

IDENTITY FRAUD BY POSING AS ANOTHER

The defendant is charged with identity fraud by posing as another person. Section 37E(b) of chapter 266 of our General Laws provides as follows:

“Whoever,
with intent to defraud,
poses as another person
without the express authorization of that person
and uses such person’s personal identifying information
(to obtain or to attempt to obtain [money] [credit] [goods]
[services] [anything of value] [any identification card
or other evidence of such person’s identity],)
(or) (to harass another)
shall be punished”

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

First: That the defendant posed as another person;

Second: That the defendant did so without that person’s express

authorization;

Third: That the defendant used that person's identifying information (to obtain or attempt to obtain [money] [credit] [goods] [services] [some other thing of value] [an identification card or other evidence of such person's identity]) (to harass another person); and

Fourth: That the defendant did so with the intent to defraud.

Here the jury must be instructed on specific intent from Instruction 3.120 ("Intent").

To satisfy the first element, the Commonwealth must prove that the defendant falsely represented (himself) (herself), directly or indirectly, as another person or persons.

To prove the third element, the Commonwealth must prove that the defendant used another person's personal identifying information. Such information includes any name or number that may be used, alone or with any other information, to (assume the identity of an individual) (harass an individual).

SUPPLEMENTAL INSTRUCTIONS

1. "Pose." The word "pose" is defined as falsely representing oneself, directly or indirectly, as another person or persons.

2. "Harass." To prove that the defendant intended to harass an individual, the Commonwealth must prove that (he) (she) willfully and maliciously intended to engage in an act directed at a specific person (or persons), which would seriously alarm or annoy that person (or persons) and would cause a reasonable person to suffer substantial emotional distress.

An act is "willful" if it is done intentionally and by design, in contrast to an act which is done accidentally.

An act is done with "malice" if it is intentional and without justification or mitigation, and any reasonably prudent person would have foreseen the actual harm that resulted.

NOTES:

1. **Personal identifying information.** While the statute specifically identifies particular types of personal information that would fall within the definition of personal identifying information (specifically name, address, telephone number, driver's license number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, credit card number, and computer password identification), the statute does not indicate that they are exclusive. G.L. c. 266, §37E(a).

2. **Malicious conduct.** In the criminal harassment statute (G.L. c. 265, §43A), the requirement of malice does not require a showing of cruelty, hostility or revenge, nor does it require an actual intent to cause the required harm, but merely that the conduct be "intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual harm that resulted." *Commonwealth v. O'Neil*, 67 Mass. App. Ct. 284, 290-293, 853 N.E.2d 576, 582-584 (2006). Accord, *Commonwealth v. Paton*, 63 Mass. App. Ct. 215, 219, 824 N.E.2d 887, 891 (2005); *Commonwealth v. Giavazzi*, 60 Mass. App. Ct. 374, 375-376, 802 N.E.2d 589 (2004). Prior to the *O'Neil* decision, the second supplemental instruction included the following language: "An act is 'wilful' if it is done intentionally and by design, in contrast to an act which is done thoughtlessly or accidentally. The defendant acted wilfully if the defendant intended both the conduct and its harmful consequences. An act is done with 'malice' if it is done out of cruelty, hostility or revenge. To act with malice, one must act not only deliberately, but out of hostility toward [the alleged victim]."