

IDENTITY FRAUD BY POSING AS ANOTHER

G.L. c. 266, § 37E(b)

The defendant is charged with identity fraud by posing as another person without authorization. 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 personal identifying information [to obtain or attempt to obtain (money) (credit) (goods) (services) (a thing of value) (an identification card) (or) (evidence of that person's identity)] (or) [to harass another person]; and**

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

To prove the first element, the Commonwealth must prove that the defendant falsely represented themselves, directly or indirectly, as another person or persons. Something is false when it is not true

or genuine.

To prove the second element, the Commonwealth must prove that the defendant represented themselves, directly or indirectly, as the other person without having obtained express permission from the other person.

To prove the third element, the Commonwealth must prove that the defendant used another person's personal identifying information [to obtain or attempt to obtain (money) (credit) (goods) (services) (a thing of value) (an identification card) (or) (evidence of that person's identity)] (or) [to harass another person]. "Personal identifying information" is any name or number that can be used, alone or along with any other information, to assume another person's identity. This includes, but is not limited to, a 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, or computer password identification.

While the statute identifies specific types of data 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).

Supplemental Instruction: Definition of “harassment”.

To harass an individual, the Commonwealth must prove that the defendant willfully and maliciously intended to engage in an act directed at a specific person (persons), which would seriously alarm or annoy that person (persons) and would cause a reasonable person to suffer substantial emotional distress. An act is “willful” if it is done intentionally and by design, and not out of mistake or accident. The defendant acted willfully if the defendant intended the conduct. 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 to [the alleged victim].

The malice requirement in the criminal harassment statute (G.L. c. 265, §43A) 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. Ecker*, 92 Mass. App. Ct. 216, 221 (2017), quoting *Commonwealth v. O’Neil*, 67 Mass. App. Ct. 284, 293 (2006).

To prove the fourth element, the Commonwealth must prove that the defendant used the information with the intent to defraud.

Here the jury may be instructed as follows or alternatively on Intent (Instruction 3.120).

To act with an intent to defraud means to act knowingly with the

aim of deceiving or cheating another. The purpose is often to bring about gain or benefit either for oneself or for another person or entity.

See United States v Phath, 144 F.3d 146, 149 (1st Cir. 1998); *United States v. Leahy*, 445 F.3d 634, 644 (3d Cir. 2006), abrogated on other grounds by *Loughrin v. United States*, 573 U.S. 351 (2014).

Obviously, it is impossible to look directly into a person's mind. But in our everyday affairs we often decide from the actions of others what their state of mind is. You may examine the evidence in the case, all the surrounding circumstances, and any reasonable inferences you draw from that evidence to help you determine whether the defendant had an intent to defraud. The Commonwealth does not need to prove the identity of the person whom the defendant intended to defraud, but the Commonwealth must prove that the defendant intended to defraud someone.

See Commonwealth v. O'Connell, 438 Mass. 658, 664 (2003) (Commonwealth need not show intent to defraud a particular person, but sufficient that defendant "intended to injure or defraud someone"; proof of intent to defraud may be inferred from the circumstances); *Commonwealth v. Analetto*, 326 Mass. 115, 118 (1950) ("Nor is it necessary to show that any person actually was defrauded.").

If the Commonwealth has proven all four elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.