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SJC-13880

COMMONWEALTH vs. CLERENCE H. GONCALVES.

Dukes County. April 6, 2026. - October 6, 2026.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges,  
Dewar, & Wolohojian, JJ.

Evidence, Photograph, State of mind, Intent, Accident. Intent.  
Statute, Construction. Practice, Criminal, State of mind,  
Instructions to jury. Words, "Disseminates."

Complaint received and sworn to in the Edgartown Division  
of the District Court Department on December 29, 2021.

The case was tried before Benjamin C. Barnes, J.

The Supreme Judicial Court granted an application for  
direct appellate review.

Haylie Jacobson, Committee for Public Counsel Services, for  
the defendant.

John J. Carmody, Assistant District Attorney, for the  
Commonwealth.

DEWAR, J. The defendant, Clerence H. Goncalves,  
surreptitiously photographed a sexual encounter between himself  
and the victim using a camera installed in his living room and

later sent a photograph of the encounter to the victim. A jury convicted the defendant of two offenses: photographing an unsuspecting nude person, in violation of G. L. c. 272, § 105 (b), first par., and disseminating the resulting photograph, in violation of G. L. c. 272, § 105 (c), first par. The defendant challenges both convictions on appeal.

We reject the defendant's challenges to his conviction of photographing an unsuspecting nude person. Notwithstanding the defense at trial that the photograph resulted accidentally from the defendant's installation of the camera for security purposes, the evidence was sufficient to prove that the defendant willfully photographed the victim in the nude with the intent to do so secretly. And, contrary to the defendant's argument raised for the first time on appeal, the jury instructions adequately conveyed to the jury that the Commonwealth was required to prove that the defendant willfully photographed the victim while the victim was nude.

We agree with the defendant, however, that his conviction of disseminating the resulting photograph must be reversed. We hold that sending a photograph of a victim solely to the victim himself or herself does not amount to "disseminat[ing]" the photograph within the meaning of G. L. c. 272, § 105 (c), first par. And here, the Commonwealth did not present evidence that

the defendant sent the photograph to any person other than the victim.

We therefore affirm the defendant's conviction under G. L. c. 272, § 105 (b), first par., and reverse the defendant's conviction under G. L. c. 272, § 105 (c), first par.

Background. 1. Facts. We recite the facts the jury could have found, viewing the evidence in the light most favorable to the Commonwealth.

The defendant lived in a basement-level apartment in Edgartown on Martha's Vineyard. The apartment's living room contained a television on one wall, a couch in the middle of the room, and other furniture. The walls were white or light-colored, and a white tarp covered the ceiling.

The defendant had installed a Kasa-branded "24/7 Recording" camera at a top corner of the room, approximately seven and one-half feet above the floor, above and to the side of the television. The camera was affixed to the wall with a bracket similar in color to the wall. The main body of the camera was square-shaped, two and one-half to three inches long per side, and black in color on the side facing the room. The camera was installed just below a dark gap in the ceiling where the white tarp did not quite meet the wall, and next to a dark-colored pipe also protruding from the same wall. The camera was angled

downward, pointing directly toward the couch in the middle of the room.

On the evening of December 6, 2021, while visiting Martha's Vineyard, the victim began communicating with the defendant through an online application for men seeking to meet other men. The defendant's profile on the application stated, among other things, "I will never make videos."

After exchanging messages with the defendant, the victim went to the defendant's apartment. Their ensuing sexual encounter began on the couch in the middle of the defendant's living room, and, for a period of time, the victim sat on the couch completely nude, engaged in sexual conduct with the defendant. As shown in the photograph taken during this time, the room was dimly lit, inferably illuminated only by a small table lamp located near the couch. After ten minutes, the defendant and victim moved to the defendant's bedroom to continue the sexual encounter. After another thirty-five minutes, they exchanged telephone numbers and parted ways.

The defendant did not notify the victim that he was being photographed or otherwise recorded, nor ask for the victim's consent to be photographed or recorded. The victim did not notice the camera in the living room nor perceive any other sign that the encounter was being recorded.

The two did not communicate again until two weeks later, when the victim sent the defendant a text message. During the ensuing exchange of messages, the defendant sent the victim a photograph<sup>1</sup> of the victim and defendant, both nude, in the defendant's living room during their prior encounter. The victim is seated on the couch, facing the camera. Based on the angle of the photograph and a "Kasa" watermark on the image, the photograph inferably was taken by the camera that the defendant had installed in the top corner of the room. The victim responded to this photograph with a series of messages that, in part, questioned the defendant's conduct in "secretly recording guys that come over" and raised the possibility of reporting the conduct to the Edgartown police. The defendant's subsequent messages to the victim did not include any assertion that the

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<sup>1</sup> In referring to this visual image as a "photograph" and the defendant's conduct as "photographing" the victim, we adhere to the terms used by the witnesses at trial and the parties on appeal. Section 105 applies more broadly to "photograph[ing], videotap[ing,] or electronically surveil[ling]" a victim, G. L. c. 272, § 105 (b), and defines "[e]lectronically surveils" as "to view, obtain or record a person's visual image by the use or aid of a camera, cellular or other wireless communication device, computer, television or other electronic device," G. L. c. 272, § 105 (a). While acknowledging that the distinctions among photographing, videotaping, or electronically surveilling may be material in some cases, cf. Commonwealth v. Cooper, 100 Mass. App. Ct. 345, 348 n.2 (2021), for simplicity's sake we at times use the term "recording" when referring collectively to all of these actions prohibited by the statute.

recording was accidental, and, after the victim's reference to the police, the defendant replied, "Block u[.] Bye."

The victim reported the defendant's conduct to the Edgartown police. During a subsequent search of the defendant's apartment, police observed the camera installed in the defendant's living room. They also found the box in which the camera was sold inside the drawer of a dresser in the defendant's bedroom.<sup>2</sup> There were no signs posted in the apartment notifying visitors of any potential recording.

While detained, the defendant told one officer, "This is the last time I'll be in the police station. I'll go back to Brazil." He then said, "So I make porno," and laughed.

2. Procedural history. On December 29, 2021, the defendant was charged with photographing an unsuspecting nude person, G. L. c. 272, § 105 (b), and with disseminating a photograph of an unsuspecting nude person, G. L. c. 272, § 105 (c). A jury trial began on March 21, 2024. The trial judge denied the defendant's motion for a required finding of not guilty at the close of the Commonwealth's case, and the defense did not present any evidence. The following day, the

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<sup>2</sup> Police did not recover any photographs or other recordings of the victim in the defendant's possession at the time of the search. The camera did not at that time contain an "SD card" on which recordings could be stored, and, although police also seized a cell phone, they were unable to obtain access to its contents.

jury returned guilty verdicts on both charges. The judge sentenced the defendant to concurrent terms of ninety days in a house of correction, with ten days to serve and the balance suspended for one year, as well as one year of administrative probation. The defendant timely appealed, and this court allowed his application for direct appellate review.

Discussion. We address in turn the defendant's arguments with respect to each of his two convictions.

1. Photographing an unsuspecting nude person. General Laws c. 272, § 105 (b), first par., makes it a crime to

"willfully photograph[], videotape[] or electronically surveil[] another person who is nude or partially nude, with the intent to secretly conduct or hide such activity, when the other person in such place and circumstance would have a reasonable expectation of privacy in not being so photographed, videotaped or electronically surveilled, and without that person's knowledge and consent."

The Commonwealth thus must prove two things with respect to the defendant's intent: that the defendant (1) "willfully photograph[ed], videotape[d] or electronically surveil[led] another person who is nude or partially nude," and (2) did so with the "intent to secretly conduct or hide" this activity. See Commonwealth v. Robertson, 467 Mass. 371, 375-376 (2014).

The defendant challenges the sufficiency of the evidence that he willfully photographed the victim in the nude, the sufficiency of the evidence that he did so with the intent to hide this activity, and the jury instruction on willfulness.

a. Evidence of willfulness. When reviewing the sufficiency of the evidence, we assess whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). See Commonwealth v. MacCormack, 491 Mass. 848, 859-860 (2023) (court "must look at the evidence as a whole" to determine whether it is "of sufficient force to bring minds of ordinary intelligence and sagacity to the persuasion of [guilt] beyond a reasonable doubt" [citations omitted]). "A conviction may rest exclusively on circumstantial evidence, and, in evaluating that evidence, we draw all reasonable inferences in favor of the Commonwealth." Commonwealth v. Spaulding, 495 Mass. 300, 309-310 (2025), quoting Commonwealth v. Bonner, 489 Mass. 268, 275 (2022). These inferences "need only be reasonable and possible, not necessary or inescapable" (quotation omitted). Commonwealth v. Witkowski, 487 Mass. 675, 679 (2021), quoting Commonwealth v. Copeland, 481 Mass. 255, 259-260 (2019). The Commonwealth's evidence is insufficient, however, if it "relies on conjecture or speculation." Commonwealth v. Rodriguez, 456 Mass. 578, 582 (2010).

The parties agree that, in the context of G. L. c. 272, § 105 (b), "willfully" means "intentional[ly] and by design[,]"

in contrast to that which is thoughtless or accidental."

Commonwealth v. Pfeiffer, 482 Mass. 110, 116, cert. denied, 589 U.S. 1061 (2019), quoting Commonwealth v. McGovern, 397 Mass. 863, 868 (1986). The defendant also contends, and the Commonwealth does not dispute, that the Commonwealth was required to prove more than just the willful photographing of a victim generally; rather, the Commonwealth was required to prove more specifically that the defendant willfully photographed a victim he knew to be nude or partially nude. See G. L. c. 272, § 105 (b), first par. ("Whoever willfully photographs . . . another person who is nude or partially nude . . ."). Cf. Commonwealth v. Castro, 99 Mass. App. Ct. 502, 508 (2021) (Commonwealth must "prove the defendant's specific intent at the time of the actus reus -- . . . the taking of the photograph"). And the defendant argues that here, the Commonwealth failed to prove such willfulness, because the evidence presented at trial was "equally or more consistent" with accidental taking of the photograph.

The Commonwealth presented sufficient circumstantial evidence to prove this element. See Commonwealth v. Gonzalez, 475 Mass. 396, 414 (2016) (intent is "rarely proved by direct evidence" [citation omitted]). The jury could infer from the empty camera box located in the defendant's dresser that the camera had been installed by the defendant during his residency

at the apartment. He had installed it in a location that the jury could infer was intended to make the camera less conspicuous to visitors; it was positioned high on the wall, between the corner and a protruding dark-colored pipe, and close to a dark gap between the tarp ceiling and wall. He also had installed it so that it was pointed directly at the couch where the defendant's sexual encounter with the victim began. The defendant then demonstrated his knowledge that he had photographed the sexual encounter with the victim when, upon being contacted again by the victim, he responded with a photograph of the encounter.

The jury also reasonably could find that the defendant made statements evincing consciousness of guilt. See MacCormack, 491 Mass. at 856 ("Evidence of consciousness of guilt, while not conclusive, may be considered in conjunction with other evidence to establish guilt beyond a reasonable doubt"). When the victim questioned the defendant's conduct in "secretly recording guys that come over" and raised the prospect of contacting the police, the defendant did not state that the recording was accidental and instead responded, "Block u[.] Bye." The defendant also later stated to the police, while laughing, that he had made "porno," thus inferably attempting to minimize his conduct.

From all of this evidence, considered as a whole in the light most favorable to the Commonwealth, the jury reasonably could conclude beyond a reasonable doubt that the defendant acted willfully in photographing the nude victim during their encounter. See MacCormack, 491 Mass. at 860-861 (while "no single inference the jury reasonably could have drawn would have been sufficient, in isolation, to establish guilt beyond a reasonable doubt," when "[c]ombined, . . . those reasonable inferences create a 'fabric of proof' that is sufficient"). Although the inferences urged by the Commonwealth were not "necessary or inescapable," they were "reasonable and possible" (citation omitted). Witkowski, 487 Mass. at 679.

The evidence did not, as the defendant contends, "tend[] equally" to support his accident theory (quotation and citation omitted). Rodriguez, 456 Mass. at 582. The defendant argues that the same evidence could result from a chain of events in which he did not willfully photograph the victim in the nude and instead installed the camera for security purposes, forgot about the camera during the encounter with the victim, later discovered the photograph, and commented to police with laughter at accidentally making "porno." There was, however, no evidence at trial of such an intervening discovery of an accidental recording; instead, as discussed, on being contacted again by the victim, the defendant sent him the photograph and then made

no claim of an accident in response to the victim's accusation of "secretly recording guys that come over." Although no evidence definitively disproved the accident defense, the jury were entitled to find beyond a reasonable doubt that the photograph was taken intentionally based on the totality of the evidence described above and the permissible inferences therefrom. See Witkowski, 487 Mass. at 681 n.6 (when "conflicting inferences are possible from the evidence, it is for the jury to determine where the truth lies" [quotation and citation omitted]).

Our holding today does not, as the defendant claims, impose strict liability for any accidental recording of nudity by a home security camera. To obtain a conviction of photographing an unsuspecting nude person under G. L. c. 272, § 105 (b), first par., the Commonwealth must prove that the defendant willfully, rather than accidentally, recorded a victim whom the defendant knew to be nude or partially nude. Here, the Commonwealth's evidence -- including the defendant's placement of the camera, his retrieval and transmission of the photograph upon being contacted by the victim, and his actions after being confronted by the victim -- was sufficient to prove that the defendant acted willfully in photographing the victim in the nude.

b. Evidence of intent to secretly conduct or hide photographing. For similar reasons, the Commonwealth's

circumstantial evidence also was sufficient to prove that the defendant intended to "secretly conduct or hide" his photographing of the victim in the nude. G. L. c. 272, § 105 (b), first par.

As discussed, the defendant installed the camera in a location the jury reasonably could find was chosen in order to make the camera less conspicuous to visitors: high on the wall, near a dark-colored pipe and a dark gap between the ceiling and wall. Although the camera remained visible in that location, the jury were entitled to find that the defendant sought to prevent others from noticing it through the manner of its installation.

In addition, the defendant never notified the victim of the existence of the camera in the corner of the dimly lit room, let alone obtaining the victim's consent to photograph their encounter. The jury could infer that the defendant knew the victim was unlikely to notice the camera in the location where he had installed it, in a ceiling corner of the dimly lit room. Accordingly, the jury reasonably could have found that the defendant's failure to alert the victim to the camera's presence or obtain his consent was part of a scheme to hide the defendant's photographing of the encounter.<sup>3</sup>

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<sup>3</sup> The defendant argues that because lack of consent is a separate element of the offense, evidence of lack of consent

Finally, the defendant's profile on the online application stated, "I will never make videos." In the circumstances here -- where the defendant installed a camera in a ceiling corner of his living room, pointed the camera at a couch, and then used the camera to record a sexual encounter on that couch with a person he met through the online application -- the jury could infer from the defendant's statement that he was attempting to reassure unsuspecting prospective visitors that he would not record them, despite planning to do exactly that.

Taken together, this evidence was sufficient to prove beyond a reasonable doubt that the defendant intended to hide or conduct secretly his photographing of the victim during their sexual encounter. See MacCormack, 491 Mass. at 860-861. As with his willfulness argument, the defendant's argument based on an alternate innocent explanation for the evidence is

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cannot additionally prove his intent to secretly conduct or hide his photographing of the victim. However, evidence is relevant as long as "it has a rational tendency to prove a material issue" (citation omitted). Commonwealth v. Bresilla, 470 Mass. 422, 436 (2015). Here, considered together with the evidence that the defendant had installed the camera pointed at the couch and in a location inferably intended to make it less conspicuous, the evidence of the defendant's failure to inform the victim of the camera's existence or seek his consent during their encounter on the couch tends to prove the defendant's intent to hide and keep secret the photographing of the victim. See Castro, 99 Mass. App. Ct. at 508 (evidence of lack of consent, considered together with fact that victim was asleep and other evidence, could be viewed by rational juror as evidence that defendant intended to conduct activity secretly).

unavailing. The defendant emphasizes that the camera was installed openly on the wall, unobscured and unaltered. Cf. Commonwealth v. Wassilie, 482 Mass. 562, 563-564 (2019) (defendant concealed camera in bathroom by wrapping it with paper towels). And, he argues, his failure to notify and obtain consent from the victim was consistent with the defendant forgetting that a camera was installed for security purposes and photographing the encounter only inadvertently. However, viewing the evidence in the light most favorable to the Commonwealth, see Latimore, 378 Mass. at 677, for the reasons we have stated, the jury reasonably could find that the defendant installed the camera in the manner he did and then failed to mention its existence to the victim in order to hide and secretly conduct his photographing of the victim in the nude. See Witkowski, 487 Mass. at 679, 681 n.6.

c. Jury instruction on willfulness. The defendant also argues that the judge's instructions to the jury materially misstated the law by permitting the jury to conclude that the defendant acted willfully based solely on a finding that he intended to photograph (such as by installing and operating an around-the-clock security camera), without further finding that he intended to photograph the victim in the nude.

"We evaluate jury instructions as a whole to determine how a reasonable juror would understand them." Commonwealth v.

Carvajal, 496 Mass. 490, 500 (2025). "While trial judges are not required to use any particular phrasing, the instructions must convey the correct legal standard." Id. Because the defendant did not object to the instruction on willfulness at trial, "we review [his] claim to determine whether there was an error and, if so, whether the error created a substantial risk of a miscarriage of justice." Commonwealth v. Kelly, 470 Mass. 682, 697 (2015).

We discern no error in the jury instruction considered as a whole, in view of the undisputed evidence that the defendant was with the nude victim at the time of the recording. Consistent with Instruction 6.530 of the Criminal Model Jury Instructions for Use in the District Court (2021), the judge broke the offense into discrete elements, including the element "that the defendant willfully photographed, videotaped or electronically surveilled the alleged victim." The judge subsequently elaborated that, to conclude "that the defendant acted willfully in recording," the jury would have to "make a decision about the defendant's state of mind at the time of the incident, and whether his actions were intentionally [sic], and not accidental or due to some inadvertence or inattentiveness." The judge also instructed the jury that to convict the defendant they had to find "that the alleged victim was nude or partially nude at the time."

In the circumstances of this case, these instructions sufficed to convey to the jury that they could not convict the defendant without finding that he willfully photographed the victim in the nude. See Kelly, 470 Mass. at 698 (elements of crime "cannot be divorced from the facts surrounding" incident); Commonwealth v. Dyer, 389 Mass. 677, 684 (1983) (no error where "[i]n the context of this trial, the charge as a whole was sufficient to convey" relevant intent standard). With respect to the element of willfulness in photographing the alleged victim, the jury were instructed to consider "the defendant's state of mind at the time of the incident" and whether his conduct at that time was intentional or accidental, and they also were instructed that the alleged victim had to be "nude or partially nude at the time." In the context of this trial, where it was undisputed that the defendant was in the room with the nude victim at the time the photograph was taken and thus knew of the victim's nudity, a reasonable jury would have understood from the instructions as a whole that to convict the defendant, they had to conclude that the defendant willfully photographed the victim while the victim was in the nude. There was therefore no error in the instructions as to the required

intent.<sup>4</sup> Cf. id. at 683 ("The concept of intent may be conveyed to the jury in a variety of ways").

2. Dissemination. Lastly, the defendant contends that his conduct of sending the photograph of the victim to the victim did not, as a matter of law, amount to "disseminat[ing]" the photograph within the meaning of G. L. c. 272, § 105 (c), first par.<sup>5</sup> Based on the text, structure, and purpose of the statute, he argues, "disseminat[ion]" requires sending the image to a third party.<sup>6</sup> Alternatively, he contends, the statute is at least ambiguous, and thus the rule of lenity should apply. The Commonwealth urges instead that the definition of "[d]isseminate" set forth in G. L. c. 272, § 31, should apply, and that definition has been interpreted to include sending an image to the individual depicted, see Commonwealth v. Ubeda, 99

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<sup>4</sup> For clarity in future cases, a model instruction for the offense is set forth in the Appendix.

<sup>5</sup> General Laws c. 272, § 105 (c), first par., provides: "Whoever willfully disseminates the visual image of another person, with knowledge that such visual image was unlawfully obtained in violation of the first and second paragraphs of subsection (b) and without consent of the person so depicted, shall be punished by imprisonment in the house of correction for not more than 2 1/2 years or in the state prison for not more than 5 years or by a fine of not more than \$10,000, or by both such fine and imprisonment."

<sup>6</sup> In light of the facts of this case, we, like the parties, at times refer to "sending" the photograph in discussing the question presented regarding the meaning of dissemination in § 105 (c). We recognize, however, that an image may be disseminated through other methods.

Mass. App. Ct. 587, 595-596 (2021). We review this question of statutory interpretation de novo. See Commonwealth v. Morrison, 494 Mass. 763, 769 (2024).

"Our primary goal in interpreting a statute is to effectuate the intent of the Legislature." Commonwealth v. Thanh Du, 495 Mass. 103, 105 (2024), quoting Commonwealth v. Rainey, 491 Mass. 632, 641 (2023). We begin with the statute's plain language, which is the "principal source of insight into legislative intent" (quotation and citation omitted). Cruz v. Commonwealth, 494 Mass. 800, 804 (2024). We "endeavor to ascertain that intent from 'all [the statute's] words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished.'" Thanh Du, supra at 106, quoting Rainey, supra. Thus, we do not "determine the plain meaning of a statute in isolation, but, rather, . . . [in consideration of] the surrounding text, structure, and purpose of the [statute]" (quotation and citation omitted). Commonwealth v. Russo, 494 Mass. 356, 365 (2024).

The disputed dissemination provision is part of G. L. c. 272, § 105, a statutory scheme for punishing "'Peeping Tom' voyeurism" that establishes a total of five criminal offenses. Wassilie, 482 Mass. at 565. Three of these offenses are set

forth in § 105 (b), which prohibits photographing, videotaping, or electronically surveilling persons in certain circumstances. The subsection's first paragraph, as discussed, criminalizes recording an unsuspecting nude or partially nude person; the second paragraph criminalizes surreptitious recording of the sexual or other intimate parts of a person under or around the person's clothing, known colloquially as "upskirting," see Wassilie, supra at 564-565; and the third paragraph criminalizes "upskirting" of minors. G. L. c. 272, § 105 (b).

Section 105 (c) then additionally punishes the "disseminat[ion]" of visual images obtained through the means prohibited in § 105 (b). The first paragraph of § 105 (c) prohibits "disseminat[ing]" any "visual image of another person [that the disseminator knew] was unlawfully obtained in violation of the first and second paragraphs of [§ 105] (b)," i.e., an image of an unsuspecting nude or partially nude person or an "upskirting" image of an adult. Obtaining "consent of the person . . . depicted" is a defense to these offenses. G. L. c. 272, § 105 (c), first par. The second paragraph of § 105 (c) prohibits the dissemination of any "visual image [that the disseminator knew] was unlawfully obtained in violation of the third paragraph of [§ 105] (b)," i.e., an "upskirting" image of a minor. Consent is not a defense to this offense against a minor. See G. L. c. 272, § 105 (c), second par.

The statute establishes escalating punishments for these offenses, with the dissemination offenses in § 105 (c) punished more harshly. Recording an unsuspecting nude or partially nude person or "upskirting" an adult is punishable by up to two and one-half years in a house of correction, a fine of up to \$5,000, or both. G. L. c. 272, § 105 (b), first & second pars. Disseminating an image obtained through these prohibited means, however, is punishable by up to five years in State prison, a fine of up to \$10,000, or both. G. L. c. 272, § 105 (c), first par. Similarly, while "upskirting" a minor is punishable by up to five years in State prison, G. L. c. 272, § 105 (b), third par., disseminating an image created through this prohibited means is punishable by up to ten years in State prison, G. L. c. 272, § 105 (c), second par.

The statute's definitions section does not supply a definition of "disseminate[]." See G. L. c. 272, § 105 (a). To ascertain the meaning of terms not defined in a statute, we look to "sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." Commonwealth v. Tinsley, 487 Mass. 380, 386-387 (2021).

At the time this statute was enacted in 2008, see St. 2008, c. 451, § 149, Black's Law Dictionary defined "dissemination" as "[t]he act of spreading, diffusing, or dispersing; esp[ecially], the circulation of defamatory matter," Black's Law Dictionary

506 (8th ed. 2004). See also Merriam-Webster's Collegiate Dictionary 362 (11th ed. 2007) (defining "disseminate" as "to spread abroad as though sowing seed" or "to disperse throughout"); American Heritage Dictionary of the English Language 523 (4th ed. 2006) ("disseminate" is "[t]o scatter widely, as in sowing seed" or "[t]o spread abroad; promulgate"). The plain meaning of "disseminate[]" thus involves spreading or dispersing material.

In considering the meaning of this term in the context of § 105 (c), we take further guidance from the statute's structure and purpose, see Russo, 494 Mass. at 365, including, in particular, the graduated sentencing scheme created by the Legislature. Such a graduated scheme reflects the Legislature's "apparent belief that the greater the harm to the victim, the harsher the punishment should be for the offender." United States v. Gordon, 875 F.3d 26, 33 (1st Cir. 2017). See, e.g., Commonwealth v. Daley, 463 Mass. 620, 625 n.4 (2012) (graduated sentencing scheme for leaving scene of vehicle collision based on level of harm caused by collision); Commonwealth v. Jean-Pierre, 65 Mass. App. Ct. 162, 165 & n.4 (2005) (graduated scheme of assault and battery offenses and penalties based on factors including degree of harm to victim).

Here, the fact that the Legislature set penalties for violations of § 105 (c) twice as great as those under § 105 (b)

evinces an apparent view on the part of the Legislature that the harm caused by "disseminat[ing]" the visual image of a victim is distinctly greater than the initial harm caused by creating the image. Indeed, we have already observed that, while the general purpose of § 105 is to protect both adults and minors against invasions of their privacy, Wassilie, 482 Mass. at 569-570, the prohibition on dissemination in § 105 (c) more specifically "recognizes . . . individuals' privacy interests in avoiding . . . subsequent public distribution of any . . . invasive images" taken in violation of the statute, Lanier v. President & Fellows of Harvard College, 490 Mass. 37, 56 (2022). The dissemination provision protects against the many additional harms to victims that may be caused when images taken in violation of § 105 (b) are spread to "friends, family, bosses, co-workers, teachers, fellow students, or random strangers on the internet." State v. Casillas, 952 N.W.2d 629, 641 (Minn. 2020), cert. denied, 142 S. Ct. 90 (2021). See id. at 641-642 (describing reputational, economic, and other harms caused by nonconsensual dissemination of private sexual images); State v. VanBuren, 210 Vt. 293, 299 (2019) ("nonconsensual dissemination of such intimate images . . . can cause public degradation, social isolation, and professional humiliation for the victims" [quotation and citation omitted]).

We conclude, based on the ordinary meaning of "disseminate[]" and the graduated scheme of which § 105 (c) is a part, that "disseminat[ion]" under § 105 (c) requires dispersing the visual image to at least one third party. By providing for a far greater penalty for subsequent dissemination of a visual image created in violation of the statute, the Legislature apparently acknowledged and sought to redress the distinct harms to victims caused by spreading such invasive images to others. Transmitting the image solely to the victim, while no doubt in many cases a source of intense distress to the victim, does not entail these same harms.<sup>7</sup> And, to the extent there is any ambiguity regarding whether sending an image of the victim to the victim constitutes "disseminat[ing]" the image within the meaning of this statute, we must resolve the ambiguity in the defendant's favor under the rule of lenity. See Commonwealth v. Garafalo, 495 Mass. 746, 761 (2025).

We are not persuaded to conclude otherwise by the Commonwealth's reliance on the definition of "[d]isseminate" in G. L. c. 272, § 31, as interpreted in Ubeda, 99 Mass. App. Ct. at 595-596. In Ubeda, supra, the Appeals Court held that the

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<sup>7</sup> The Commonwealth highlights, in particular, that sending the image to the victim may be viewed by the victim as a veiled threat that the defendant may send the image to others. Even so, sending the image solely to the victim does not entail the same harms as sending it to third parties.

defendant "disseminated" child pornography in violation of G. L. c. 272, § 29B (a), by sending nude photographs to the minor depicted in them. Importantly, however, the Legislature has defined the term "disseminate" for purposes of the child pornography statute. See G. L. c. 272, § 31 ("Disseminate" means "to import, publish, produce, print, manufacture, distribute, sell, lease, exhibit or display"). The Legislature expressly listed the statutes in which this definition applies, and the listed statutes do not include § 105 (c). See G. L. c. 272, § 31 (definitions applicable to terms "[a]s used in" G. L. c. 272, §§ 28, 28C-28E, 29, 29A-29B, 30, 30D). Moreover, the Legislature already had established the definition of "[d]isseminate" in § 31 when it enacted § 105 (c) in 2008. See St. 1974, c. 430, § 12. The Legislature thus could have provided that the definition in § 31 applied to this statute -- as it did for the child pornography statute at issue in Ubeda, see St. 1982, c. 364, § 3 -- but did not do so. See Suliveres v. Commonwealth, 449 Mass. 112, 116 (2007) (we assume Legislature is aware of existing statutes when enacting new laws). We therefore conclude that the Legislature did not intend for the definition of "[d]isseminate" in § 31 to control the meaning of § 105 (c). See Commonwealth v. Smith, 431 Mass. 417, 423 & n.7 (2000) (declining to follow definition of "sexual intercourse" in G. L. c. 272, § 31, in interpreting G. L.

c. 272, § 17, because Legislature "expressly limited" application of § 31 definitions to certain sections of G. L. c. 272, not including § 17).<sup>8</sup>

In sum, we hold that a violation of § 105 (c) requires proof that the defendant disseminated the visual image of the victim taken in violation of § 105 (b) to a third party. Because the Commonwealth did not present such evidence here, it failed to meet its burden of proof.

Conclusion. For the foregoing reasons, we affirm the judgment convicting the defendant under G. L. c. 272, § 105 (b), and reverse the judgment convicting the defendant under G. L. c. 272, § 105 (c). We set aside the latter verdict and direct that a judgment of not guilty enter on that charge.

So ordered.

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<sup>8</sup> The Commonwealth argues that, even if not controlling, the meaning of "disseminate" in the context of § 29B (a) should be highly persuasive here, given that § 105 (c) also criminalizes the dissemination of images of nude or partially nude persons. Cf. Smith, 431 Mass. at 420 ("When interpreting undefined terms in a statute, it is certainly permissible to draw on the meaning that has settled on the same language in other legislation . . . [particularly] when the two statutes relate to the same class of persons or things or share a common purpose"). But the Commonwealth has not directed us to a case in which we have disregarded the ordinary meaning of an undefined term in favor of a statutory definition expressly limited in application to certain other statutes. And, as noted, in Smith, supra at 423 & n.7, we declined to apply a definition set forth in § 31 in the context of another provision in chapter 272 not listed in § 31.

## Appendix.

### Model Jury Instruction -- Secretly Photographing an Unsuspecting Nude Person

The defendant is charged with secretly (photographing) (videotaping) (electronically surveilling) a nude or partially nude person.

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

First: That the defendant (photographed) (videotaped) (electronically surveilled) [the alleged victim] while [the alleged victim] was nude or partially nude;

Second: That the defendant did so without [the alleged victim's] knowledge and consent;

Third: That the defendant acted willfully in (photographing) (videotaping) (electronically surveilling) [the alleged victim] while the defendant knew [the alleged victim] to be nude or partially nude;

Fourth: That the defendant intended to secretly conduct or hide such activity; and

Fifth: That [the alleged victim] had a reasonable expectation of privacy in not being so (photographed) (videotaped) (electronically surveilled).

To prove the first element, the Commonwealth must prove that the defendant (photographed) (videotaped) (electronically surveilled) [the alleged victim]. (The term "electronically surveils" means "to view, obtain or record a person's visual image by the use or aid of a camera, cellular or other wireless communication device, computer, telephone or other electronic device.")

The Commonwealth also must prove that [the alleged victim] was nude or partially nude at the time of the (photographing) (videotaping) (electronic surveillance). One is partially nude when the genitals, buttocks, pubic area or female breast below a point immediately above the top of the areola is exposed. The "areola" is the area of dark-colored skin on the breast that surrounds the nipple.

To prove the second element, the Commonwealth must prove that [the alleged victim] did not know of or consent to the (photographing) (videotaping) (electronic surveillance).

To prove the third element, the Commonwealth must prove that the defendant acted willfully in (photographing) (videotaping) (electronically surveilling) [the alleged victim] while the defendant knew [the alleged victim] to be nude or partially nude. This requires you to make a decision about the defendant's state of mind at the time -- whether his (her) actions were intentional and not accidental or due to inadvertence or inattention.

To prove the fourth element, the Commonwealth must prove that the defendant intended to secretly conduct or hide such activity. This element also requires you to make a decision about the defendant's state of mind at the time. A person's intent is his or her purpose or objective. In our everyday affairs, we often must decide from the actions of others what their intent is. You should consider all the evidence, and any reasonable inferences you draw from the evidence, in determining whether the defendant acted with the intent to secretly conduct or hide his (her) activity.

To prove the fifth element, the Commonwealth must prove that [the alleged victim] had a reasonable expectation of privacy in not being (photographed) (videotaped) (electronically surveilled) at the time. Whether such an expectation is reasonable under the circumstances of this case is to be measured by common understanding and practices.

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