional distress;

Second, that [the alleged victim] did not consent to this distribution of the visual material. Consent to the creation of the visual material is distinct from and not the same as consent to its distribution; and

Third, that [the alleged victim] had a reasonable expectation that the visual material would remain private. Whether such an expectation is reasonable under the circumstances of this case is to be measured by the evidence and common understanding and practices.

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

NOTES:

1. Reasonable expectation of privacy. “A person does not lose all reasonable expectation of privacy in his or her covered ‘sexual or intimate parts’ simply by being in public.” *Commonwealth v. Nascimento*, 91 Mass. App. Ct. 665, 667 (2017) (construing statute criminalizing photographing, videotaping or electronically surveilling an unsuspecting nude person in violation of G.L. c. 272, § 105). “Instead, that expectation must be measured against current mores, taking into account the totality of the circumstances.” *Id.* Location certainly is a factor to be considered when assessing what an objectively reasonable expectation would be at a particular moment, but is not the only factor, nor is it dispositive. See *id.* Similarly, a person’s state of dress or undress is a factor to be considered, but it too is not dispositive. See *id.*

2. No public access to visual material in case. “Visual material that is part of any court record arising from a prosecution under this subsection shall not be open to public inspection and, unless otherwise ordered in writing by the court, shall only be made available for inspection by court personnel to a district attorney, a defendant's attorney, a defendant or a victim connected to such prosecution; provided, however, that this paragraph shall not prohibit disclosure, inspection or other use of the visual material in the underlying prosecution or any related court proceeding in accordance with applicable evidentiary and procedural rules or a court order.” G.L. c. 265, § 43A(b)(5).

3. Applicability. “This subsection shall not apply to: (i) visual material involving nudity, partial nudity or sexual conduct that is voluntary or consensual and occurring (A) in a commercial setting, or (B) in a place where a person does not have a reasonable expectation of privacy; (ii) distribution made in the public interest, including the reporting of unlawful conduct; (iii) lawful and common practices of law enforcement, criminal reporting, corrections, legal proceedings or medical treatment, including telemedicine; (iv) distribution of visual material that constitutes a matter of public concern; (v) interactive computer services as defined in 47 U.S.C. 230(f)(2) for content solely provided by another person; or (vi) information services or telecommunications services as defined in 47 U.S.C. 153 for content solely provided by another person.” G.L. c. 265, § 43A(b)(6).