

CHEATING AND SWINDLING¹

- 1) G.L. c. 23K, § 39 (a) – First Theory – p. 1-5
- 2) G.L. c. 23K, § 39 (b) – Second Theory – p. 6-9
- 3) G.L. c. 23K, § 39 (e) – Third Theory – p. 10-14

The defendant is charged with cheating and swindling during a game in a gaming establishment.

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

***First:* That the defendant won or attempted to win money or property, or reduced or attempted to reduce a losing wager;**

***Second:* That the defendant used any trick or sleight of hand performance, or used a fraud or fraudulent scheme, cards, dice, or other gaming device;**

***Third:* The defendant did so knowingly;**

***Fourth:* That the prohibited activity occurred during a game;
and**

¹ Definitions of terms in the explanation of elements throughout this instruction are taken from G.L. c. 23K, § 2.

***Fifth:* That the prohibited activity occurred in a gaming establishment.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant won or attempted to win money or property, or reduced or attempted to reduce a losing wager. A “wager” is a sum of money or representation of value (e.g., a casino chip) that is risked on a game for which the outcome is uncertain.

See G.L. c. 23K, § 2. The defendant’s action may be “for himself, for another or for a representative of either.” *Id.*

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant used (any trick or sleight of hand performance) (fraud) (a fraudulent scheme) (or) (fraudulent cards, dice, or other gaming device). (A “gaming device” is an electronic, electrical, or mechanical contrivance or machine used in connection with gaming or a game.)

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly used (any trick or sleight of hand performance) (fraud) (a fraudulent scheme) (or) (fraudulent cards, dice, or other gaming device). You may

examine any evidence regarding the defendant’s actions or words, and all of the surrounding circumstances, to help you determine whether the defendant knew they were using a cheating or swindling device or game.

See Instruction 3.140, Knowledge.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant engaged in the prohibited activity during a “game”. A “game” is a banking or percentage game played with cards, dice, tiles, dominoes or an electronic or mechanical device or machine played for money, property, checks, credit or a representation of value (e.g., a casino chip) approved by the gaming commission. (A banking game is any game where an establishment collects money from the losers and uses it to pay the winners.) (A percentage game is any game where the establishment collects a percentage of the bets for its profit.)

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the prohibited activity took place in a “gaming establishment”. A “gaming establishment” is the premises approved under a gaming license which includes any gaming area

and any other nongaming structure related to the gaming area including, but not limited to, hotels, restaurants, or other amenities.

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 one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant is guilty of cheating or swindling, you must also go on to determine the value of the money, property, or wager cheated or swindled. You must decide whether the value was [less than \$1,000] [between \$1,000 and \$10,000 inclusive] [more than \$10,000]. You may use your general knowledge in evaluating the value of the money, property, or wager cheated or swindled; it is not required that you have any expert evidence of its value.

The jury may use its common knowledge, and does not require expert evidence, in evaluating value. *Commonwealth v. Hosman*, 257 Mass. 379, 386 (1926); *Commonwealth v. McCann*, 16 Mass. App. Ct. 990, 991 (1983).

If your verdict is guilty, you must indicate on your verdict slip whether the Commonwealth has proved beyond a reasonable doubt that the value of the money, property, or wager cheated and swindled

was [less than \$1,000] [between \$1,000 and \$10,000 inclusive] [more than \$10,000].

See note 2.

G.L. c. 23K, § 39 (b) – Second Theory

The defendant is charged with using a cheating and swindling device or cheating and swindling game in a gaming establishment. In order to prove the defendant guilty of this offense, the Commonwealth must prove the following three (3) things beyond a reasonable doubt:

First: The defendant used a cheating and swindling device or cheating and swindling game;

Second: The defendant did so knowingly; and

Third: The defendant did so in a gaming establishment.

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant used a cheating and swindling device or cheating and swindling game. A cheating or swindling device or cheating and swindling game is:

Instruct on whichever theory below is relied upon by the Commonwealth.

- (i) a coin, token or slug other than a lawful coin or legal tender of the United States or a coin not of the same denomination as the coin intended to be used by the

gaming establishment while playing or using a slot machine there, (except that a “cheating and swindling device” shall not include a token or similar object which is approved by the commission); or

- (ii) a bogus or counterfeit chip, coin or die; a marked card; a computerized, electronic, electrical, mechanical or magnetic device; a tool, drill, wire, key or other device designed, constructed or programmed specifically for: (A) use in obtaining an advantage in a game; (B) opening, entering or affecting the operation of a gaming device; or (C) removing from a slot machine, other gaming device or drop box any money or other contents; or**
- (iii) a tool, drill, wire, coin or token attached to a string or wire, or an electronic or magnetic device to facilitate the alignment of a winning combination; or**
- (iv) a gaming device that has been manufactured, serviced, marked, plugged or tampered with, or placed in a condition or operated in a manner to: (1) deceive or attempt to deceive the public; or (2) alter or attempt to alter the normal random selection of characteristics, the**

normal chance of the game or the result of the game at a gaming establishment.

To prove the second element the Commonwealth must prove beyond a reasonable doubt that the defendant knew they were using the cheating and swindling device or game. You may examine any evidence regarding the defendant’s actions or words, and all of the surrounding circumstances, to help you determine whether the defendant knew they were using a cheating or swindling device or game.

See Instruction 3.140 Knowledge

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant used the cheating and swindling device or game in a gaming establishment. A “gaming establishment” consists of the premises approved under a gaming license, including any gaming area and other nongaming structure related to the gaming area including, but not limited to, hotels, restaurants, or other amenities.

If the Commonwealth has proved all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the

Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant is guilty of using a cheating and swindling device or game in a gaming establishment, you must also go on to determine the value of the money, property, or wager cheated or swindled. You must decide whether the value was [less than \$1,000] [between \$1,000 and \$10,000 inclusive] [more than \$10,000]. You may use your general knowledge in evaluating the value of the money, property, or wager cheated or swindled; it is not required that you have any expert evidence of its value.

The jury may use its common knowledge, and does not require expert evidence, in evaluating value. *Commonwealth v. Hosman*, 257 Mass. 379, 386 (1926); *Commonwealth v. McCann*, 16 Mass. App. Ct. 990, 991 (1983).

If your verdict is guilty, you must indicate on your verdict slip whether the Commonwealth has proved beyond a reasonable doubt that the value of the money, property, or wager cheated and swindled was [less than \$1,000] [between \$1,000 and \$10,000 inclusive] [more than \$10,000].

See note 2.

G.L. c. 23K, § 39 (e) – Third Theory

The defendant is charged with using a cheating and swindling device or cheating and swindling game in a gaming establishment as a gaming licensee or the employee of a gaming licensee. In order to prove the defendant guilty of this offense, the Commonwealth must prove the following five things beyond a reasonable doubt:

***First:* The defendant was a gaming licensee or an employee of a gaming licensee;**

***Second:* The defendant used a cheating and swindling device or cheating and swindling game;**

***Third:* The defendant either:**

a. conducted or operated a game using a cheating or swindling device or game,

b. displayed a cheating and swindling game for play, or

c. permitted a cheating and swindling device or game to be conducted, operated, or displayed;

Fourth: The defendant did so knowingly; and

Fifth: The defendant did so in a gaming establishment.

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant was a gaming licensee or the employee of a gaming licensee. A “gaming licensee” is a person or entity who holds a gaming license.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant used a cheating and swindling device or cheating and swindling game. A cheating or swindling device or cheating and swindling game is:

Instruct on whichever theory below is relied upon by the Commonwealth.

- (i) a coin, token or slug other than a lawful coin or legal tender of the United States or a coin not of the same denomination as the coin intended to be used by the gaming establishment while playing or using a slot machine there, (except that a “cheating and swindling

- device” shall not include a token or similar object which is approved by the commission); or**
- (ii) a bogus or counterfeit chip, coin or die; a marked card; a computerized, electronic, electrical, mechanical or magnetic device; a tool, drill, wire, key or other device designed, constructed or programmed specifically for: (A) use in obtaining an advantage in a game; (B) opening, entering or affecting the operation of a gaming device; or (C) removing from a slot machine, other gaming device or drop box any money or other contents; or**
 - (iii) a tool, drill, wire, coin or token attached to a string or wire, or an electronic or magnetic device to facilitate the alignment of a winning combination; or**
 - (iv) a gaming device that has been manufactured, serviced, marked, plugged or tampered with, or placed in a condition or operated in a manner to: (1) deceive or attempt to deceive the public; or (2) alter or attempt to alter the normal random selection of characteristics, the normal chance of the game or the result of the game at a gaming establishment.**

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant

- a. conducted or operated a game using a cheating or swindling device or game,**
- b. displayed a cheating and swindling game for play, or**
- c. permitted a cheating and swindling device or game to be conducted, operated, or displayed.**

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that that the defendant knew they were using the cheating and swindling device or game. You may examine any evidence regarding the defendant’s actions or words, and all of the surrounding circumstances, to help you determine whether the defendant knew they were using a cheating or swindling device or game.

See Instruction 3.140 Knowledge

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant used the cheating and swindling device or game in a gaming establishment. A “gaming establishment” consists of the premises approved under a gaming license, including any gaming area and other nongaming structure

related to the gaming area including, but not limited to, hotels, restaurants, or other amenities.

If the Commonwealth has proved all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

NOTES

1. Unit of prosecution. The statute makes clear that the Commonwealth may choose to prosecute multiple episodes or transactions under this statute either as separate charges or as one charge alleging a single scheme or a course of conduct. G.L. c. 23K, § 29(d). If the Commonwealth elects to prosecute multiple episodes or transactions as a single offense, “the amounts involved in acts of swindling and cheating committed according to a scheme or course of conduct, whether by the same person or several persons, may be aggregated in determining the value of money, property or wager involved in the offense.” *Id.*

2. Jurisdiction and value. If the amount is over \$75,000, the punishment includes up to ten years in state prison, thus removing it from the jurisdiction of the District Court, which under G.L. c. 218, § 26 is limited to “felonies punishable by imprisonment in the state prison for not more than five years”. G.L. c. 23K, § 39(c).

3. Value determined by the jury. *Commonwealth v. Kelly*, 24 Mass. App. Ct. 181, 183-186 & n.4 (1987), held that, whether or not the value of the property stolen is alleged in the complaint, “the judge should instruct the jury that if they convict, they must determine by their verdict whether the value did or did not exceed [a certain statutory amount] so that the judge will know what range of punishments is available. Otherwise the judge will be required to sentence as if the value did not exceed [the minimum statutory amount].” *Kelly* also indicated that the value of the stolen property need not be alleged in the complaint, since “the value of the property . . . is an element of the punishment but not an element of the offense of larceny” Compare *Commonwealth v. Pyburn*, 26 Mass. App. Ct. 967, 968-70 (1988) (in prosecution for wanton destruction of property under G.L. c. 266, § 127, “if there is an allegation in a complaint . . . that the value of the property so destroyed or injured exceeded” \$1,200 then jury must determine that issue, but instruction need not present that factor as an essential element of the offense since it is not such) with *Commonwealth v. Beale*, 434 Mass. 1024, 1025 & n.2 (2001) (“the value of the property must be treated as an element of the felony of malicious destruction of property” but “the focus of the constitutional inquiry is not a formalistic examination of whether a finding is labeled an ‘element’ or a ‘sentencing factor,’ but whether the finding is made by a jury on proof beyond a reasonable doubt”). See also *Commonwealth v. Harrington*, 130 Mass. 35, 36 (1880) (statutory attempt to dispense with need to charge that crime is subsequent offense, where an element of enhanced sentencing, violated art. 12 of Massachusetts Declaration of Rights).