

## INTENTIONALLY MISLEADING AN INVESTIGATOR IN A CRIMINAL INVESTIGATION

G.L. c. 268, § 13B

This instruction is narrowly tailored for the offense of Intentionally Misleading an Investigator in a Criminal Investigation pursuant to G.L. 268, § 13B. This instruction may be adapted for use with other persons or proceedings listed in the statute. For the general instruction of Intimidating a Witness, Juror, Court Official or Law Enforcement Officer pursuant to G.L. 268, § 13B, see Instruction 7.360.

**The defendant is charged with intentionally misleading a (police officer) (federal agent) (investigator) in a criminal investigation. In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:**

***First:* The defendant willfully misled another person, either directly or indirectly;**

***Second:* The other person was a (police officer) (federal agent) (investigator); and**

***Third:* That the defendant did so with the intent to (impede) (obstruct) (delay) (prevent) or otherwise interfere with a criminal investigation.**

**To prove the first element, the Commonwealth must prove that the defendant willfully, either directly or indirectly, misled another person. An act is misleading where it is reasonably likely to lead investigators to**

**pursue or refrain from pursuing a course of investigation substantially different from the course they may have otherwise taken; in other words, send them in the wrong direction or on a “wild goose chase.”**

**The Commonwealth is not required to prove that the defendant’s act actually misled the person, only that it reasonably could have done so.**

*Commonwealth v. Paquette*, 475 Mass 793, 800, 802 (2016).

**To prove the second element, the Commonwealth must prove the person misled was (a police officer) (an investigator) (a federal agent).**

For the definition of an investigator, see supplemental instruction 1.

**To prove the third element, the Commonwealth must prove that the defendant specifically intended to impede, obstruct, delay, prevent or otherwise interfere with a criminal investigation.**

*Further instruction on specific intent.*

**Obviously, it is impossible to look directly into the defendant’s mind. But in our everyday affairs, we often decide from the actions of others what their state of mind is. In this case, you may examine the defendant’s actions and words, and all of the surrounding circumstances, to help you determine what (his) (her) intent was at the time.**

**If the Commonwealth has proved each of the three elements of the crime beyond a reasonable doubt, you should return a verdict of guilty. If any element of the crime has not been proved beyond a reasonable doubt, you must find the defendant not guilty.**

SUPPLEMENTAL INSTRUCTIONS

**1. “Investigator.” An “investigator” is defined by our law to mean an individual or group of individuals lawfully authorized by (a department or agency of the federal government, or any political subdivision thereof) (or) (a department or agency of the Commonwealth) (or) (a political subdivision of the Commonwealth, such as a city or town) to conduct or engage in an investigation of, prosecution for, or defense of an alleged violation of law in the course of his or her official duties.**

G.L. c. 268, § 13B(2)

## NOTES:

1. **District Court jurisdiction.** The District Court was granted jurisdiction over the crime of intentionally misleading an investigator by St. 2018 c. 69, § 155. Prior to St. 2018, c. 69, § 155, the District Court did not have jurisdiction over the crime of intentional misleading an investigator, although it did have jurisdiction over intimidation of a witness or juror in violation of G.L. c. 268, § 13B. See *Commonwealth v. Muckle*, 478 Mass. 1001 (2017).
2. **Examples of misleading conduct.** *Commonwealth v. Tejeda*, 476 Mass. 817, 820 (2017) (swallowing plastic bag of drugs in full view of officer held not to be misleading under the statute); *Commonwealth v. Paquette*, 475 Mass. 793, 799 (2016) (false statement given to police not misleading where police knew it was false at time it was given); *Commonwealth v. Morse*, 468 Mass. 360, 361 (2014) (defendant's answer of "no" in response to police officer's question whether he had consumed any substances in addition to alcohol before boating that could have impaired his ability to operate was not misleading because the answer was a subjective assessment of the defendant's response to an intoxicating substance); *Commonwealth v. Figueroa*, 464 Mass. 365, 372 (2013) (defendant's detailed false alibi to parole officer during investigation into possible violation of conditions of parole constituted misleading conduct); *Commonwealth v. Fortuna*, 80 Mass. App. Ct. 45, 47, 50-51 (2011) (defendant's statement to police immediately after he had been shot that he had been shot by a person who was a significant distance away was misleading, as forensic evidence suggested that he had been shot from a firearm at close distance).
3. **"Criminal proceeding."** The trial does not end when the verdict is announced. *Commonwealth v. Cathy C.*, 64 Mass. App. Ct. 471, 474 (2005). When a show cause hearing was held and the application was either allowed or no decision had yet been announced, the proceeding was still ongoing. *Commonwealth v. Robinson*, 444 Mass. 102, 109-110 (2005).
4. **Future cooperation with police.** There is no requirement that the victim must be furnishing information on the day that the intimidating action is taken or statement made. *Commonwealth v. King*, 69 Mass. App. Ct. 113, 121 (2007). "It is enough that the jury reasonably conclude from the surrounding circumstances that it was likely that the victim would furnish to an official investigating authority information pertaining to the crime and that the defendant intended to discourage such communication." *Id.*
5. **Investigation.** "The Legislature intended [G.L. 268, § 13B] to encompass 'any investigation or proceeding that may result in criminal-type sanctions'." *Commonwealth v. Occhiuto*, 88 Mass. App. Ct. 489, 505 (2015) (emphasis in original), quoting *Commonwealth v. Figueroa*, 464 Mass. 365, 370 (2013). This expansive definition does not, however, require the government to prove the exact nature of the criminal proceedings, "[b]ut a sham investigation into a fake crime is something different." *Occhiuto*, 88 Mass. App. Ct. at 505.
6. **Impeding element.** "Absent additional evidence of specific intent, [] [a simple] exculpatory denial [such as "No"], standing alone rarely will permit a reasonable inference that a defendant possessed the specific intent necessary to establish a violation of G.L. c. 268 Sec. 13B." *Commonwealth v. Morse*, 468 Mass. 360, 375-76 (2014). See also *Commonwealth v. Paquette*, 475 Mass. 793 (2016). A simple exculpatory denial, on its own, does not allow for an inference of specific intent to interfere with a police investigation, because, unlike "a content-laden fabrication designed to send police off course, thereby interfering with their investigation," it leaves police "in the same position they would have been had the [suspect] instead remained silent." *Morse*, 468 Mass. at 374.
7. **No model instruction based on reckless conduct.** Although section 13B of chapter 268 includes a prong for reckless behavior, that concept appears in conflict with the balance of the statute which requires the Commonwealth to prove that the misleading act was done with the specific purpose of impeding, obstructing, delaying, preventing, or otherwise interfering with an investigation. Consequently, there is no model instruction for recklessly misleading an investigator.