

**DISORDERLY CONDUCT:
VOYEURISM / “PEEPING TOM” CASES ONLY**

G.L. c. 272, § 53

If not a voyeurism allegation, use Instruction 7.160.

The defendant is charged with disorderly conduct.

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

***First:* that the defendant committed an act that created a physically offensive condition that served no legitimate purpose;**

***Second:* that the act occurred in a place where [the alleged victim] had purposefully closed themselves off from public view in an enclosed space or area where there was a reasonable expectation of privacy; and**

***Third:* that the defendant did so with the intent to invade the privacy of [the alleged victim] or with reckless disregard for [the alleged victim's] privacy.**

The defendant acted with reckless disregard for [the alleged victim's] privacy if the defendant knew, or should have known, that their actions were very likely to invade [the alleged victim's] privacy, but they ran that risk and went ahead anyway. It is not enough for the

Commonwealth to prove that the defendant acted negligently – that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant’s actions went beyond mere negligence and amounted to recklessness.

The Commonwealth is not required to prove that the victim was put in fear of imminent physical harm. See *Commonwealth v. Cooper*, 100 Mass. App. Ct. 345, 352 (2021).

SUPPLEMENTAL INSTRUCTION

If no evidence victim was aware of conduct.

**The Commonwealth is not required to prove that the alleged
victim was aware of the offensive conduct.**

See *Commonwealth v. LePore*, 40 Mass. App. Ct. 543, 549 (1996) (“Conduct that is disorderly by reason of its physically offensive nature does not, however, require that the object of the offensive conduct be aware of it.”)

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

NOTES:

1. **Theory of Voyeurism / Peeping Tom:** Although there is no express prohibition concerning voyeurism in the General Laws, G.L. c. 272, § 53 may be applied to a “Peeping Tom”. See *Commonwealth v. LePore*, 40 Mass. App. Ct. 543, 548 (1996). Because voyeurism “may cause alarm to the person peered at, ... [it] thereby makes a breach in the public peace.” *Id.* “[D]isorderly” acts or language include those “that create a hazardous or physically offensive condition for no legitimate purpose of the actor, whether the resulting harm is suffered in public by the public or in private by an individual.” See *Commonwealth v. Chou*, 433 Mass. 229, 233 (2001).

Under this theory, the Commonwealth need not prove that the defendant’s actions were reasonably likely to affect the public. Instead, “the concept is designed to protect the legitimate and widely shared expectations of privacy possessed by those who have purposely closed themselves off from public view in an enclosed space or area.” *Commonwealth v. Swan*, 73 Mass. App. Ct. 258, 264 (2008). “Acting the ‘Peeping Tom’ offends and results in disorder by invading the privacy of persons precisely where they are most entitled to feel secure -- where they live and rest.” *Commonwealth v. LePore*, 40 Mass. App. Ct. at 549. “The ‘extreme invasion of personal privacy’ that occurs in the act of voyeurism creates the requisite physically offensive condition.” *Commonwealth v. Cooper*, 100 Mass. App. Ct. 345, 352 (2021), quoting *Cahill*, 446 Mass. at 782.

2. **Area where victim has reasonable expectation of privacy.** In *Swan*, the Appeals Court found that a set of urinals in a bathroom was an area that “was insufficiently private to trigger the prohibitions embodied in the Peeping Tom or voyeurism theory of disorderly conduct.” *Commonwealth v. Swan*, 73 Mass. App. Ct. 258, 265 (2008). In *Cooper*, the Appeals Court ruled that, “By following the victim into the bathroom, standing right outside her stall, and pointing his camera inside while she was urinating, the defendant created a physically offensive condition.” *Commonwealth v. Cooper*, 100 Mass. App. Ct. 345, 353 (2021). The private stall of a bathroom was an area where the victim had an expectation of privacy. *Id.*