

DISORDERLY CONDUCT

The defendant is charged with disorderly conduct. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

***First:* The Commonwealth must prove that the defendant involved himself (herself) in at least one of the following actions: he (she) either engaged in fighting or threatening, or engaged in violent or tumultuous behavior or created a hazardous or physically offensive condition by an act that served no legitimate purpose of the defendant's;**

***Second:* The Commonwealth must prove beyond a reasonable doubt that the defendant's actions were reasonably likely to affect the public; and**

***Third:* The Commonwealth must prove beyond a reasonable doubt that the defendant *either* intended to cause public inconvenience, annoyance or alarm, *or* recklessly created a risk of public inconvenience, annoyance or alarm.**

See Instruction 3.120 (Intent).

G.L. c. 272, § 53. *Commonwealth v. Feigenbaum*, 404 Mass. 471, 536 N.E.2d 325 (1989) ("hazardous or physically offensive condition" branch of the statute cannot be applied to political protesters who block passage); *Commonwealth v. A Juvenile*, 368 Mass. 580, 595-599, 334 N.E.2d 617, 627-629 (1975); *Alegata v. Commonwealth*, 353 Mass. 287, 302-304, 231 N.E.2d 201, 210-211

(1967), adopting Model Penal Code § 250.2(a) & (c) (1962); *Commonwealth v. Lopiano*, 60 Mass. App. Ct. 723, 725-726, 805 N.E.2d 522, 525 (2004) (finding no violent or tumultuous behavior where defendant, upon being told by police that he would be summoned to court for assault and battery, began to flail his arms and shout at police); *Commonwealth v. Sinai*, 47 Mass. App. Ct. 544, 546, 714 N.E.2d 830, 833 (1999) (affirming first element of crime); *Commonwealth v. Bosk*, 29 Mass. App. Ct. 904, 906-907, 556 N.E.2d 1055, 1057-1058 (1990) (statute applicable to motorist who stood in traffic lane, forcing vehicles to pass around him, while debating with police officer and refusing to return to his car).

SUPPLEMENTAL INSTRUCTIONS

1. *Prohibited conduct.*

Our disorderly conduct law seeks to control intentional conduct which tends to disturb the public tranquility, or to alarm or provoke others. It prohibits four separate and distinct acts: It forbids conduct that involves the use of force or violence. It also prohibits making threats that involve the immediate use of force or violence. It forbids tumultuous and highly agitated behavior, which may not involve physical violence, but which causes riotous commotion and excessively unreasonable noise, and so constitutes a public nuisance. Finally, the law prohibits any conduct that creates a hazard to public safety or a physically offensive condition by an act that serves no legitimate purpose of the defendant's.

Feigenbaum, supra; Alegata, supra; Commonwealth v. Blavackas, 11 Mass. App. Ct. 746, 749, 419 N.E.2d 856, 858 (1981).

2. "Public." For the defendant to be found guilty, his (her) actions must have been reasonably likely to affect the public, that is, persons in a place to which the public or a substantial group has access.

Alegata, supra. See *Commonwealth v. Templeman*, 376 Mass. 553, 537, 381 N.E.2d 1300, 1303 (1978).

3. Recklessness. A person acts recklessly when he consciously ignores, or is indifferent to, the probable outcome of his actions. The defendant was reckless if he (she) knew, or must have known, that such actions would create a substantial and unjustifiable risk of public inconvenience, annoyance or alarm, but he (she) chose, nevertheless, to run the risk and go ahead.

Commonwealth v. Welansky, 316 Mass. 383, 397-401, 55 N.E.2d 902, 909-912 (1944); *Commonwealth v. Papadinis*, 23 Mass. App. Ct. 570, 574-575, 503 N.E.2d 1334, 1336 (1987), *aff'd*, 402 Mass. 73, 520 N.E.2d 1300 (1988).

NOTES:

1. **Offensive language.** General Laws c. 272, § 53 cannot constitutionally be applied to language and expressive conduct, even if it is offensive and abusive, unless it falls outside the scope of First Amendment protections, i.e. it constitutes "fighting words which by their very utterance tend to incite an immediate breach of the peace." *Commonwealth v. Richards*, 369 Mass. 443, 445-450, 340 N.E.2d 892, 894-897 (1976); *A Juvenile*, 368 Mass. at 587-595, 334 N.E.2d at 622-627; *Commonwealth v. Sinai*, 47 Mass. App. Ct. 544 at 546, 714 N.E.2d at 833. See *Lewis v. New Orleans*, 415 U.S. 130, 94 S.Ct. 970 (1974); *Rosenfeld v. New Jersey*, 408 U.S. 901, 92 S.Ct. 2479 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766 (1942); *Blavackas*, 11 Mass. App. Ct. at 748-752, 419 N.E.2d at 857-859 (doubtful that public solicitation for sexual activity is "disorderly conduct," which seems to require

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proof at least of significant risk of violence or serious disturbance). However, non-expressive disorderly conduct is punishable even if accompanied by constitutionally protected speech or expressive conduct. *Richards, supra*; *Commonwealth v. Carson*, 10 Mass. App. Ct. 921, 921-922, 411 N.E.2d 1337, 1337-1338 (1980).

2. **Annoying and accosting persons of the opposite sex.** Regarding that portion of G.L. c. 272, § 53 dealing with annoying and accosting persons of the opposite sex, see Instruction 6.600.

3. **Political protesters.** The acts that may constitute disorderly conduct fall into two branches: (i) “engag[ing] in fighting or threatening, or in violent or tumultuous behavior,” and (ii) “creat[ing] a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.” Model Penal Code § 250.2(a) & (c) (Proposed Official Draft, 1962). A disorderly conduct prosecution of political protesters is maintainable only under the first of the two branches. “[A]lthough conduct that is designed to call attention to a political cause, and may therefore have a legitimate purpose, may nevertheless be criminal under the common law or by some statute, it does not constitute disorderly conduct under [the second branch of] G.L. c. 272, § 53” because it does serve a legitimate purpose of the actor. *Feigenbaum, supra*.

4. **First Amendment.** As to the burden of proof when there is an assertion that the defendant’s acts were protected by the First Amendment to the United State Constitution, see *Commonwealth v. Manzelli*, 68 Mass. App. Ct. 691, 864 N.E.2d 566 (2007).