

Sex Trafficking¹

Dft is charged with trafficking AvM for sex.² To prove Dft guilty of this offense, the Commonwealth must prove the following two elements beyond a reasonable doubt:

1. Dft committed an act of sex trafficking, which I will define in a moment, or received money or anything of value as a result of an act of sex trafficking;³ and
2. That Dft did so knowingly.⁴

¹ G.L. c. 265, § 50 states: "(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished....

"(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished"

² Although the Commonwealth must prove beyond a reasonable doubt that there was a victim, it need not prove the identity of that person as an element of the offense. *Commonwealth v. Fan*, 490 Mass. 433, 448 (2022).

³ The judge should instruct only on the applicable subclause. See *Commonwealth v. Dabney*, 478 Mass. 839, 853, n.11, cert. denied, 139 S. Ct. 127 (2018). If the defendant is the only person who engaged in the act of sex trafficking, then the Commonwealth must prove the defendant guilty of sex trafficking under the first part of the first element, in order to prove the defendant guilty of the second part of the first element, receiving anything of value as a result of the sex trafficking. Ordinarily, the second part of the first element will only be relevant or necessary if a person other than the defendant committed the act of sex trafficking, but the defendant knowingly benefitted from it. The second part of the first element is different from, and sometimes charged together with, the offense of deriving support from prostitution, G.L. c. 272, § 7, which does not require proof of an act of sex trafficking. See *Commonwealth v. Brown*, 481 Mass. 77, 89–90 (2018).

⁴ A judge may choose to define knowingly after defining "obtain" below as follows: An act is done knowingly if it was done voluntarily or intentionally and not by accident or mistake.

An “act of sex trafficking” means an act that subjects, recruits, entices, harbors, transports, provides, or obtains AvM⁵ [, or that attempts to subject, recruit, entice, harbor, transport, provide, or obtain AvM,]⁶ by any means to engage in commercial sexual activity, [a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272],⁷ or causes

⁵ The act of sex trafficking may be proved in a number of different ways. The judge should charge on the theories pressed at trial and delete the others. The judge should discuss the theories of the defendant’s potential culpability during the charge conference.

⁶ In *Fan*, the Supreme Judicial Court noted that “enabling” or “causing” prostitution are “short-hand means of describing the various ways in which a person may violate the human trafficking statute as enumerated in G.L. c. 265, § 50(a).” 490 Mass. at 448, citing *Dabney*, 478 Mass. at 857. A judge may choose to use the “enabling” or “causing” language in describing the first element, and then use the statutory language to define those terms.

G.L. c. 265, § 50(a) uses the term “another person” for alleged victim. Factual impossibility (e.g., an undercover operation where a police officer poses as a provider or consumer of commercial sexual services) is not a defense to sex trafficking. *Commonwealth v. Garafolo*, 495 Mass. 746, 749-750 & n.6 (2025).

⁷ Where appropriate, the judge should instruct the jury on the elements of the alleged crime involving child pornography or obscene adult pornography pursuant to G.L. c. 272, as shown below. Both of these crimes are defined by statute, as follows:

G.L. c. 272, § 29C defines child pornography as a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom a person knows or reasonably should know to be under the age of 18 years of age and such child is:

- (i) actually or by simulation engaged in any act of sexual intercourse with any person or animal;
- (ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
- (iii) actually or by simulation engaged in any act of masturbation;
- (iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal;
- (v) actually or by simulation engaged in any act of excretion or urination within a sexual context;
- (vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
- (vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child.

<continued...>

Avm to engage in commercial sexual activity [a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272].

As used here:

- "Subject" means to cause.
- "Recruit" means to persuade a person to join a scheme, organization, or enterprise;⁸ and "entice" means to attract or to tempt.^{9,10}
- "Harbor" means to shelter or to conceal.
- "Transport" means to take or convey.
- "Provide" means to make available.
- "Obtain" means to take possession or control of someone.¹¹

Pornography depicting persons over 18 is unlawful only if is it "obscene." See G.L. c. 272, § 29. Matter is "obscene" if taken as a whole it:

- (1) appeals to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed;
- (2) depicts or describes sexual conduct in a patently offensive way; and
- (3) lacks serious literary, artistic, political or scientific value.

See G.L. c. 272, § 31.

⁸ *Garafalo*, 495 Mass. at 752 & n.10.

⁹ *Id.* at 751; *Dabney*, 478 Mass. at 856 ("one may entice, for example, simply by making an attractive offer").

¹⁰ "[A]lthough the terms 'entice' and 'recruit' require proof that the defendant engaged in conduct aimed at alluring, attracting, tempting, or persuading the victim to engage in commercial sexual activity, . . . these acts [do not] require proof of the victim's state of mind. . . . [T]he central focus of the statute is the defendant's conduct and the defendant's state of mind; whether the victim was predisposed or otherwise willing to engage in commercial sexual activity is not an element of the crime proscribed." *Garafalo*, 495 Mass. at 752. "A person may 'entice' or 'recruit' another to engage in commercial sexual activity through, for example, words or acts of encouragement, assistance, incentives, gifts, money, housing, benefits, promises, drugs, or alcohol, without engaging in threats of serious harm (coercion), physical force, or fraud." *Id.* at 753.

¹¹ *Id.* at 754 & 755 n.13. A person who only responds to an an advertisement for, and agrees to pay for, sexual services by a sex worker acting independently (a so-called "John") does not "entice," "recruit," or "obtain" the sex worker, within the meaning of the sex-trafficking statute. *Id.* at 761.

- An act is done “knowingly” if it was done voluntarily or intentionally and not by accident or mistake.

< If the case involves commercial sexual activity, add the next two paragraphs.>

Commercial sexual activity is any sexual act involving physical contact for which anything of value is given, promised to, or received by any person.¹²

Sexual conduct is human masturbation, sexual intercourse actual or simulated, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship. Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse.¹³

¹² G. L. c. 265, § 49; *Commonwealth v. McGhee*, 472 Mass. 405, 419 (2015). In a case where the issues of the lack of evidence of force or coercion are raised by the defendant a judge may consider giving the following instruction: The Commonwealth does not have to prove that Dft used “coercion” or “force” to compel Avm to engage in commercial sexual activity. *Dabney*, 478 Mass. at 763.

¹³ G.L. c. 272, § 31.

<If the case involves a sexually-explicit performance, add the next four paragraphs.>

A sexually-explicit performance is an unlawful¹⁴ live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.¹⁵

A sexually explicit performance is unlawful if it is "obscene." An "obscene" performance is one that depicts sexual conduct in a patently offensive way. Offensiveness is to be determined with reference to contemporary community norms. While nude dancing is protected speech, it may lose its protected status when it involves "hard-core" sexual conduct. Conduct which has been found obscene by courts include patrons grabbing at a dancer, lewd exposure of the genitals, particularly when accompanied by lewd conduct, and masturbation or fondling oneself.¹⁶

Sexual conduct is human masturbation, sexual intercourse actual or simulated, normal or perverted, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship. Sexual intercourse is simulated when it

¹⁴ A sexually explicit performance is unlawful if it is "obscene" as defined in G.L. c. 272, § 31. See G.L. c. 272, § 29. An "obscene" performance is one that depicts sexual conduct in a patently offensive way. Offensiveness is to be determined with reference to contemporary community norms. While nude dancing is protected speech, it may lose its protected status when it involves "hard-core" sexual conduct. Conduct which has been found obscene by courts include patrons grabbing at a dancer, lewd exposure of the genitals, particularly when accompanied by lewd conduct, and masturbation or fondling oneself. *New Palm Gardens v. Alcoholic Beverages Control Commission*, 11 Mass. App. Ct. 785, 794–795 (1981); *Commonwealth v. Kocinski*, 11 Mass. App. Ct. 120, 122–122 (1981); see also G.L. c. 272, § 31 (definition of "obscene").

¹⁵ G. L. c. 265, § 49.

¹⁶ *New Palm Gardens v. Alcoholic Beverages Control Commission*, 11 Mass. App. Ct. 785, 794–795 (1981); *Commonwealth v. Kocinski*, 11 Mass. App. Ct. 120, 122–123 (1981); see also G.L. c. 272, § 31 (definition of "obscene").

depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse.¹⁷

A “prurient interest” is a shameful or morbid interest in nudity, sex, or excretion, an unhealthy interest about sexual matters which is repugnant to prevailing moral standards.¹⁸

< If the case involves production of child pornography, add the next paragraph and whichever of the subsequent bullets are relevant.¹⁹>

Child pornography is unlawful. Child pornography includes any negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom a person knows or reasonably should know to be under the age of 18 years of age and such child is:

- actually or by simulation engaged in any act of sexual intercourse with any person or animal;
- actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
- actually or by simulation engaged in any act of masturbation;
- actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal;
- actually or by simulation engaged in any act of excretion or urination within a sexual context;
- actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or

¹⁷ G.L. c. 272, § 31.

¹⁸ Massachusetts District Court Jury Criminal Instruction 7.180.

¹⁹ The judge should charge only on the theory pressed at trial.

- depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or a fully or partially developed female breast of the child.

< If the case involves production of unlawful adult pornography, add the following paragraph.>

Pornography is unlawful if it is obscene. Matter is “obscene” if, taken as a whole it: (1) appeals to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed; (2) depicts or describes sexual conduct in a patently offensive way; and (3) lacks serious literary, artistic, political, or scientific value. A “prurient interest” is a shameful or morbid interest in nudity, sex, or excretion, an unhealthy interest about sexual matters which is repugnant to prevailing moral standards.²⁰

< The following three paragraphs apply in all human sex trafficking cases.>

The Commonwealth is not required to prove that Dft used force or coercion in committing the alleged acts.²¹

The Commonwealth is also not required to prove that Avm did not consent. It is irrelevant whether or not Avm consented to engage in commercial sexual activity, [a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272].²²

To act knowingly means to act with an awareness of the unlawful act. For example, a taxi driver who transports a person to a hotel where she engages in commercial sexual activity does not “knowingly” transport the person to engage in commercial sexual activity unless the taxi driver actually knows that the person was going to the hotel to engage in the commercial sexual activity.

²⁰ Massachusetts District Court Jury Criminal Instruction 7.180.

²¹ *Dabney*, 478 Mass. at 852-854; *McGhee*, 472 Mass. at 415–416.

²² *McGhee*, 472 Mass. at 416.

Sex Trafficking of a Person Under 18 <supplemental instruction>²³

Sex trafficking of a person under 18 has one additional element to those required for sex trafficking.

3. Avm was under 18 years of age.

This last element is self-explanatory.

²³ G.L. c. 265, § 50(b) states: "Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished."