

VIOLATION OF AN ABUSE PREVENTION ORDER

The defendant is charged with knowingly violating an abuse prevention order issued by a court. Section 7 of chapter 209A of our General Laws provides, in substance, that it is unlawful to violate an order issued pursuant to that chapter which orders the defendant:

(to refrain from abusing the person who requested the order) (or that person's child);

(or) (to refrain from contacting the person who requested the order (or that person's child) unless authorized by a court;

(or) (to stay a particular distance away from the person who requested the order) (or that person's child);

(or) (to vacate and remain away from the [household] [multiple family dwelling] of the person who requested the order);

(or) (to vacate and remain away from the work place of the person who requested the order).

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

First: That a court had issued an order pursuant to chapter 209A of

our General Laws which ordered the defendant:

(to refrain from abusing [name of plaintiff or child]);

(or) (to refrain from contacting [name of plaintiff or child] (directly or indirectly) unless authorized by a court);

(or) (to stay a particular distance away from the person who requested the order [or that person's child]);

(or) (to vacate and remain away from the household or multiple family dwelling of [name of plaintiff or child]);

(or) (to remain away from the workplace of [name of plaintiff or child] [located at [address]]).

***Second:* That such order was in effect on the date when its violation allegedly occurred;**

***Third:* That the defendant knew that the pertinent term(s) of the order (was) (were) in effect, either by having received a copy of the order or by having learned of it in some other way;**

and *Fourth:* That the defendant violated the order by:

(abusing [name of plaintiff or child]);

(or) (contacting [name of plaintiff or child] [directly or indirectly] unless authorized by a court);

- (or) (failing to stay a particular distance away from the person who requested the order [or that person’s child]);**
- (or) (failing to vacate and remain away from the household or multiple family dwelling of [name of plaintiff or child])**
- (or) (failing to remain away from the workplace of [name of plaintiff or child] [located at [address]]).**

Here the jury must be instructed on “Knowledge” (Instruction 3.140).

Commonwealth v. Gordon, 407 Mass. 340, 553 N.E.2d 915 (1990).

SUPPLEMENTAL INSTRUCTIONS

1. “Abuse.”

By “abuse” the law means:

- (causing or attempting to cause another person physical harm);**
- (or) (placing another person in fear of immediate serious physical harm);**
- (or) (causing another person by force or threat or duress to engage involuntarily in sexual relations).**

2. *Accidental contact.*

If there is evidence that suggests that the alleged (contact) (encounter) may have occurred by accident, the Commonwealth must prove one of two things beyond a reasonable doubt: either that the alleged (contact) (encounter) did not occur by accident or, if it did occur by accident, that the defendant failed to take reasonable steps to end the accidental (contact) (encounter).

An accident is an unexpected happening that occurs without intention or design on a person's part. A (contact) (encounter) was accidental if the defendant did not have reason to know or believe that *[name of plaintiff or child]* would be present at that time or place.

If a (contact) (encounter) occurred by accident, the defendant was required to take reasonable steps to end the (contact) (encounter). The defendant must be found not guilty unless the Commonwealth proves beyond a reasonable doubt that he (she) could have taken steps to terminate the accidental (contact) (encounter) but unreasonably delayed or failed to do so.

The Commonwealth is not required to prove that the defendant intended to violate the abuse prevention order. It must prove only that he (she) intended the act which would constitute a violation.

So if the evidence raises the possibility that the defendant did not know or could not reasonably have known that *[name of plaintiff or child]* would be present at the time and place alleged, then the Commonwealth must prove beyond a reasonable doubt either that the (contact) (encounter) was *not* accidental or, if it was accidental, that the defendant failed to take reasonable steps to end it.

If the Commonwealth has proved beyond a reasonable doubt each element of the offense and also proved beyond a reasonable doubt either that the (contact) (encounter) was *not* accidental or that the defendant did not take reasonable steps to end an accidental encounter, you should return a verdict of guilty.

If the Commonwealth failed to prove beyond a reasonable doubt any element of the offense, you must return a verdict of

not guilty. In addition, if the Commonwealth failed to prove beyond a reasonable doubt either that the (contact) (encounter) was *not* accidental or that the defendant unreasonably delayed in ending an accidental (contact) (encounter), you must return a verdict of not guilty.

If a person subject to a restraining order happens upon a protected person whom he or she did not and could not reasonably know to be present at that time and place, the party subject to the order must make reasonable efforts to terminate the accidental encounter. *Commonwealth v. Stoltz*, 73 Mass. App. Ct. 642 (2009). When there is evidence that fairly raises the issue of accident, the burden falls on the Commonwealth to disprove it. See *Commonwealth v. Zezima*, 387 Mass. 748, 756, 443 N.E.2d 1282 (1982); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 583, 571 N.E.2d 411 (1991) (“Where the evidence raises the possibility of accident, the defendant is, as matter of due process, entitled upon request to a jury instruction that the Commonwealth has the burden of proving beyond a reasonable doubt that the act was not accidental”).

See notes to Instruction 9.100 (Accident).

3. *Incidental contact.* If there is evidence that suggests that the alleged contact may have been incidental to a legitimate, lawful activity such as (e.g., contacting a child, going to work, going to school), then the Commonwealth must prove beyond a reasonable doubt that the alleged violation was not incidental to that permitted activity. Conduct that is incidental to legitimate, lawful activity is conduct which is connected to that activity — conduct which is

purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity.

So, for example, if a person subject to an abuse prevention order waited in the only public hallway of a courthouse for the start of a hearing, and the person protected by that order was waiting somewhere else in that same public hallway, that conduct would be incidental to a legitimate, lawful activity — attending the court hearing. Although there might be a stay away order in effect, there would be no violation of that order because the conduct was purely a natural and reasonable outgrowth of the scheduling of the hearing.

On the other hand, if the subject entered the public hallway and intentionally stood directly next to the plaintiff when the subject could have stood elsewhere, that would violate the order because it was not incidental or necessary to the lawful activity.

The Commonwealth may prove that the defendant's conduct was not incidental to a lawful activity by proving that the alleged violation was not purely or naturally a reasonable outgrowth or necessary part of that legitimate, lawful activity.

Put another way, the Commonwealth must prove that the defendant's conduct was not a good faith attempt by the defendant to do that which was permitted.

In deciding whether there was any contact which violated the abuse prevention order, you may consider any evidence relevant to: (1) the nature and purpose of any contact; (2) the number of contacts over time; (3) the length of any contact; and (4) the substance and character of any statements made during any contact.

You should consider all the evidence in the case to decide whether any contact was made in good faith for a legitimate reason or whether that reason was merely a pretext or excuse for contacting the protected party, [name of plaintiff or child] .

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also that the violation was not committed incidental to a legitimate, lawful activity, you should return a verdict of guilty. If the Commonwealth has failed to prove beyond a reasonable doubt any of the elements of the offense or failed to prove beyond a

reasonable doubt that the contact(s) was (were) not incidental to a legitimate, lawful activity, you must return a verdict of not guilty.

Commonwealth v. Silva, 431 Mass. 194, 726 N.E.2d 408 (2000); *Commonwealth v. Consoli*, 58 Mass. App. Ct. 734, 738 (2003); *Commonwealth v. Stewart*, 52 Mass. App. Ct. 755, 756 N.E.2d 22 (2001); *Commonwealth v. Leger*, 52 Mass. App. Ct. 232, 752 N.E.2d 799 (2001); *Commonwealth v. Mendonca*, 50 Mass. App. Ct. 684, 687 n.8, 740 N.E.2d 799 n.8 (2001).

4. Violation through third party.

If there is evidence that the conduct by which the defendant is alleged to have violated the abuse prevention order resulted from the action of a third person, the Commonwealth must prove beyond a reasonable doubt that the defendant had an intent, or shared an intent with the third person, to do an act that could result in a violation of the protective order. The defendant is not guilty unless he (she) had such an intent or shared intent. The defendant cannot be found guilty for an act of another person which he (she) did not intend and over which he (she) had no control.

The Commonwealth is not required to prove that the defendant specifically intended to violate the abuse prevention

order. It is required only to prove that the defendant intended, or shared an intent with the third party, that an act be done which violated the order.

If the Commonwealth has proved beyond a reasonable doubt each of the elements of the offense and also that the defendant had an intent or shared intent with a third person to do an act that could result in a violation of a protective order, you should return a verdict of guilty. If the Commonwealth failed to prove beyond a reasonable doubt any element of the offense or failed to prove beyond a reasonable doubt that the defendant intended or shared the intent of a third party to commit such an act, you must return a verdict of not guilty.

If appropriate, here instruct on inferences (Instruction 3.100).

Commonwealth v. Collier, 427 Mass. 385, 389, 693 N.E.2d 673, 676 (1998) (where act constituting violation was committed by third party, Commonwealth must prove act was intended by defendant but not that defendant intended to violate order). See also Commonwealth v. Russell, 46 Mass. App. Ct. 307 705 N.E.2d 1144 (1999).

NOTES:

1. **Related violations of abuse restraining orders.** In appropriate cases, the model instruction may be adapted to indicate that it is now a criminal offense under G.L. c. 209A to violate an order to surrender any firearm, firearms license or firearms identification card, or to violate an abuse prevention order issued by another state. The model instruction may also be modified as appropriate for violations of restraining, vacate or no-contact orders entered under G.L. c. 208, §§ 18, 34B or 34C, G.L. c. 209, § 32, or G.L. c. 209C, §§ 15 or 20.

The model instruction should also be adapted in a case involving the aggravated offense of violating an abuse

prevention order in retaliation for the plaintiff's having reported the defendant to the Department of Revenue for failing to pay child support or for the establishment of paternity.

2. **Attempted physical harm requires overt act.** The nature of an attempt to cause a person physical harm, "like criminal attempt, is predicated on an unsuccessful but affirmative effort at commission of the underlying offense." *Commonwealth v. Fortier*, 56 Mass. App. Ct. 116, 775 N.E. 2d 785 (2002). "Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd." *Fortier* at 122, citing *Commonwealth v. Kennedy*, 170 Mass. 18, 20-21 (1897).

3. **Service or knowledge of extended order.** A defendant may be prosecuted for violating an order that was extended unchanged after a "10-day" hearing, despite not being served with the extended order, if he had been served with the prior ex parte temporary order, which provided sufficient notice that his failure to attend the scheduled hearing would result in the continuation of the temporary order by operation of law. *Commonwealth v. Delaney*, 425 Mass. 587, 682 N.E.2d 611 (1997). However, the same is not true of successive annual extensions of the order; failure to serve a copy of the current extended order is fatal where there have been successive annual extensions unless the Commonwealth proves constructive knowledge of the extension. *Commonwealth v. Molloy*, 44 Mass. App. Ct. 306, 690 N.E. 2d 836 (1998).

4. **Intent to violate order.** The statute does not require any specific mens rea or intent to violate the order, merely knowledge of and violation of the order. *Commonwealth v. Delaney*, 425 Mass. 587, 682 N.E.2d 611 (1997).

5. **Stalking.** Violating a G.L. c. 209A order (G.L. c. 209A, § 7) is a lesser included offense of stalking in violation of that same 209A order (G.L. c. 265, § 43[b]). As a result, a defendant may not be prosecuted for the latter offense based on incidents already prosecuted as violations of the 209A order. *Edge v. Commonwealth*, 451 Mass. 74, 76-77, 883 N.E.2d 928, 931 (2008).