

OPEN AND GROSS LEWDNESS AND LASCIVIOUS BEHAVIOR

(G.L. c. 272, § 16)

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

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

First: That the defendant exposed his (her) (genitals) (buttocks) (or) (female breasts) to one or more persons;

Second: That the defendant did so intentionally;

[In a prosecution for intentional exposure to a single person in a private setting, the following element should be rephrased by deleting the word "public" and replacing the word "others" with "another person."]

Third: That the defendant did so "openly," that is, either he (she) intended public exposure, or he (she) recklessly disregarded a substantial risk of public exposure, to others 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.

Alarm or shock means the defendant's conduct created a serious, negative emotional experience. Alarm or shock requires more than proof

of mere nervousness or offense.

Commonwealth v. Maguire, 476 Mass. 156, 158, 161 (2017);

Commonwealth v. Kessler, 442 Mass. 125, 127 (2008).

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, 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 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.

4. **Open.** Requirement that act be "open" refers to defendant's intent that 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).

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. **Indecent exposure is lesser included offense.** Indecent exposure (G.L. c. 272, § 53) is a lesser included offense of open and gross lewdness (G.L. c. 272, § 16). *Commonwealth v. Alvin B. Fields*, 71 Mass. App. Ct. 1116 (2008) (unpublished opinion under Appeals Court Rule 1:28). (See Instruction 7.340) However, indecent exposure may be used to prosecute only exposure of the genitals and not exposure of non-genital pubic areas. *Commonwealth v. Arthur*, 420 Mass. 535, 541 (1995).

7. **Single penalty for one act with multiple victims.** Where there is a single incident of open and gross lewdness resulting in shock and alarm to more than one person, the legislature intended that only a single penalty attach to the conduct. For double jeopardy purposes, the “unit of prosecution” is conduct-based, not victim-based. *Commonwealth v. Botev*, 79 Mass. App. Ct. 281 (2011).