

OPEN AND GROSS LEWDNESS AND LASCIVIOUS BEHAVIOR

G.L. c. 272, § 16

The defendant is charged with open and gross lewdness and lascivious behavior.

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

***First:* That the defendant exposed their (genitals) (buttocks) (or) (female breast) to one or more persons;**

***Second:* That the defendant did so intentionally;**

***Third:* That the defendant did so “openly,” that is, either the defendant intended exposure to another person or recklessly disregarded a substantial risk of exposure, to another person who might be offended by such conduct;**

***Fourth:* That the defendant’s act was done in such a way as would alarm or shock a reasonable person; and**

***Fifth:* That at least one person was alarmed or shocked.**

Commonwealth v. Maguire, 476 Mass. 156, 158, 161 (2017);
Commonwealth v. Kessler, 442 Mass. 125, 127 (2008).

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant exposed their

(genitals) (buttocks) (or) (female breast). To expose means to uncover or display.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant exposed their (genitals) (buttocks) (or) (female breast) intentionally. This means that the exposure was not merely an accident or the result of carelessness. Rather, the exposure must have been the result of a conscious and deliberate act.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant exposed their (genitals) (buttocks) (or) (breast) openly. This requires proof either that the defendant intended to expose themselves to another person, or that the defendant recklessly disregarded a substantial risk of exposing themselves to another person who might be offended by such conduct.

To prove the defendant recklessly disregarded a substantial risk of exposing themselves to another person who might be offended by such conduct, the Commonwealth must prove that that the defendant's actions went beyond mere negligence or carelessness.

The defendant acted recklessly if the defendant knew, or should have known, that their actions were very likely to result in exposure of their (genitals) (buttocks) (or) (female breast) to another person who might be offended, but they ran that risk and went ahead anyway. It is enough if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were very likely to result in exposure to another person who would be offended.

See Commonwealth v. St. Martin, 105 Mass. App. Ct. 71, 73 (2024).

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant's act was done in such a way as would alarm or shock a reasonable person. You may consider evidence about the act such as the time, the place, the extent and length of the exposure, and any other relevant evidence.

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that at least one person was alarmed or shocked upon witnessing the exposed (genitals) (buttocks) (or) (breast). Alarm or shock requires more than proof of mere nervousness or offense. It means a serious negative emotional reaction. Mere nervousness or excitement is not enough.

If the Commonwealth has proved all five elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove any element beyond a reasonable doubt, you must find the defendant not guilty.

NOTES:

1. Constitutionality. The criminal prohibition of open and gross lewdness (G.L. c. 272, § 16), as limited by prior decisions, is facially constitutional. *Commonwealth v. Ora*, 451 Mass. 125, 128 (2008). The statute prohibits the imposition of lewdness or nudity on an unsuspecting or unwilling person, and cannot be applied to expressive conduct that falls within the ambit of the First Amendment (which does not include legally obscene acts) and is offered to a willing audience. *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 197 (2005) (nude dancing enjoys constitutional protection as a form of expression under both the First Amendment to the U.S. Constitution as well as art. 16 of the Massachusetts Declaration of Rights); *Revere v. Aucella*, 369 Mass. 138, 142-143 (1978), appeal dismissed sub nom (statute does not apply to nude go-go dancing where there is no imposition of the lewdness or nudity on an unsuspecting or unwilling person).

2. Degree and nature of shock clarified. The display of nudity must be intentional, done openly in a manner to produce alarm or shock, and must actually produce alarm or shock that is a "serious negative emotional experience," and not just nervousness and offense." *Commonwealth v. Kessler*, 442 Mass. 770, 774 (2004). Vicarious concern for other people or even disgust does not "convert any ordinary indecent exposure case into one for open and gross lewdness." *Commonwealth v. Maguire*, 476 Mass. 156, 160 (2016) (insufficient where detective was "disgusted", not for himself, but rather out of concern for the women seated nearby and no evidence that the women sustained a "serious negative emotional experience" stronger than "mere nervousness and offense"). See *Commonwealth v. Ora*, 451 Mass. 125, 127 (2008) (as a felony, it "is thus a much more serious offense than the misdemeanor of indecent exposure, G. L. c. 272, § 53, and consequently requires a substantially more serious and negative impact as a result of the behavior").

The fourth element has an objective standard which is satisfied only if the factfinder determines that the subjective response was reasonable. *Commonwealth v. Maguire*, 476 Mass. 156, 161 (2016).

3. "Buttocks" or "female breasts." Open and gross lewdness is not limited to exposure of the genitals, and may include exposure of the "buttocks" or "female breasts." *Commonwealth v. Quinn*, 439 Mass. 492, 501 (2003) (exposure of thong-clad buttocks); *Commonwealth v. Ora*, 451 Mass. at 127 (prosecution must show that the defendant exposed his or her genitals, buttocks, or breasts to one or more persons).

4. Open. Requirement that act be "open" refers to defendant's intent or reckless disregard that the act be seen by one or more unwilling persons present and does not require that it be done in a public place. *Commonwealth v. Kelley*, 25 Mass. App. Ct. 180, 184-85 (1987). See *Commonwealth v. Wardell*, 128 Mass. 52, 53-54 (1880) (salesman exposed himself in private home to minor children); *Commonwealth v. Guy G.*, 53 Mass. App. Ct. 271, 273 (2001) (student defendant exposed penis to female student in shared cubicle); *Commonwealth v. Montez*, 45 Mass. App. Ct. 802,

806 (1997) (standing in window of apartment and masturbating); *Commonwealth v. Gray*, 40 Mass. App. Ct. 901, 901 (1996) (fellatio in public bathroom). Compare *Commonwealth v. Ferguson*, 384 Mass. 13, 14-15 (1981) (statute inapplicable to sexual acts in car parked in dark parking lot reasonably expected to be private) with *Commonwealth v. Adams*, 389 Mass. 265, 272 (1983) (masturbating in a public place “certainly falls within the common understanding” of the offense).

“To be ‘open’ under G. L. c. 272, § 16, the conduct ‘must occur in the presence of another person who can be alarmed or shocked.’ The ‘presence’ requirement is well established in our case law.” *Commonwealth v. Snow*, 104 Mass. App. Ct. 403, 408 (2024), quoting *Quinn*, 439 Mass. at 496 n.9 (finding “virtual presence” insufficient to support finding of probable cause where defendant walked through victim’s home while masturbating, which victim observed on video captured on monitors throughout the home, but victim was not physically present to observe; SJC “[did] not opine whether a “virtual presence” theory might prevail on different facts and circumstances”).

5. Eyewitness testimony. There is no requirement that the Commonwealth must prove the exposure element solely through the victim’s eyewitness testimony. *Commonwealth v. Poillucci*, 46 Mass. App. Ct. 300, 303 n.3 (1999).

6. Sex Offender Registration. “A ‘second and subsequent adjudication or conviction of open and gross lewdness’ in violation of G. L. c. 272, § 16, requires such registration.” *Commonwealth v. Wimer*, 480 Mass. 1, 2 (2018), citing G. L. c. 6, § 178C.