Publication Date: October 16, 2025

Kidnapping [instruct on theories supported by the evidence]

Simple:

a) Confined in Massachusetts 2–3

b) Carried or sent out of Massachusetts 3–4

c) Seized and confined, or inveigled, with specific intent 4–6

Aggravated:

d) Of a child under the age of 16 7

e) With intent to extort 8

f) Armed with firearm or assault weapon 8–15

g) With dang. weapon, inflicted serious bodily injury 16–17

h) With dang. weapon, committed sexual assault 17-19

Simple kidnapping[1]

[If charging on more than one theory: The crime of kidnapping can be committed in more than one way. Dft is charged with kidnapping by **[insert as appropriate:** confining Avm in Massachusetts; carrying or sending Avm out of Massachusetts; and seizing and confining, or inveigling, Avm with a specific intent. The Commonwealth may prove Dft guilty of kidnapping if it

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[1] G.L. c. 265, § 26, first par., states: "Whoever, without lawful authority, [a] forcibly or secretly confines or imprisons another person within this commonwealth against his will, or [b] forcibly carries or sends such person out of this commonwealth, or [c] forcibly seizes and confines or inveigles or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned within this commonwealth against his will, or to cause him to be sent out of this commonwealth against his will or in any way held to service against his will, shall be punished."

proves each element of one or more of these theories. I will now describe what the Commonwealth must do to prove each theory.]

a) Confined in Massachusetts

Dft is charged with kidnapping Avm **[if more than one theory:** by confining Avm in Massachusetts**]**. To prove Dft guilty of kidnapping **[if more than one theory:** on this theory**]**, the Commonwealth must prove four elements beyond a reasonable doubt:

1. Dft confined Avm in Massachusetts;[2]
2. Dft did so by force or secretly;
3. Dft did so against Avm's will; and
4. Dft did so without lawful authority.

The first element requires proof of confinement. "Confine" means to enclose within bounds, isolate, restrict, restrain, shut up, or keep in.[3] So, to prove the first element, the Commonwealth must prove that Dft restrained Avm's movement in some way, and did so in Massachusetts.

As for the second element, the Commonwealth must prove either that Dft used force to restrain Avm's movement or that Dft secretly restrained Avm.

"Force" may involve actual physical contact or threatened contact. Examples of actual force include grabbing or dragging someone. An example of threatened force is compelling someone to move by using menacing words or gestures.[4]

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[2] Massachusetts cases treat the terms "confine" and "imprison" as synonymous under the kidnapping statute. *Commonwealth* v. *Wilcox*, 72 Mass. App. Ct. 344, 350 (2008). To the extent "imprison" has as a meaning "to put in a prison," it is included in the term "confine."

[3] *Commonwealth* v. *Oberle*, 476 Mass. 539, 548 (2017); *Commonwealth* v. *Rivera*, 460 Mass. 139, 142 (2011) ("In the context of the kidnapping statute, the word 'confine' has been interpreted to mean 'any restraint of a person's movement.'").

[4] *Commonwealth* v. *Caracciola*, 409 Mass. 648, 652 (1991); *Commonwealth* v. *LaPlante*, 73 Mass. App. Ct. 199, 202-203 (2008).

Confinement occurs secretly if it happens in a place or in a way that makes it unlikely that members of the public will know or learn of the person's confinement within a reasonable period.[5]

As to the third element, the Commonwealth must prove that Dft confined Avm against Avm's will, that is without Avm's consent.[6] A person who submits because of force or threat of force has not consented.[7]

As for the fourth element, the Commonwealth must prove that Dft did not have lawful authority to confine Avm. An act is done under lawful authority if it is permitted by law. For example, a parent, teacher, or other caretaker of a child may reasonably limit the child's movement or behavior.

b) Carried or sent out of Massachusetts

Dft is charged with kidnapping Avm **[if more than one theory:** by carrying or sending Avm out of Massachusetts**]**. To prove Dft guilty of kidnapping **[if more than one theory:** on this theory**]**, the Commonwealth must prove three elements beyond a reasonable doubt:

1. Dft carried or sent Avm out of Massachusetts;
2. Dft did so by force; and
3. Dft did so without lawful authority.

As to the first element, the Commonwealth must prove that Dft moved, took, or transported Avm out of Massachusetts, or caused Avm to be moved, taken, or transported out of Massachusetts.

As to the second element, the Commonwealth must prove that Dft used force to carry or send Avm out of Massachusetts. Force may involve actual physical contact or threatened contact. Examples of actual force include

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[5] *Commonwealth v. Rivera*, 460 Mass. 139, 142–144 (2011).

[6] *Commonwealth* v. *Edgerly*, 13 Mass. App. Ct. 562, 580 (1982).

[7] *Caracciola*, 409 Mass. at 651.

grabbing or dragging someone. An example of threatened force is compelling someone to move by using menacing words or gestures.[8]

As to the third element, the Commonwealth must prove that Dft did not have lawful authority to confine Avm. An act is done under lawful authority if it is permitted by law. For example, a parent, teacher, or other caretaker of a child may reasonably limit the child's movement or behavior.

c) Seized and confined, or inveigled, with a specific intent[9]

Dft is charged with kidnapping Avm **[if more than one theory:** by seizing and confining, or inveigling, Avm with a specific intent**]**. To prove Dft guilty of kidnapping **[if more than one theory:** under this theory**]**, the Commonwealth must prove three elements beyond a reasonable doubt.

1. (a) Dft seized and confined Avm, or

   (b) Dft inveigled Avm;
2. Dft did so without lawful authority; and
3. Dft intended to cause Avm **[instruct as relevant:** to be secretly confined in Massachusetts against Avm's will, to be sent out of Massachusetts against Avm's will, or to be held to service against Avm's will**]**.[10]

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[8] *Commonwealth* v. *Caracciola*, 409 Mass. 648, 652 (1991); *Commonwealth* v. *LaPlante*, 73 Mass. App. Ct. 199, 202-203 (2008).

[9] This theory has two parts: (a) seizing and confining, or (b) inveigling, each requiring a specific intent. As explained below, part (a) requires force, while part (b) requires trickery or deceit. Instruct on whichever parts of this theory are supported by the evidence.

[10] Kidnapping under parts (a) or (b) of this theory requires some restraint or confinement to distinguish this theory from attempted kidnapping. See generally *Commonwealth v. Titus*, 32 Mass. App. Ct. 216, 221-222 (1992) (approving of instruction to jury that "the essence of kidnapping is restraint, restraint of locomotion"); see also *Commonwealth v. Trotto*, 487 Mass. 708, 735 (2021) (remarking, in dicta, that this theory of kidnapping requires seizing or confining).

The Commonwealth may prove the first element **[instruct as relevant:** in one of two ways: by proving Dft seized and confined Avm, or by proving that Dft inveigled Avm**]**.

"To seize" means to take possession of a person by force.[11] "Force" may involve actual physical contact or threatened contact. Examples of actual force include grabbing or dragging someone. An example of threatened force is compelling someone to move by using menacing words or gestures.[12]

"To confine" means to enclose within bounds, isolate, restrict, restrain, shut up, or keep in.

"To inveigle" means to lure or entice a person into confinement or restraint by trick, false representations or promises, or other deceitful means.[13] For example, lying to a person about the purpose for which a trip is taken in order to lure that person into a vehicle is inveiglement.

As to the second element, the Commonwealth must prove that Dft did not have lawful authority to confine Avm. An act is done under lawful authority if it is permitted by law. For example, a parent, teacher, or other caretaker of a child may reasonably limit the child's movement or behavior.

As to the third element, the Commonwealth must prove that Dft specifically intended to cause Avm **[instruct as relevant:** to be secretly confined in Massachusetts against Avm's will, to be sent out of Massachusetts against Avm's will, or to be held to service against Avm's will**]**.

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[11] Black's Law Dictionary (11th ed. 2019).

[12] *Commonwealth v. Caracciola*, 409 Mass. 648, 652 (1991); *Commonwealth v. LaPlante*, 73 Mass. App. Ct. 199, 202-203 (2008).

[13] Compare "inveigling" under the federal kidnapping statute, 18 U.S.C. § 1201(a), which has been defined as "lur[ing] or entic[ing] through deceit or insincerity." *United States* v. *Walker*, 934 F.3d 375, 378 (4th Cir. 2019) (quoting *Inveigle*, Black's Law Dictionary (10th ed. 2014)). Force is not necessary for inveigling. *Commonwealth* v. *Colon*, 431 Mass. 188, 191 n.6 (2000) (referring to "kidnapping by 'inveiglement' without the use of force").

"Intent" is a state of mind. It means a person's purpose or objective. A person does an act with a specific intent to cause an alleged victim **[instruct as relevant:** to be secretly confined in Massachusetts, to be sent out of Massachusetts, or to be held to service, against the alleged victim's will**]** if, when the person does the act, the person has in mind the specific purpose or objective of causing the alleged victim **[instruct on relevant theory:** to be secretly confined in Massachusetts, to be sent out of Massachusetts, or to be held to service, against the alleged victim's will**]**. The decision to do the act for that purpose requires some period of thought and deliberation, however brief.

> **[If intent to secretly confine applies:]** To prove that Dft intended to secretly confine Avm, the Commonwealth must prove that Dft intended to confine Avm in a place or in a manner that would make it unlikely that members of the public would know or learn of Avm's unwilling confinement within a reasonable period of time.[14]
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> **[If intent to send out of Massachusetts applies:]** A defendant carries or sends a person out of Massachusetts if the defendant moves, takes, or transports the person out of Massachusetts, or if the defendant causes the person to be moved, taken, or transported out of Massachusetts.
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> **[If intent to hold to service applies:]** To hold to service means to force a person to work or perform services against their will.

To do something against a person's will means that the person did not consent to the action. A person who submits because of force or threat of force has not consented.[15]

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[14] *Commonwealth v. Rivera*, 460 Mass. 139, 142–144 (2011).

[15] *Commonwealth* v. *Caracciola*, 409 Mass. 648, 651 (1991).

Aggravated kidnapping – supplemental instructions
[Each of the following instructions adds one or two elements to those for simple kidnapping, set forth in parts (a)—(c) above.]

d) Of a child under the age of 16[16]

Kidnapping of a child under the age of 16 has one element in addition to those required for kidnapping: that, at the time of the kidnapping, Avm was younger than 16 years old.

[Note: as provided in the statute, see n.16, this aggravated form of kidnapping "shall not apply to the parent of a child under 16 years of age who takes custody of such child."**]**

Supplemental instruction—if child is aged 12 or younger

Because Avm was 12 years old [or younger] when the alleged kidnapping occurred, Avm could not consent to being **[insert as relevant**: confined, retrained, carried or sent out of Massachusetts, or made to work or perform services**]**.[17]

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[16] G.L. c. 265, § 26, fourth par., states: "Whoever, without lawful authority, forcibly or secretly confines or imprisons a child under the age of 16 within the commonwealth against his will or forcibly carries or sends such person out of the commonwealth or forcibly seizes and confines or inveigles or kidnaps a child under the age of 16 with the intent either to cause him to be secretly confined or imprisoned in the commonwealth against his will or to cause him to be sent out of the commonwealth against his will or in any way held to service against his will, shall be punished by imprisonment in the state prison for not more than 15 years. The provisions of the preceding sentence shall not apply to the parent of a child under 16 years of age who takes custody of such child."

[17] *Commonwealth* v. *Colon*, 431 Mass. 188, 191-192 & n.8 (2000) (a twelve-year-old child is too young, as a matter of law, to consent to kidnapping—i.e., cannot consent to leaving the custody of their parents or guardians; in so holding, the court said: "we merely restate the long-standing tender years doctrine," under which a child under fourteen was incapable of consenting to kidnapping). Because *Colon* did not directly address whether a thirteen-year-old child can consent—though the tender years doctrine would suggest not—whether such a child arguably can do so may depend on the child's maturity (a question that would require findings in a particular case).

e) With intent to extort[18]

Kidnapping with intent to extort has one element in addition to those required for kidnapping: that Dft committed the kidnapping with the specific intent to extort money or anything else of value.

To "extort" means to obtain property, coerce payment of money, secure a financial advantage for oneself, or compel another to do an act against that person's will.

"Intent" is a state of mind. It means a person's purpose or objective. A person does an act with a specific intent to extort if, at the time the person does the act, the person has in mind the specific purpose or objective of obtaining or coercing money or securing a financial advantage from the alleged victim or from another person, or has in mind the specific purpose or objective of compelling the alleged victim to do an act against the alleged victim's will. The decision to do the act for that purpose requires some period of thought and deliberation, however brief.[19]

f) Armed with a firearm or assault weapon

[Use the following, if the offense occurred BEFORE Oct. 2, 2024.][20]

Kidnapping while armed with a **[choose whichever applies:** firearm, rifle, shotgun, machine gun, assault weapon, or stun gun**]** has one element in

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[18] G.L. c. 265, § 26, first par., states: "Whoever commits any offence described in this section with the intent to extort money or other valuable thing thereby shall be punished."

[19] If the judge previously instructed on specific intent in the context of kidnapping by seizing and confining, or inveigling, with intent, the judge does not have to redefine specific intent and may simply explain that the words specific intent have the same meaning previously given.

[20] G.L. c. 265, § 26, second par., as in effect before Oct. 2, 2024, states: "Whoever commits any offense described in this section while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished . . . ." The statute includes the following exception: "The provisions of the preceding sentence shall not apply to the parent of a child under 18 years of age who takes custody of such child."

If the offense occurred on or after Oct. 2, 2024, see below.

addition to those required for kidnapping: that, at the time of the kidnapping, Dft possessed a [firearm, rifle, shotgun, machine gun, assault weapon, or stun gun]. The Commonwealth does not have to prove that Dft used the weapon during the kidnapping, but it must prove, beyond a reasonable doubt, that Dft actually possessed the weapon during the kidnapping.[21]

To actually possess something means to have physical custody or control of it. In this case, the weapon that Dft is charged with possessing during the kidnapping is a [firearm, rifle, shotgun, machine gun, assault weapon, or stun gun].[22]

Firearm

A "firearm" is any pistol, revolver, or other weapon that is capable of discharging a shot or bullet and that has a barrel shorter than 16 inches, or a stun gun.[23] The barrel is the part of a firearm through which a shot or bullet is driven, guided, or stabilized, and includes the chamber.

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[21] 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 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).

[22] Definitions of these weapons are set forth in G.L. c 140, § 121, as in effect before Oct. 2, 2024.

[23] "Pistol" and "revolver" are not defined by statute. It may suffice to instruct the jury to give these terms their ordinary meaning.

"Firearm" excludes "any weapon that is: (i) constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray machines commonly used at airports or walk-through metal detectors." G.L. c. 140, § 121.

Rifle

A "rifle" is any weapon that has a rifled bore, is capable of discharging a shot or bullet for each pull of the trigger, and has a barrel length equal to or greater than 16 inches. The barrel is the part of a rifle through which a shot or bullet is driven, guided, or stabilized, and includes the chamber.

Shotgun

A "shotgun" is any weapon that has a smooth bore, is capable of discharging a shot or bullet for each pull of the trigger, and has a barrel length of at least 18 inches and an overall length of at least 26 inches. The barrel is the part of a shotgun through which a shot or bullet is driven, guided, or stabilized, and includes the chamber.

Machine gun

A "machine gun" is a weapon of any description, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged by one continuous activation of the trigger, including a submachine gun;[24] provided, however, that ''machine gun'' shall include bump stocks[25] and trigger cranks.[26]

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[24] "Submachine gun" was not defined in the General Laws before Oct. 2, 2024, nor in any Massachusetts reported appellate decision. But, through St. 2024, c. 135, § 24 (eff. Oct. 2, 2024), the definition of "machine gun" now includes "submachine gun." See definition of "machine gun" and "submachine gun," below.

[25] A "bump stock" is "any device for a weapon that increases the rate of fire achievable with such weapon by using energy from the recoil of the weapon to generate a reciprocating action that facilitates repeated activation of the trigger." G.L. c. 140, § 121.

[26] A "trigger crank" is "any device to be attached to a weapon that repeatedly activates the trigger of the weapon through the use of a lever or other part that is turned in a circular motion; provided, however, that 'trigger crank' shall not include any weapon initially designed and manufactured to fire through the use of a crank or lever." G.L. c. 140, § 121.

Assault weapon

An "assault weapon" is **[fashion a case-specific definition from the statutory description quoted in the footnote].**[27]

Stun gun

A "stun gun" is any portable device or weapon that is designed to pass or emit an electrical shock to temporarily incapacitate, injure, or kill someone. Such a device is a stun gun whether is passes an electrical shock by means of a dart or projectile via a wire lead, and whether it does so by emitting an electrical current, impulse, wave, or beam.

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[27] "Assault weapon," "shall have the same meaning as a semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(30) as appearing in such section on September 13, 1994, and shall include, but not be limited to, any of the weapons, or copies or duplicates of the weapons, of any caliber, known as: (i) Avtomat Kalashnikov (AK) (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC–70); (iv) Colt AR–15; (v) Fabrique National FN/FAL, FN/LAR and FNC; (vi) SWD M–10, M–11, M–11/9 and M–12; (vi) Steyr AUG; (vii) INTRATEC TEC–9, TEC–DC9 and TEC–22; and (viii) revolving cylinder shotguns, such as, or similar to, the Street Sweeper and Striker 12; provided, however, that the term assault weapon shall not include: (i) any of the weapons, or replicas or duplicates of such weapons, specified in appendix A to 18 U.S.C. section 922 as appearing in such appendix on September 13, 1994, as such weapons were manufactured on October 1, 1993; (ii) any weapon that is operated by manual bolt, pump, lever or slide action; (iii) any weapon that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated a semiautomatic assault weapon; (iv) any weapon that was manufactured prior to the year 1899; (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable assault weapon; (vi) any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or (vii) any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine." G.L. c. 140, § 121.

[Use the following, if the offense occurred ON OR AFTER Oct. 2, 2024].[28]

Kidnapping while armed with a firearm has one element in addition to those required for kidnapping: that, at the time of the kidnapping, Dft possessed a firearm. The Commonwealth does not have to prove that Dft used the firearm during the kidnapping, but it must prove, beyond a reasonable doubt, that Dft actually possessed the firearm during the kidnapping.

Firearm

A "firearm" is a **[choose whichever applies:** pistol, revolver, rifle, shotgun, sawed-off shotgun, large capacity firearm, machine gun or submachine gun, or assault-style firearm**]**, which is designed to or may readily be converted to expel a shot or bullet[, or a stun gun].[29]

[Instruct on the applicable firearm:]

Rifle

A "rifle" is a firearm having a rifled bore with a barrel length equal to or greater than 16 inches and capable of discharging a shot or bullet for each pull of the trigger. The barrel is the part of a rifle through which a shot or bullet is driven, guided, or stabilized, and includes the chamber.

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[28] G.L. c. 265, § 26, second par., as amended by St. 2024, c. 135, § 107 (eff. Oct. 2, 2024), states: "Whoever commits any offense described in this section while armed with a firearm, as defined in [G.L. c. 140, § 121], shall be punished . . . ." The statute includes the following exception: "The provisions of the preceding sentence shall not apply to the parent of a child under 18 years of age who takes custody of such child."

[29] Definitions of these weapons are set forth in G.L. c 140, § 121, as amended by St. 2024, c. 135 (eff. Oct. 2, 2024).

"Pistol" and "revolver" are not defined by statute. It may suffice to instruct the jury to give these terms their ordinary meaning.

"Firearm" is also defined as "the frame or receiver of any such firearm or the unfinished frame or receiver of any such firearm," but "firearm" excludes "any antique firearm or permanently inoperable firearm." G.L. c. 140, § 121. For definitions of "frame," "receiver," "unfinished frame or receiver," and "antique firearm," see G.L. c. 140, § 121.

Shotgun

A "shotgun" is a firearm having a smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches, and capable of discharging a shot or bullet for each pull of the trigger. The barrel is the part of a rifle through which a shot or bullet is driven, guided, or stabilized, and includes the chamber.

Sawed-off shotgun

A "sawed-off shotgun" is any firearm made from a shotgun, whether by alteration, modification or otherwise, if such firearm as modified has one or more barrels less than 18 inches in length or as modified has an overall length of less than 26 inches. The barrel is the part of a rifle through which a shot or bullet is driven, guided, or stabilized, and includes the chamber.

Large capacity firearm

A "large-capacity firearm" is **[fashion a case-specific definition from the statutory description quoted in the footnote].**[30]

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[30] "Large capacity firearm" is "any firearm that: (i) is semiautomatic with a fixed large capacity feeding device; (ii) is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device when both are in the same person's possession or under their control in a vehicle; (iii) employs a rotating cylinder capable of accepting more than 10 rounds of ammunition or more than 5 shotgun shells; or (iv) is an assault-style firearm; provided, however, that "large capacity firearm" shall be a secondary designation and shall apply to a firearm in addition to its primary designation as a firearm, and shall not include, any firearm that: (a) operates by manual bolt, pump, lever or slide action; (b) is a single-shot firearm; (c) has been modified so as to render it permanently inoperable or otherwise rendered permanently unable to be designated a large capacity firearm; or (d) is an antique or relic, theatrical prop or other firearm that is not capable of firing a projectile and which is not intended for use as a functional firearm and cannot be readily modified through a combination of available parts into an operable large capacity firearm." G.L. c. 140, § 121.

"Semiautomatic" means "capable of utilizing a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and requiring a separate pull of the trigger to fire each cartridge." G.L. c. 140, § 121.

A "large capacity feeding device" is a "(i) a fixed or detachable magazine, belt, drum, feed strip or similar device that has a capacity of, or that can be readily converted to accept, more than 10 rounds of ammunition or more than 5 shotgun shells; or (ii) any part or combination

Machine gun or submachine gun

A "machine gun" [or] "submachine gun" is a firearm, loaded or unloaded, which may automatically discharge more than 1 shot by a continuous activation of the trigger, whether originally manufactured as such or modified by automatic conversion,[31] including through the use of an automatic part;[32] or any firearm, loaded or unloaded, which has been modified by automatic conversion to alter or increase its rate of fire to mimic automatic fire.

Assault-style firearm

An "assault-style firearm" is **[fashion a case-specific definition from the statutory description quoted in the footnote].**[33]

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of parts from which a device can be assembled if those parts are in the possession or control of the same person; provided, however, that 'large capacity feeding device' shall not include: (a) any device that has been permanently altered so that it cannot accommodate more than 10 rounds of ammunition or more than 5 shotgun shells; (b) an attached tubular device designed to accept and capable of operating only with .22 caliber rimfire ammunition; or (c) a tubular magazine that is contained in a lever-action firearm or on a pump shotgun." G.L. c. 140, § 121.

[31] "Automatic conversion" means "any modification made to a firearm, including through the use of an automatic part, that allows for the automatic discharge of more than 1 shot with 1 continuous activation of the trigger or that alters or increases the rate of fire to mimic automatic fire." G.L. c. 140, § 121.

[32] "Automatic part" is "any device, part or combination of parts capable of being attached to a firearm that allows for the automatic discharge of more than 1 shot with 1 continuous activation of the trigger or that increases the rate of fire of a firearm to mimic automatic fire." G.L. c. 140, § 121.

[33] "Assault-style firearm" is "any firearm which is:

(a) a semiautomatic, centerfire rifle with the capacity to accept a detachable feeding device and includes at least 2 of the following features: (i) a folding or telescopic stock; (ii) a thumbhole stock or pistol grip; (iii) a forward grip or second handgrip or protruding grip that can be held by the non-trigger hand; (iv) a threaded barrel designed to accommodate a flash suppressor or muzzle break or similar feature; or (v) a shroud that encircles either all or part of the barrel designed to shield the bearer's hand from heat, excluding a slide that encloses the barrel;

(b) a semiautomatic pistol with the capacity to accept a detachable feeding device and includes at least 2 of the following features: (i) the capacity to accept a feeding device that

Stun gun

A "stun gun" is a portable device or weapon, regardless of whether it passes an electrical shock by means of a dart or projectile via a wire lead, from which an electrical current, impulse, wave or beam that is designed to incapacitate temporarily, injure or kill may be directed.

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attaches to the pistol outside of the pistol grip; (ii) a second handgrip or a protruding grip that can be held by the non-trigger hand; (iii) a threaded barrel capable of accepting a flash suppressor, forward handgrip or silencer; or (iv) a shroud that encircles either all or part of the barrel designed to shield the bearer's hand from heat, excluding a slide that encloses the barrel;

(c) a semiautomatic shotgun that includes at least 2 of the following features: (i) a folding or telescopic stock; (ii) a thumbhole stock or pistol grip; (iii) a protruding grip for the non-trigger hand; or (iv) the capacity to accept a detachable feeding device;

(d) Any firearm listed on the assault-style firearm roster pursuant to section 131¾;

(e) Any of the following firearms, or copies or duplicates of these firearms, of any caliber, identified as: (i) Avtomat Kalashnikov, or AK, all models; (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta AR70 (SC-70); (iv) Colt AR-15; (v) Fabrique National FN/FAL, FN/LAR and FNC; (vi) SWD M-10, M-11, M-$^{11}/_{9}$ and M-12; (vii) Steyr AUG; (viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and (ix) revolving cylinder shotguns including, but not limited to, the Street Sweeper and Striker 12;

(f) a copy or duplicate of any firearm meeting the standards of or enumerated in clauses (d) and (e); provided, that for the purposes of this subsection, 'copy or duplicate' shall mean a firearm: (A) that was manufactured or subsequently configured with an ability to accept a detachable magazine; and (B)(i) that has internal functional components that are substantially similar in construction and configuration to those of an enumerated firearm in clauses (d) and (e); or (ii) that has a receiver that is the same as or interchangeable with the receiver of an enumerated firearm in said clauses (d) and (e); provided further, that the firearm shall not be considered a copy or duplicate of a firearm identified in clauses (d) and (e) if sold, owned and registered prior to July 20, 2016;

(g) 'Assault-style firearm' shall not include any: (i) firearm that is operated by manual bolt, pump, lever or slide action; (ii) firearm that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated as a semiautomatic assault-style firearm; (iii) firearm that is an antique or relic, theatrical prop or other firearm that is not capable of firing a projectile and which is not intended for use as a functional firearm and cannot be readily modified through a combination of available parts into an assault-style firearm; (iv) any of the firearms, or replicas or duplicates of such firearms, specified in appendix A to 18 U.S.C. section 922 as appearing in such appendix on September 13, 1994, as such firearms were manufactured on October 1, 1993; or (v) semiautomatic shotgun that cannot hold more than 5 rounds of ammunition in a fixed or detachable feeding device." G.L. c. 140, § 121.

g) With a dangerous weapon, inflicted serious bodily injury[34]

Kidnapping while armed with a dangerous weapon used to inflict serious bodily injury has two elements in addition to those required for kidnapping:

- Dft possessed a dangerous weapon; and
- Dft used the dangerous weapon to inflict serious bodily injury on Avm.[35]

Let me explain some of these terms. To "possess" something means to have physical custody or control of it.

A "dangerous weapon" is **[choose whichever definition applies:]**[36]

> **[per se]** any object designed and constructed to produce death or great bodily harm. For example, a gun or dagger is a dangerous weapon because it is designed for the purpose of bodily assault or defense.
>
> **[as used]** any object that is used in a way that can cause serious bodily harm. In determining whether an object is dangerous as used, you must consider not only the nature and specific features of the object but also the circumstances surrounding its use and the manner in which it was handled or controlled. The Commonwealth must prove beyond a reasonable doubt that Dft formed the intent to use the object in a dangerous or potentially dangerous way. For example, a pocket knife, baseball bat, shoe, or even a pencil may be a dangerous weapon if it is

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[34] G.L. c. 265, § 26, third par., states: "Whoever commits any [kidnapping] offense described in this section while armed with a dangerous weapon and inflicts serious bodily injury thereby upon another person . . . shall be punished . . . ."

[35] *Commonwealth v. Morrison*, 494 Mass. 763, 769–771 (2024). If more than one dangerous weapon is involved, the Commonwealth bears the burden of proving that the defendant used the same weapon(s) he possessed to seriously injure the victim. See *id.* at 774 (where defendant possessed a gun and a coventurer possessed a police baton, but where the evidence linked only the baton to the victim's injuries, it was reversible error to instruct the jury that the weapon possessed need not have been the weapon used to injure, where the jury did not specify which weapon they found was used).

[36] *Commonwealth v. Tevlin*, 433 Mass. 305, 310 (2001); *Commonwealth v. Appleby*, 380 Mass. 296, 303-304, 308 (1980); *Commonwealth v. Marrero,* 19 Mass. App. Ct. 921, 922 (1984).

used to cut, strike, or otherwise touch someone in a way that can cause death or great bodily harm.

Serious bodily injury, in this case, means bodily injury that results in permanent disfigurement; protracted loss or impairment of a bodily function, limb, or organ; or substantial risk of death.[37]

To summarize, the Commonwealth must prove beyond a reasonable doubt all the elements of kidnapping plus that Dft possessed a dangerous weapon at the time of the kidnapping and used it to inflict serious bodily injury on Avm.

h) With a dangerous weapon, committed sexual assault[38]

A kidnapping while armed with a dangerous weapon and which involves a sexual assault has two elements in addition to those required for kidnapping:

- Dft possessed a dangerous weapon;[39] and
- Dft sexually assaulted Avm.

Let me explain some of these terms. To possess something means to have physical custody or control over it. The Commonwealth does not have to prove that Dft used the weapon, but it must prove, beyond a reasonable doubt, that Dft possessed the weapon during the kidnapping.

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[37] G.L. c. 265, § 26, third par.

[38] G.L. c. 265, § 26, third par., states: "Whoever commits any [kidnapping] offense described in this section while armed with a dangerous weapon and . . . sexually assaults [another] person shall be punished . . . ."

[39] *Commonwealth v. Rodriguez*, 83 Mass. App. Ct. 267, 270–272 (2013).

A "dangerous weapon" is **[choose whichever definition applies:]**[40]

[per se] any object designed and constructed to produce death or great bodily harm. For example, a gun or dagger is a dangerous weapon because it is designed for the purpose of bodily assault or defense.

[as used] any object that is used in a way that can, or reasonably appears to be able to,[41] cause serious bodily harm. In determining whether an object is dangerous as used, you must consider not only the nature and specific features of the object but also the circumstances surrounding its use and the manner in which it was handled or controlled. The Commonwealth must prove beyond a reasonable doubt that Dft formed the intent to use the object in a dangerous or potentially dangerous way. For example, a pocket knife, baseball bat, shoe, or even a pencil may be a dangerous weapon if it is used to cut, strike, or otherwise touch someone in a way that a reasonable person would recognize could cause death or great bodily harm.

The Commonwealth must also prove that the defendant sexually assaulted the alleged victim. In this case, sexual assault means **[choose applicable definition under the statute, set forth in the footnote, and instruct on it accordingly].**[42]

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[40] *Commonwealth v. Tevlin*, 433 Mass. 305, 310 (2001); *Commonwealth v. Appleby*, 380 Mass. 296, 303-304, 308 (1980); *Commonwealth v. Marrero,* 19 Mass. App. Ct. 921, 922 (1984).

[41] *Commonwealth v. Powell*, 433 Mass. 399, 401 (2001) ("an object that is, on closer inspection, incapable of inflicting serious injury or death can still be a dangerous weapon if, at the time of the offense, it would have been reasonable to believe that it was capable of inflicting such injury").

[42] "For purposes of [kidnapping involving sexual assault], the term 'sexual assault' shall mean the commission of any [indecent assault and battery, rape, or assault with intent to commit rape] set forth in sections 13B, 13B½, 13B¾, 13F, 13H, 22, 22A, 22B, 22C, 23, 23A, 23B, 24 or 24B [of Chapter 265]." G.L. c. 265, § 26, third par.

To summarize, the Commonwealth must prove beyond a reasonable doubt all the elements of kidnapping plus that Dft possessed a dangerous weapon at the time of the kidnapping and that Dft sexually assaulted Avm.