

Assault with Intent to Rape a Child / Attempted Statutory Rape¹

Dft is charged with assault with intent to rape a child. To prove Dft guilty of this offense, the Commonwealth must prove three elements beyond a reasonable doubt:

1. Avm was under sixteen years old at the time;
2. Dft intended to have sexual intercourse with Avm; and
3. Dft took a substantial step to have sexual intercourse with Avm and came reasonably close to having intercourse.²

The first element the Commonwealth must prove is that Avm was under sixteen years old at the time. The Commonwealth does not have to prove that Dft knew Avm's actual age at the time³ [add if appropriate: even if Avm lied to Dft about Avm's age⁴].

¹ G.L. c. 265, § 24B states: "Whoever assaults a child under sixteen with intent to commit a rape, as defined in [G.L. c. 277, § 39], shall be punished . . ." Assault with intent to rape a child (without force) is attempted statutory rape, *Commonwealth v. Dunne*, 394 Mass. 10, 18 (1985), and thus a lesser-included offense of statutory rape, *Commonwealth v. Capone*, 39 Mass. App. Ct. 606, 609 (1996). Assault with intent to commit statutory rape may be proved by satisfying the elements of attempted statutory rape. No proof of force, threat, or lack of consent is required. *Commonwealth v. Askins*, 18 Mass. App. Ct. 927, 928–929 (1984), citing *Commonwealth v. Roosnell*, 143 Mass. 32, 40–42 (1886) and *Commonwealth v. Burke*, 390 Mass. 480, 485 (1983). Also, the judge need not define "assault." *Commonwealth v. Lebaron*, 90 Mass. App. Ct. 1109, 2016 WL 5898804, at *5 (Oct. 11, 2016) (Rule 1:28 decision); *Commonwealth v. Taylor*, 71 Mass. App. Ct. 1123, 2008 WL 1988250, at *1 (May 9, 2008) (Rule 1:28 decision).

² "The elements of attempt . . . are (1) the specific intent to commit the substantive crime at issue, and (2) an overt act toward completion of the substantive crime." *Commonwealth v. LaBrie*, 473 Mass. 754, 764 (2016). "[T]he essence of the crime of attempt is to punish the defendant's substantial acts toward the accomplishment of an intended substantive offense . . . acts that bear a proximate relation to the [substantive offense]." *Id.* at 763. These elements are discussed in detail below.

³ *Commonwealth v. Harris*, 74 Mass. App. Ct. 105, 110 (2009).

⁴ *Dunne*, 394 Mass. at 19 n.17 ("Even if the victim had so convincingly misrepresented her age as to give rise to a reasonable belief that she was older than sixteen, a consideration of the

Under Massachusetts law, children under sixteen cannot consent to sexual intercourse. Therefore, if you find Avm was under sixteen at the time, then you may not consider whether Avm was willing to have sexual intercourse. If Avm was under sixteen at the time of the incident, it is irrelevant whether Avm agreed to have sexual intercourse.

The second element the Commonwealth must prove is that Dft intended to have sexual intercourse with Avm. Intent is a state of mind. It means a person's purpose or objective. The Commonwealth must prove that Dft had the specific purpose or objective to have sexual intercourse with Avm when Dft acted. The decision to act for that purpose requires some period of thought and deliberation, however brief.

There are several types of sexual intercourse; all of them involve penetration, that is, entry into a bodily opening, however slightly. **[Instruct on all types as appropriate, unless a specific act is indicated:]**

Sexual intercourse occurs when the penis **[insert as applicable: or a finger, another body part, or foreign object]** penetrates the female genital opening. In addition to the vagina, the female genital opening includes the parts known as the vulva and labia. Penetration into the vagina itself is not required.⁵

Sexual intercourse [also] includes oral sex, which occurs when a tongue [or other part of a person's mouth] penetrates the female genital opening,⁶ or when a penis penetrates another person's mouth.

Sexual intercourse [also] includes anal sex, which occurs when **[insert as relevant: a penis, tongue, finger, or other body part – or a foreign object under the defendant's control]** – penetrates another person's anus. It is

reasonableness of the defendant's belief would circumvent the rule that consent is no defense.").

⁵ *Commonwealth v. Centeno*, 87 Mass. App. Ct. 564, 568 (2015), citing, *inter alia*, *Commonwealth v. Donlan*, 436 Mass. 329, 336 (2002).

⁶ *Commonwealth v. Edward*, 34 Mass. App. Ct. 521, 523 (1993) (rape established by defendant's lips contacting victim's vagina, vulva, or labia).

not enough to penetrate the groove between the buttocks; penetration of the anal opening is necessary.⁷

The third element the Commonwealth must prove is that Dft took a substantial step to have sexual intercourse with Avm and came reasonably close to having intercourse.⁸ Just intending to commit a crime, talking about it, or making preliminary preparations to carry it out is not enough. Dft's act may be the last act necessary for Dft to have sexual intercourse with Avm, meaning an act a reasonable person would expect would result in sexual intercourse unless some outside factor intervenes. Or it may be an act that, even if not the last act necessary, comes very near to Dft having sexual intercourse with Avm and makes the sexual intercourse with Avm probable.⁹

Supplemental Instruction – while armed with a firearm¹⁰

Assault with intent to rape a child while armed with a firearm has one additional element: that, at the time of the assault with intent to rape a child, Dft possessed a firearm.

A person can possess an object by having direct physical control over it. For example, you possess whatever you have in your pocket. **[If there is evidence of constructive possession:** A person can also possess an object if the person:

⁷ *Commonwealth v. Nylander*, 26 Mass. App. Ct. 784, 788-789 (1989).

⁸ *Commonwealth v. Bell*, 455 Mass. 408, 412-417 (2009), and cases cited. See also *Commonwealth v. Buswell*, 468 Mass. 92, 97 (2014) (defendant's actions must "come[] very near to the accomplishment of the [crime such that] the intent to complete it renders the crime [sufficiently] probable").

⁹ Proof of the defendant's physical proximity to the alleged victim is not required. *Bell*, 455 Mass. at 414 n.9. See also *Commonwealth v. Martinez*, 104 Mass. App. Ct. 13, 16-19 (2024) (inmate's sexualized and manipulative telephone calls to his fourteen-year-old daughter from prison, including directing her to touch her genitals, which she did, sufficed to support indictment for attempted rape of a child).

¹⁰ G.L. c. 265, § 24B, second par., states: "Whoever commits any offense described in this section while being armed with a firearm, as defined in [G.L. c. 140, § 121], shall be punished"

- knows of the object;
- has the ability to exercise control over it, either directly or through another person; and
- has the intent to exercise control over it.¹¹

For example, under the law, you possess items that you keep in your dresser drawer at home.^{12]}

You must determine whether Dft possessed the object in question from all of the facts and the reasonable inferences that you may draw from those facts. Merely being present near an object **[add as appropriate: being associated with a person who controls an object or controls a place where an object is found, living in an apartment where an object is found, or being in a vehicle where an object is present]** does not amount to possession. To find that someone possessed an object, you must find that the person knew of the object and had the ability and intent to exercise control over it.

[Add if relevant: The possession does not have to be exclusive to one person. Someone can possess an item jointly with another person.^{13]}

The Commonwealth does not have to prove that Dft used the weapon during the assault with intent to rape a child, but it must prove, beyond a reasonable doubt, that Dft possessed the weapon during the incident.¹⁴

¹¹ "Possession implies 'control and power,' . . . exclusive or joint . . . , or, in the case of 'constructive possession,' knowledge coupled with the ability and intention to exercise dominion and control." *Commonwealth v. Brzezinski*, 405 Mass. 401, 409 (1989) (citations omitted).

¹² If the case involves a firearm found in a dresser drawer, the judge should consider using a different example to avoid an appearance of commenting on the evidence. Alternatives include: "I am in possession of my car keys, even though they are next door on my desk."

¹³ *Brzezinski*, 405 Mass. at 409.

¹⁴ The Legislature often has used "armed" to mean possessing but not necessarily using a weapon. See, e.g., *Commonwealth v. Nickologines*, 322 Mass. 274, 277 (1948) (armed robbery); *Commonwealth v. Werner*, 73 Mass. App. Ct. 97, 101-103 (2008) (armed assault in a dwelling house); *Commonwealth v. King*, 69 Mass. App. Ct. 113, 115-116 (2007) (armed robbery). "[W]hen the Legislature has intended to distinguish crimes that are committed 'by means of a dangerous weapon' from other crimes that are committed simply by 'being

I will now instruct you on what a firearm is. [Use the appropriate definition from the list of Firearms Definitions, under Criminal Instructions of the Superior Court Model Jury Instructions.]

armed with a dangerous weapon,' whether or not the weapon is actually used, it has . . . done so.'" *Commonwealth v. Dunn*, 43 Mass. App. Ct. 58, 61-62 (1997).