

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

2014 SITTING

NO. SJC-11568

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COMMONWEALTH OF MASSACHUSETTS,

APPELLEE,

V.

JOSEPH SULLIVAN,

APPELLANT.

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ON APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT

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BRIEF FOR THE COMMONWEALTH

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ISSUE PRESENTED

Did the judge properly deny the motion for a required finding of not guilty on the charge of accosting or annoying a person of the opposite sex, where there was ample evidence that the defendant's acts and language were both "offensive" and "disorderly," regardless of whether his language was "sexually explicit," and where there was evidence, in any event, that the accosting took place in a context that implied "sexual" impropriety?

STATEMENT OF THE CASE

Prior Proceedings

On November 27, 2007, a Middlesex grand jury returned a three count indictment (MICR2007-1581) charging the defendant with attempt to commit a crime, to wit: kidnapping ("attempted kidnapping"), G. L. c. 274, § 6; accosting or annoying a person of the opposite sex, G. L. c. 272, § 53; and assault to commit a felony, to wit: kidnapping, G. L. c. 265, § 29. (R.A. 5, 13-18).<sup>1</sup>

On December 15, 2008, trial commenced before Justice Hiller B. Zobel and a jury. (R.A. 4; Tr. I). At the close of the Commonwealth's case, and again at the close of the evidence, Justice Zobel denied the defendant's motions for required findings of not guilty. (Tr. II: 50-55, 86).

On December 16, 2008, the jury convicted the defendant of accosting or annoying a person of the opposite sex and acquitted him of assault with intent to kidnap. (R.A. 8). The following day, December 17,

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<sup>1</sup> The record appendix will be cited, "R.A. [page]." The defendant's brief will be cited "D.Br. [page]." The three volume trial transcript will be cited by volume and page, e.g., "Tr. II: 67." The transcripts of post-trial hearings will be cited by date and page, e.g., "Tr. 12/22/08: 9."

2008, the jury convicted the defendant of attempted kidnapping. (Tr. III: 3-7).

On December 22, 2008, Justice Zobel "provisionally" sentenced the defendant to a term of 3 years to 3 years and 1 day in state prison on the attempted kidnapping conviction. (R.A. 8; Tr. 12/22/08: 9-10). On June 18, 2009, after argument, Justice Zobel denied the defendant's renewed motions pursuant to Mass. R. Crim. P. 25(b) for required findings of not guilty (after the verdict), ordered the "provisional" sentence revised and revoked, and sentenced the defendant to a term of 3-5 years in state prison on the attempted kidnapping conviction and a "from an after" term of 3 years probation on the accosting or annoying conviction. (R.A. 9; Tr. 6/18/09: 45).

The defendant filed a timely notice of appeal from the judgments on June 18, 2009. (R.A. 9; Tr. 6/18/09: 47). The case was docketed in the Appeals Court on October 12, 2010. (R.A. 11).

On October 22, 2010, the direct appeal was stayed to permit the defendant to file a motion for new trial. (R.A. 11). On November 2, 2010, the defendant filed his motion for new trial. (R.A. 9, 62-127). After

briefing and argument, Justice Sandra L. Hamlin denied the motion and issued a memorandum of decision and order on March 9, 2012. (R.A. 12, 205-232).

On March 26, 2010, the defendant filed a notice of appeal from the order denying his motion for new trial. (R.A. 12). On April 17, 2012, the appeals were consolidated, A.C. No. 10-P-1791.

On July 10, 2013, the Appeals Court affirmed the conviction for attempt to commit a crime but vacated the conviction for accosting or annoying a person of the opposite sex. Commonwealth v. Sullivan, 84 Mass. App. Ct. 26, 32 (2013) (a copy of which is included in the Addendum).

On November 1, 2013, the defendant's application for further appellate review was denied and the Commonwealth's application for further appellate review was allowed; the Court ordered that "the scope of the further review shall be limited to issues regarding the conviction under G. L. c. 272, § 53 (accosting or annoying persons of the opposite sex)." Commonwealth v. Sullivan, FAR-21841.

The case was entered on the docket of the Supreme Judicial Court on November 7, 2013.

Statement of the Facts

The Commonwealth's Case

The victim was a graduate student at M.I.T. doing research and teaching in the field of physical chemistry. (Tr. I: 50). She was approximately 5'3" tall, weighed 110 pounds, and had very short hair. (Tr. I: 63). On the evening of Friday, September 28, 2007, she went to a Tae Kwon Do class at the Zesiger Center at M.I.T. which lasted from 7 p.m. until 9 p.m. (Tr. I: 51). She stayed after class for about thirty minutes. (Tr. I: 51). When she left the Zesiger Center, she was still wearing her Tae Kwon Do uniform which was bright white in color. (Tr. I: 51-52). She was carrying her Tae Kwon Do duffle bag over her shoulder across her chest and wearing a backpack with straps on both shoulders. (Tr. I: 52).

The victim left the Zesiger Center alone to begin the fifteen to twenty minute walk home. (Tr. I: 52). She walked up Massachusetts Avenue past two streets and a car came towards her. (Tr. I: 53, 80). Massachusetts Avenue is "fairly well lit." (Tr. I: 81). The oncoming car "swerved" into a spot that was not a parking spot. (Tr. I: 53). She identified the defendant, Joseph Sullivan, as the person who was

driving the car. (Tr. I: 64). She thought the defendant was going to ask for directions, so she took a step towards the car. (Tr. I: 53). The defendant rolled down the window and said, "hey little girl, you look so tired. Come on over. Talk to me. Let's you know, let's talk." (Tr. I: 53). When he said those words, the pitch of his voice was "much higher than his normal tone of voice, more like . . . what you use to bribe someone." (Tr. I: 54). When the victim heard those words, she took a step away and started walking away because she "didn't want to have anything to do with that situation." (Tr. I: 54).

The defendant got out of the car walked quickly towards the victim saying, "hey little girl, come on over. I want to talk to you." (Tr. I: 54, 92). He left the car running. (Tr. I: 84). The victim was walking slowly because she was very scared and so he was able to come within an arm's length of her. (Tr. I: 54). (Tr. I: 93). She got a good look at the defendant and described him as having long, greasy, hair, and thick dark rimmed glasses. (Tr. I: 64, 96). The victim was in the middle of the sidewalk with the defendant on her right side and a building on her left side. (Tr. I: 55). As he told her that she "looked

tired," she tried to get away. (Tr. I: 55). In order to do so, she had to twist her left shoulder to avoid touching him or the wall. (Tr. I: 56). The defendant then got back into his car and started driving towards Boston, the same direction in which he had been heading before he had stopped. (Tr. I: 53, 55).

But as the victim watched, the defendant suddenly swerved and turned around. (Tr. I: 57). Seeing this, the victim turned the corner onto Landsowne Street. (Tr. I: 57). Landsowne Street was not well lit, but it was better lit than Albany Street, which was an alternate route she could have taken to go home. (Tr. I: 81, 82). There were no other pedestrians or cars on the road. (Tr. I: 57, 58). The defendant drove through a gas station parking lot, at the corner of Landsowne Street and Massachusetts Avenue, in order to stop in front of her again. (Tr. I: 57). He stopped, "jumped out of his car" and started walking towards her. (Tr. I: 58). He kept the car running. (Tr. I: 58). Now, the defendant was "insistent," demanding repeatedly that she "get in the car." (Tr. I: 57-58, 62, 65). He was so close to her that she could smell his body odor, so close that he could have "put his arms around [her]." (Tr. I: 62).

The defendant then "took his arm the way you ... would put your arm around someone's shoulder's to lead them somewhere," in order to guide her into his car (Tr. I: 62). Resisting, she "slid[] past him," then moved quickly away, ostentatiously looking at the license plate number on the front of the defendant's car and repeating it to herself aloud. (Tr. I: 62-65). The defendant followed closely behind before he "stormed off," got in his car and "started zooming away." (Tr. I: 66).

The victim was "really, really, really scared" as she wrote down a description of the defendant and his license plate number so she would not forget and ran to her dormitory. (Tr. I: 66). She asked the person at the front desk to call the police. (Tr. I: 67).

Cambridge Police Detective James Diggins spoke to the victim. (Tr. II: 32). He ran the registration number of the license plate, No. 11HC42. (Tr. II: 33). He learned that the registered owners of the car were Joseph Sullivan and Dorothy Goldman. (Tr. II: 34). He also saw their photographs. (Tr. II: 34). Detective Diggins matched the RMV photograph to the victim's description and requested that a photo array be compiled. (Tr. II: 36).

On October 2, 2007, Cambridge Police Detective Michael Regal showed the victim the photo array. (Tr. I: 68; Tr. II: 39). Detective Regal read the victim instructions as to how the array was going to be conducted and presented the photographs sequentially. (Tr. I: 69). The victim looked through the photographs, identified the defendant and put her initials and the date on the back of the defendant's photograph. (Tr. I: 70).

The victim identified the defendant in Court, noting that there were differences in the way the defendant had appeared in the photograph that she had selected from the array and the way that the defendant appeared on September 28, 2007. (Tr. I: 72).

#### The Defense

The defendant's theory of the case was that he had been misidentified as the perpetrator and that the evidence, moreover, was legally insufficient. (Tr. I: 41-45). The defendant called one witness, a private investigator who described the layout of the vicinity of the crime, as it had appeared to him approximately one year after the crime had occurred. (Tr. II: 56-82).

## ARGUMENT

I. THE JUDGE PROPERLY DENIED THE MOTION FOR REQUIRED FINDING OF NOT GUILTY, BECAUSE THERE WAS AMPLE EVIDENCE SUFFICIENT TO PROVE THE ELEMENTS OF ACCOSTING OR ANNOYING A PERSON OF THE OPPOSITE SEX.

The defendant argues that the judge erred in denying his motions for a required finding of not guilty. (D.Br. 11-12, 15). This argument is meritless.

Under the familiar standard, this court reviews the evidence to determine whether, when viewed in the light most favorable to the Commonwealth, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979) (emphasis in original).

A. The Statute Requires Evidence That The Defendant's Conduct Was Both "Offensive" and "Disorderly."

G. L. c. 272, § 53(a) provides, in pertinent part, that "persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex ... shall be punished..." To support an accosting or annoying conviction, the Commonwealth must present evidence that the conduct at issue was both "offensive" and "disorderly." Commonwealth v. Peace Chou, 433

Mass. 229, 231 (2001); Commonwealth v. Lombard, 321

Mass. 294, 296 (1947).

This Honorable Court has defined "offensive" acts or language, G. L. c. 272, § 53(a), as those that cause "displeasure, anger or resentment." Commonwealth v. Cahill, 446 Mass. 778, 781 (2006). This Court in Cahill indicated that such acts or language "especially" can include those that are "repugnant to the prevailing sense of what is decent or moral." Id., citing *Black's Law Dictionary* 1113 (8<sup>th</sup> ed. 2004) ("esp.") and Commonwealth v. Whiting, 58 Mass. App. Ct. 918, 920 (2003) (same).

Contrary to what is suggested in the opinion of the Appeals Court in this case below, neither this Honorable Court (nor the Appeals Court) has ever defined the "offensive" prong of the accosting or annoying statute so as include "especially" acts or language repugnant to the prevailing sense of what is decent or moral, see *id.*, the Court has never held that this factor is an actual element of the offense, let alone construe the statute's "reach" so as require proof of "sexually explicit language or acts" or "a sexual context." See Commonwealth v. Sullivan, 84 Mass. App. Ct. at 32.

In addition to being "offensive," the acts or language must also be "disorderly." G. L. c. 272, § 53(a). "Disorderly" acts or language for purposes of accosting or annoying includes, *inter alia*, either "threatening" or creating a "physically offensive condition for no legitimate purpose of the actor...." Chou, 433 Mass. at 233 (although it does not matter "whether the resulting harm is suffered in public by the public or in private by an individual").

This Court has held that "threatening" behavior for purposes of accosting or annoying can take place "even in the absence of an explicit statement of an intention to harm the victim as long as circumstances support the victim's fearful or apprehensive response." Chou, 433 Mass. at 235.

The Appeals Court has concluded that conduct that creates a "physically offensive condition" does not require actual physical contact, only that it be "physically offensive." Commonwealth v. LePore, 40 Mass. App. Ct. 543, 546-549 (removal of victim's bedroom window screen to peep at her was "physically offensive" under the disorderly person statute; Court reasoned, "the disorderly person statute may lawfully be applied to a 'Peeping Tom,' an activity that may

cause alarm to the person peered at, as it did in the instant case, and thereby makes a breach in the public peace."), review denied, 423 Mass. 1104 (1996). See Commonwealth v. Ramirez, 69 Mass. App. Ct. 9, 18 n.11 (2007) ("Though physically offensive conduct can form the basis of both a disorderly person offense under G. L. c. 272, § 53, and an accost and annoy offense under the same statute, the elements of the two crimes are somewhat different. Nonetheless, given their clear similarities and genesis in the same statute, the Supreme Judicial Court has looked to at least one case discussing the former when analyzing the sufficiency of evidence for a conviction under the latter, and we do the same here"), citing Cahill, 446 Mass. at 782-783 (where "physically offensive" was supported by evidence of the defendant "touching" and/or "grazing" the victim's body and hugging her in front of store customers).

B. There Was Sufficient Evidence For The Jury Reasonably To Infer That The Defendant's Conduct Was "Offensive."

There was evidence that the defendant's conduct was objectively "offensive." G. L. c. 272, § 53. A reasonable juror could have concluded that the defendant's persistent, frightening efforts to lure,

then to compel, the victim to enter his car were "offensive," because this conduct could have caused a reasonable woman to have experienced "displeasure, anger, or resentment." Cahill, 446 Mass. at 781.

The evidence was that the defendant had approached this young, petite, solitary, woman at night, while she was walking alone with no other pedestrian or vehicle traffic in the area. He called out to her, "little girl" asking, then demanding, that she get into his car. He actually got out of the car and approached her on foot. Twice he placed himself in a position uncomfortably close to the victim, causing her to have to maneuver away from the defendant in order to avoid physical contact and elude him. This was not a simple offer of help to a laboring pedestrian from a "good Samaritan" motorist. The defendant continued to follow the victim even when it was clear that she wanted him to go away. The victim described his tone of voice as "bribing" at first. Eventually his tone escalated to an angry and repeated demanded that the victim get into his car. Physically, he nearly trapped her against a wall that ran along the sidewalk, while trying to shepherd her into his running car, forcing the victim to twist her body to escape him.

A reasonable juror readily could have concluded from this evidence that a reasonable woman in the victim's position would have experienced "displeasure, anger or resentment," Cahill, 446 Mass. at 781, "especially," see id., given the powerful overtones of criminal intent that the defendant communicated by his actions, tone and language. The defendant's acts and language were sufficient to establish both the crime of attempted kidnapping and "offensive" conduct under the accosting or annoying statute, conduct that was actually criminal, in addition to "offensive," and therefore necessarily "repugnant to prevailing sense of what is decent or moral," id., as well.

C. There Was Sufficient Evidence For The Jury Reasonably To Infer That The Defendant's Conduct Was "Disorderly."

There was also sufficient evidence for the jury to conclude that the defendant's conduct was "disorderly."

G. L. c. 272, § 53.

The jury reasonably could have concluded that defendant's acts and language were "threatening" and such as to create a "physically offensive condition" for "no legitimate purpose" of the defendant. See Chou, 433 Mass. at 234 (posting flyers with victim's picture and sexually explicit language was

"threatening" even though no evidence of imminent threat of physical force); Commonwealth v. Moran, 80 Mass. App. Ct. 8, 10 (2011) (defendant's close proximity to victim, the statement "hi, nanny," and simulated masturbation was "physically offensive").

The victim herself certainly experienced the defendant's conduct as threatening and physically offensive. She was very scared, shaking, and immediately reported the incident. A reasonable juror could have concluded that the defendant's conduct was objectively threatening and physically offensive too. The defendant called out "little girl," in a tone of voice the victim described as like "what you use to bribe someone." (Tr. I: 54). His efforts to kidnap her were frightening and objectively "threatening," despite the fact that he did not specifically give voice to his intent to kidnap. The defendant exited his car not once but twice and approaching her very closely, leaving the door open and the car running. He very nearly trapped the petite young woman against a wall, forcing her to "scootch" her body sideways to elude him. He used his body, and the wall running along the sidewalk, to try to shepherd the victim into his waiting car.

This was not mere speech; the defendant's disturbing "language" was combined with overtly threatening and physically offensive "acts." This can be seen in his insistent demand that the victim "get in" his running car during the second encounter, coupled with his positioning of his body on one side of her which nearly trapped her against the wall that ran along the sidewalk, followed by him taking "his arm the way you ... would put your arm around someone's shoulder's to lead them somewhere," in order to try to guide her into his car, which cause the victim to "scootch" and slide "past him sideways" in order to avoid his touching her and so that he could move away from him. (Tr. I: 62-63). The defendant's "language" ("get in", Tr. I: 57-58, 62, 65) was coupled with menacing "acts" and although the victim moved away in order to prevent him from touching her, the touching was apparently imminent (and certainly unconsented-to). The jury could have inferred this was "threatening," even to the point of constituting an assault. See Chou, 433 Mass. at 234, citing Robicheau, 421 Mass. at 183 (offensive speech in context of violating protective order under G.L. c. 209A "placed the victim in reasonable apprehension of imminent serious physical

harm [and therefore] is equivalent to the crime of assault").

The jury also could have concluded that this combination of "acts" and "language" was "disorderly," because it created a "physically offensive condition" for the victim, "for no legitimate purpose" of the defendant. See Commonwealth v. Sholley, 432 Mass. 721, 727-728 (2000), cert. denied, 532 U.S. 980 (2001) & cases cited. The defendant's conduct was such as could readily have created a breach of the peace. See LePore, 40 Mass. App. Ct. at 548. His conduct in nearly trapping her against a wall that ran along the sidewalk, forcing her to twist and "scotch" away from his grasp under those conditions, with nobody around to help her, was at least as "physically offensive" as the evidence of the defendant "grazing" the victim's body and grasping her about the neck and shoulders in front of customers, as in Cahill, 446 Mass. at 789-790.

Therefore, it was for the jury to consider whether this conduct amounted to accosting or annoying a person of the opposite sex. Latimore, 378 Mass. at 677-678. The judge properly denied the motion for a required finding of not guilty. Mass. R. Crim. P. 25. There was no error.

D. Although "Sexually Explicit" Acts or Language Are Not Required To Prove Accosting Or Annoying A Person Of The Opposite Sex, There was Evidence To Support The Inference That The Acts Of Accosting Were Done In A "Sexual Context."

Finally, the Commonwealth anticipates that the defendant may argue that his motion for a required finding should have been allowed based on reasoning contained in the opinion of the Appeals Court below, see Commonwealth v. Sullivan, 84 Mass App. Ct. at 30-32, i.e., that the statutory prohibition against accosting or annoying a person of the opposite sex was intended (or has been construed) only to "reach" "sexually explicit" language or acts. His Honorable Court should reject any such argument.

The Appeals Court opinion stated that in "determining whether conduct is not 'decent or moral' within the meaning of the statute, our appellate cases suggest an intent to reach sexually explicit language or acts." Commonwealth v. Sullivan, 84 Mass App. Ct. at 30-31. The Court then evidently found that the defendant's conduct was "offensive in a generic sense but otherwise devoid of sexual content" and therefore concluded that it was "insufficient to prove this element of the offense charged." Id.

The Commonwealth recognizes the line of accosting or annoying cases from the Appeals Court in which the defendant's conduct indeed did include lurid words or actions with explicitly "sexual" overtones. See, e.g., Commonwealth v. Moran, 80 Mass. App. Ct. at 10 (while "within reaching distance" of the victim, the defendant "drew attention to himself by saying, 'Hi, nanny,' while grabbing the genital area of his pants and moving his hand up and down, mimicking masturbation."). Particularly in cases involving allegations of grown men accosting young girls, the proof of "offensive" conduct can be considerably strengthened by evidence of "sexually explicit" acts or language. In Commonwealth v. Whiting, for instance, the statute was violated where the defendant used "sexually explicit language toward the [thirteen year old] girls, stepped out of his car, and pulled down his pants." Whiting, 58 Mass. App. Ct. 918, 919 (2003). In Commonwealth v. Ramirez however, the statute was not violated when the defendant (1) stared at a seventh grade girl at public swimming pool and asked her why she was leaving when she left, (2) stuck his head out a window, removed his hat, and offered to buy her candy and (3) when the girl returned from the store, "sang a song about falling in

love with a little girl." Ramirez, 69 Mass. App. Ct. at 18-19.

But while "sexually explicit" acts or language can be a factor in determining whether acts or language is "offensive" under the accosting or annoying statute, close examination of this line of Appeals Court cases reveals that it is not the litmus test for "offensive" conduct. In Ramirez, for example, the problem for the Commonwealth was that there was "no evidence that the defendant attempted at any time to come near the complainant's person, restrict her movement or otherwise create physical offense." Ramirez, 69 Mass. App. Ct. at 19. The Commonwealth argued in Ramirez that the "sexual overtones" of the defendant's behavior and words were sufficient to prove *both* that his conduct was "physically offensive," 69 Mass. App. Ct. at 16-17, and "threatening," *id.*, at 19-20, but the Court in Ramirez rejected this argument.

The Commonwealth submits that the better view is that any evidence of "sexually explicit" language or acts may be considered as a factor in determining whether the conduct is "offensive" under the accosting or annoying statute, but that evidence of "sexually

explicit" acts or language, or of a "sexual context," is not the only way to prove this element.

Certainly the phrase "offensive and disorderly acts or language," by its plain meaning, is not limited to "sexually explicit" acts or language. G. L. c. 4, § 6 ("Words and phrases shall be construed according to the common and approved usage of the language"). Nothing (for all that appears) in the legislative history of this provision of Section 53 would support the conclusion that the Legislature only intended to proscribe "sexually explicit" acts or language, or conduct occurring in a "sexual context." Had the Legislature intended such a limitation, it could have expressed it. E.g., Doe v. Sup't of Schools of Worcester, 421 Mass. 117, 128 (1995).

This Court has never construed this statute in such a way, although the court has observed that "sexually explicit language ... may be inherently threatening." Chou, 433 Mass. at 234. Also, this Court has concluded that acts or language that may be motivated by a desire for sexual gratification, if combined with other evidence, can support a finding of a "physically offensive condition." Cahill, 446 Mass. at 782. But neither Cahill nor Chou hold that the

Commonwealth must submit evidence of "sexually explicit" acts or language or a "sexual context" in order to prove the element of "offensive," under either theory. It stands to reason rather, as this Court reasoned in Chou, that sexually explicit acts or language simply may be "offensive." Chou, 433 Mass. at 234 (sexually explicit acts or language may be "threatening").

Nor is there any constitutional need to limit the "offensive" element of the accosting or annoying statute to proscribe only "sexually explicit" acts or language. The crime of accosting or annoying already requires that the acts against a person of the opposite sex be not only "offensive" but also "disorderly." Lombard, 321 Mass. at 295-296 ("'offensive' and 'disorderly' have different meanings, and that to come within the prohibition of the statute the accosting and annoying must be both 'offensive' and 'disorderly'."). Disorderly conduct under the "accosting or annoying" prohibition of Section 53 covers only such acts or language "that involve fighting or threatening, violent or tumultuous behavior, or that create a hazardous or physically offensive condition for no legitimate purpose of the actor." Chou, 433 Mass. at 233.

Because of the way that this Honorable Court has construed the crime of "disorderly conduct" under Section 53, a conviction cannot be based upon protected speech. It is well-established that the First Amendment "does not protect conduct that threatens another." O'Brien v. Borowski, 461 Mass. 415, 425 (2012), quoting Robicheau, 421 Mass. at 183. Nor does the First Amendment protect conduct that creates a "physically offensive condition," so long as that conduct serves "no legitimate purpose of the actor." Chou, 433 Mass. at 233; Sholley, 432 Mass. at 727-728 & n.8.

The constitutional considerations that require proof of "without a legitimate reason" to convict of "disorderly" conduct under section 53 should also apply to the construction of Section 53's accosting or annoying prohibition. See Chou, 433 Mass. at 233-234 (although these considerations do not require that the conduct be "public"). Our published Model Jury Instructions already state that the defendant's acts or language must be "without a legitimate reason." (See Instruction 6.600, Jan. 2013, included in the Addendum). The judge in this case, similarly, defined "disorderly" acts or language as "behavior that creates

a physically offensive condition for no legitimate purpose." (Tr. II: 130).

Therefore, there is no need to require that in order to be "offensive" the defendant's acts or language must be "sexually explicit." By requiring that the element of "disorderly" be proven by words or language that do not infringe upon constitutional protections, it is assured that an accosting conviction cannot be based upon protected speech.

In any event, there actually was evidence in this case to suggest, in the Appeals Court's phrase, a "sexual context." Sullivan, 84 Mass App. Ct. at 31. The defendant's actions, words, and overall tone implied sexual impropriety. A reasonable juror could readily have inferred that this encounter would never have happened unless the defendant had targeted the victim on account of her gender, and that his intent was to seek some kind of sexual gratification.

It is true that the defendant did not engage in sexually explicit acts, or use sexually explicit language. Nevertheless, there was a clear and consistent sexual "context" which pervaded the entirety of the defendant's interaction with the victim. He called out, "hey little girl, you look so tired. Come

on over. Talk to me. Let's you know, let's talk."

(Tr. I: 53). When he said those words, the pitch of his voice was "much higher than his normal tone of voice, more like ... what you use to bribe someone."

(Tr. I: 54). Obviously the victim understood that the defendant's intent was not just to "talk." The use of the phrase "you know," coupled with the tone of voice implying that a "bribe" was forthcoming, suggested that the defendant's intent was somehow corrupt, something involving the payment by this older man to the "little girl" of money for something immoral, certainly something other than just "talk." When the victim heard those words, she took a step away and started walking away because she "didn't want to have anything to do with that situation." (Tr. I: 54).

Therefore, even if evidence of a "sexual context" is somehow required to prove accosting, such evidence is present here. Compare Cahill, 446 Mass. at 782 (defendant's physical contact with the victim - - including "grazing" her body and lower back - - was, at most, implicitly "sexual"). Indeed, the defendant's initial statement to the victim in this case - - "hey little girl, you look so tired. Come on over. Talk to me. Let's you know, let's talk," (Tr. I: 53) - - made

in a high-pitched bribing voice, Tr. I: 54), is more charged with sexual impropriety than the defendant in Cahill's straightforward assertion, "I love you."

Moreover, it appears that the defendant accosted this victim because she was female. As the Appeals Court opinion acknowledged, the Commonwealth's evidence was sufficient to prove that the defendant attempted to kidnap this woman. From the facts attendant to this attempt, the jury could have inferred an intent by the defendant to do more than kidnap her in order simply to "talk." There was certainly no suggestion of an attempt to rob. Robbery was evidently not the motive. A reasonable juror could have inferred that the defendant's "bribing" tone suggested something immoral, something corrupt, something improper, something that should not occur between an older man and a "little girl." The "context" was redolent of immorality and corruption, implicitly sexual, a situation that the victim, as she said, "didn't want to have anything to do with..." (Tr. I: 54).

Viewed in the light most favorable to the Commonwealth therefore, Latimore, 378 Mass. at 676-677, a rational juror could have found that the defendant approached this victim with an improper sexual purpose

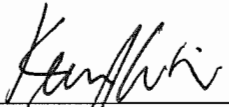
and that the accosting occurred in a "sexual context."  
So even if the statute's "explicit prohibition of  
offensive conduct toward a person of the opposite sex  
itself lends weight to an interpretation *requiring* a  
sexual context," as the Appeals Court reasoned, 84 Mass  
App. Ct. at 31 (emphasis added), there was such  
evidence here. Accordingly, even if this Honorable  
Court were to rule that some evidence of a "sexual  
context" is required -- not an easy legal standard to  
apply -- the facts of this case present such a context.

#### CONCLUSION

For these reasons, the judgment of the Superior  
Court should be affirmed.

Respectfully submitted  
For the Commonwealth,

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\_\_\_\_\_  
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Dated: January 14, 2014

CERTIFICATE OF COMPLIANCE  
Mass. R.A.P. 16 (k)

RE: Commonwealth v. Joseph Sullivan,  
Supreme Judicial Court No. SJC-11568

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I, Kevin J. Curtin, hereby certify that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

by: 

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CERTIFICATE OF SERVICE

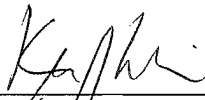
RE: Commonwealth v. Joseph Sullivan,  
Supreme Judicial Court No. SJC-11568

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I, Kevin J. Curtin, hereby do certify that I have served the Commonwealth's Brief on the defendant by placing two copies in our office depository for mailing, first class mail, postage prepaid, to:

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Signed under the pains and  
penalties of perjury,

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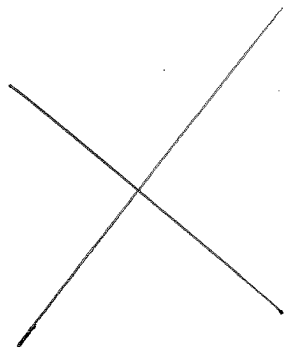
Dated: January 14, 2013

ADDENDUM

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Westlaw

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▷

Appeals Court of Massachusetts,  
 Middlesex.

COMMONWEALTH

v.

Joseph D. SULLIVAN.

No. 10-P-1791.

Argued March 18, 2013.

Decided July 10, 2013.

Further Appellate Review Granted Nov. 1, 2013.

**Background:** Defendant was convicted in the Superior Court Department, Middlesex County, Hiller B. Zobel and Sandra L. Halin, JJ., of attempted kidnapping and accosting or annoying a person of the opposite sex. Defendant appealed.

**Holdings:** The Appeals Court, Hines, J., held that: (1) evidence was sufficient to establish both intent and an overt act in furtherance of the offense, in support of conviction for attempted kidnapping, and (2) evidence was insufficient to support conviction for accosting or annoying a person of the opposite sex.

Affirmed in part and reversed in part.

West Headnotes

## [1] Criminal Law 110 ⚡1144.13(3)

110 Criminal Law  
 110XXIV Review  
 110XXIV(M) Presumptions  
 110k1144 Facts or Proceedings Not  
 Shown by Record  
 110k1144.13 Sufficiency of Evidence  
 110k1144.13(2) Construction of  
 Evidence

110k1144.13(3) k. Construction  
 in favor of government, state, or prosecution. Most  
 Cited Cases

The Appeals Court reviews a claim of

sufficiency of the evidence in the light most  
 favorable to the Commonwealth.

## [2] Kidnapping 231E ⚡36

231E Kidnapping  
 231Ek33 Evidence

231Ek36 k. Weight and sufficiency. Most  
 Cited Cases

Evidence was sufficient to establish both intent and an overt act in furtherance of the offense, in support of conviction for attempted kidnapping; defendant repeatedly asked the victim to get into his vehicle, he got out of his vehicle twice, while leaving the engine running, to converse with the victim, defendant turned his vehicle around to continue to follow the victim down a dimly lit street, and defendant's final entreaty to the victim to get into his vehicle was stated as a demand. M.G.L.A. c. 274, § 6.

## [3] Kidnapping 231E ⚡28

231E Kidnapping  
 231Ek28 k. Attempt. Most Cited Cases

The intent element of the crime of attempted kidnapping is satisfied if the Commonwealth proves that the defendant intended to forcibly or secretly confine the victim.

## [4] Kidnapping 231E ⚡18

231E Kidnapping  
 231Ek14 Elements  
 231Ek18 k. Confinement, restraint, or  
 detention. Most Cited Cases

Confinement, for the purpose of the offense of kidnapping, means any restraint of a person's movement.

## [5] Disorderly Conduct 129 ⚡124

129 Disorderly Conduct  
 129k124 k. Following, approaching, or  
 accosting. Most Cited Cases

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Evidence was insufficient to support conviction for accosting or annoying a person of the opposite sex; the conduct of defendant in entreating the victim to get into his vehicle was offensive in a generic sense, but it did not contain sexual context, as required. M.G.L.A. c. 272, § 53.

[6] **Disorderly Conduct 129** ↪124

129 Disorderly Conduct

129k124 k. Following, approaching, or accosting. Most Cited Cases

Offensive conduct, for the purpose of crime of accosting or annoying a person of the opposite sex, is that which causes displeasure, anger or resentment and is repugnant to the prevailing sense of what is decent or moral. M.G.L.A. c. 272, § 53.

[7] **Criminal Law 110** ↪1890

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1890 k. In general. Most Cited

Cases

Even if trial counsel's representation fell measurably below that which might be expected from an ordinary fallible lawyer, defendant failed to meet his burden to show that he was likely deprived of an otherwise available, substantial ground of defense. U.S.C.A. Const.Amend. 6.

**\*\*381** Dennis A. Shedd, Lexington, for the defendant.

James D. Kerr, Assistant District Attorney, for the Commonwealth.

Present: RAPOZA, C.J., CARHART, & HINES, JJ.

HINES, J.

Following a jury trial, the defendant was convicted of attempted kidnapping, G.L. c. 274, § 6, and of accosting or **\*27** annoying a person of the

opposite sex, G.L. c. 272, § 53.<sup>FN1</sup> On appeal, he argues that (1) the **\*\*382** Commonwealth presented insufficient evidence to support the convictions; (2) his motion to vacate the attempted kidnapping conviction was wrongly denied; and (3) trial counsel provided ineffective assistance during the course of the trial.<sup>FN2</sup> We affirm in part and reverse in part.

FN1. A not guilty verdict was returned on the charge of assault with intent to commit a felony, kidnapping, G.L. c. 265, § 29.

FN2. After timely noticing his appeal, the defendant filed a motion for a new trial and a motion to vacate the conviction of attempted kidnapping. Both motions were denied without a hearing by a judge of the Superior Court (motion judge) who was not the trial judge. We consolidated the defendant's direct appeal with his appeal from the denials of his postconviction motions.

1. *Sufficiency of the evidence.* The defendant challenges the jury's verdict on the attempted kidnapping charge on the ground that the Commonwealth failed to prove the required elements of the offense: a specific intent to kidnap and an overt act in furtherance of the offense. G.L. c. 274, § 6. See *Commonwealth v. Rivera*, 460 Mass. 139, 142, 949 N.E.2d 916 (2011). He also claims that his conviction of annoying or accosting a person of the opposite sex must be reversed because the Commonwealth failed to prove that his actions were "offensive" and "disorderly," as required by the statute. G.L. c. 272, § 53.

[1] We review a claim of sufficiency of the evidence under the oft-repeated *Latimore* standard, viewing the evidence in the light most favorable to the Commonwealth. *Commonwealth v. Latimore*, 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979). Under this standard, the jury could have found the following facts. At approximately 9:30 P.M. on September 28, 2007, R.M., the victim, was walking

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alone on Massachusetts Avenue in Cambridge. She was returning to her dormitory on the Massachusetts Institute of Technology campus after an evening class. The defendant, who was headed toward Boston in his vehicle, swerved toward R.M. and said, "Hey little girl, you look so tired. Come on over. Talk to me. Let's, you know, let's talk." R.M., who had expected a request for directions, quickly moved away and continued walking. The defendant then got out of his vehicle while the engine was still running, and walked toward her. He continued to insist that she come over to speak to him. R.M. declined to engage him in conversation and attempted to move away. The \*28 defendant came closer, causing her to angle her body to avoid him. Eventually, R.M. managed to continue on her way and the defendant returned to his vehicle.

Apparently changing his mind about heading into Boston, the defendant suddenly reversed his direction and followed R.M. in his vehicle as she turned onto Landsdowne Street, which at the time was dimly lit. When he caught up to her, he stopped abruptly and got out of his vehicle a second time. With the engine running and the car door open, he approached so closely that she was conscious of an unpleasant odor emanating from his body. This time, the defendant appeared angry. His tone was now more demanding than pleading as he ordered her to "get in the car." R.M. refused, and instead began reciting aloud the defendant's license plate number. At that point, the defendant "stormed off," got into his vehicle, and left the scene.

[2] a. *Attempted kidnapping.* Casting his encounter with the victim as the product of social ineptitude rather than criminal intent, the defendant relies on a more benign view of the episode than that which the jury could have found. According to the defendant's view of the evidence, the Commonwealth established only that \*\*383 he approached and spoke to R.M., and that he made no threatening gestures toward her. These facts, the defendant argues, proved neither intent nor an overt

act in furtherance of the crime. Following *Latimore*, however, we decline the defendant's invitation to weigh the evidence based on this self-serving and highly subjective characterization of his conduct. Consequently, we reject his claim that the evidence was insufficient to prove attempted kidnapping.

[3][4] The intent element of the crime of attempted kidnapping is satisfied if the Commonwealth proves that the defendant intended to forcibly or secretly confine the victim. *Commonwealth v. Rivera*, 460 Mass. at 142, 949 N.E.2d 916. Confinement in this context means "any restraint of a person's movement." *Ibid.*, quoting from *Commonwealth v. Brown*, 66 Mass.App.Ct. 237, 241, 846 N.E.2d 782 (2006), quoting from *Commonwealth v. Lent*, 46 Mass.App.Ct. 705, 710, 709 N.E.2d 444 (1999).

An intent to confine R.M. was amply demonstrated here by the entire course of the defendant's conduct, which, seen in the light most favorable to the Commonwealth, was focused solely \*29 on enticing the victim into his vehicle. Any purpose simply to engage her in conversation was belied by his persistent entreaties, even when it became clear that she did not wish to speak to him. He got out of his vehicle twice, both times leaving the engine running and on the last occasion leaving the car door open. Contrast *Commonwealth v. Banfill*, 413 Mass. 1002, 1003, 597 N.E.2d 47 (1992) (intent to confine not shown where the defendant did not "make a move toward" the victim or open the door of his vehicle). Any ambiguity in the defendant's intent was likely resolved when he reversed his direction, followed R.M. onto a dimly lit street, cornered her in close proximity to his open vehicle, and shifted his tone from a plea to a demand that she "get in the car."

We next consider whether the intended confinement was forcible. Forcible confinement may be effected by either actual or constructive force. See *Commonwealth v. Titus*, 32 Mass.App.Ct. 216, 221, 587 N.E.2d 800 (1992) (physical force not necessary if the confinement

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may be accomplished by the display of potential or constructive force). Here, the defendant reversed his direction and confronted R.M. at arm's length on a dimly lit street. And he did so while standing near his vehicle with the engine running and the door open. Having placed R.M. in this position, he demanded that she "get in the car" using a tone that she perceived as angry. On these facts, the jury could have found that the defendant used constructive force in an attempt to confine R.M. in his vehicle.<sup>FN3</sup>

FN3. Given our determination that there was sufficient evidence to find that the defendant intended to forcibly confine R.M., we need not address whether the defendant also intended to secretly confine her. Compare *Commonwealth v. Rivera*, 460 Mass. at 142–144, 949 N.E.2d 916.

The second element of the crime of attempted kidnapping is an overt act that comes "near enough to the accomplishment of the substantive offence to be punishable." *Commonwealth v. Bell*, 455 Mass. 408, 412, 917 N.E.2d 740 (2009), quoting from *Commonwealth v. Peaslee*, 177 Mass. 267, 271, 59 N.E. 55 (1901). Here, the overt act element is well established by the defendant's conduct on Landsdowne Street, where he cornered R.M. and angrily demanded that she "get in the car." The jury also could have found that but for R.M.'s recitation of the defendant's license plate number, \*\*384 \*30 thereby demonstrating an ability to identify him, the crime might have been completed.

[5] b. *Annoying or accosting a person of the opposite sex.* Under G.L. c. 272, § 53, the statute providing criminal penalties for disorderly conduct, "persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex ... may be punished." <sup>FN4</sup> The plain language of the statute requires the Commonwealth to prove conduct (acts or language) that is both "offensive" and "disorderly" (the latter construed to include "threatening," see *Commonwealth v. Chou*, 433 Mass. 229, 233–235, 741 N.E.2d 17 [2001] ) to a

reasonable person. In addition, such conduct must be employed to either "annoy" or "accost" a person of the opposite sex. Recognizing the potential for conflict with the First Amendment to the United States Constitution, our appellate cases have defined with some precision the parameters of "offensive" and "disorderly" conduct punishable under the statute. See, e.g., *Commonwealth v. Feigenbaum*, 404 Mass. 471, 474, 536 N.E.2d 325 (1989) (construction of the term "idle and disorderly" in § 53); *Commonwealth v. Chou*, 433 Mass. at 231 n. 2, 741 N.E.2d 17. Here, however, we address only the definition of "offensive" conduct because we conclude that the Commonwealth failed to meet its burden to prove this element of the offense.

FN4. The 2009 amendments to the statute, see St. 2009, c. 27, § 98, are inapplicable here. In any event, the quoted language was retained in the amended statute.

[6] Although the defendant's conduct may have been offensive in a generic sense, it did not comport with the legal definition of that term. Offensive conduct under the statute is that which causes "displeasure, anger or resentment" and is "repugnant to the prevailing sense of what is decent or moral." *Commonwealth v. Cahill*, 446 Mass. 778, 781, 847 N.E.2d 344 (2006), quoting from Black's Law Dictionary 1113 (8th ed. 2004). In determining whether conduct is not "decent or moral" within the meaning of the statute, our appellate cases suggest an intent to reach sexually explicit language or acts. See, e.g., *Commonwealth v. Cahill*, *supra* at 779–781, 847 N.E.2d 344 (grabbing and holding a female coworker with the comment, "I love you"); *Commonwealth v. Moran*, 80 Mass.App.Ct. 8, 10, 951 N.E.2d 356 (2011) (mimicking masturbation while inviting the victim's attention to the act). Moreover, the explicit \*31 prohibition of offensive conduct toward a person of the opposite sex itself lends weight to an interpretation requiring a sexual context. The Commonwealth has not drawn our attention to any

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case, and we have found none, where nonsexual conduct was deemed “offensive” under the accosting or annoying prong of G.L. c. 272, § 53. In this case, where the conduct was offensive in a generic sense but otherwise devoid of sexual content, the evidence was insufficient to prove this element of the offense charged.

The remaining issues require little discussion.

2. *Motion to vacate conviction of attempted kidnapping.* The defendant argues that the motion judge erroneously denied his motion to vacate the conviction of attempted kidnapping on the ground that it is legally inconsistent with his acquittal on the assault with intent to kidnap charge. The legal inconsistency arises, he argues, because the trial judge's instructions defined assault with the intent to kidnap as a lesser included offense of the attempted kidnapping charge. This characterization of the judge's instructions, which properly defined assault in the context of the evidence presented to the jury, \*\*385 is incorrect. Thus, there was no error in the motion judge's refusal to vacate the conviction of attempted kidnapping.

3. *Ineffective assistance of counsel.* The defendant asserts a litany of alleged deficiencies in trial counsel's performance in support of his ineffective assistance of counsel claim. We “examine the motion judge's conclusion only to determine whether there has been a significant error of law or other abuse of discretion.... When, as here, the motion judge did not preside at trial, ... we regard ourselves in as good a position as the motion judge to assess the trial record.” *Commonwealth v. Grace*, 397 Mass. 303, 307, 491 N.E.2d 246 (1986).

[7] Applying the familiar standard set out in *Commonwealth v. Saferian*, 366 Mass. 89, 96, 315 N.E.2d 878 (1974), we conclude that even if counsel's representation fell “measurably below that which might be expected from an ordinary fallible lawyer,” the defendant has failed to meet his burden to show that he was “likely deprived ... of an otherwise available, substantial ground of

defence.” *Ibid.* Accordingly, there is no merit in his claim of ineffective assistance of counsel.

\*32 4. *Conclusion.* On the indictment charging attempted kidnapping, the judgment is affirmed. On the indictment charging annoying or accosting a person of the opposite sex, the judgment is reversed, the verdict is set aside, and judgment shall enter for the defendant. The orders denying the motions for postconviction relief are affirmed.

*So ordered.*

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## ANNOYING AND ACCOSTING PERSONS OF THE OPPOSITE SEX

G.L. c. 272, § 53

The defendant is charged with accosting and annoying a person of the opposite sex.

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

**First:** That the defendant knowingly engaged in an offensive and disorderly act (or acts), or offensive and disorderly language;

**Second:** That the defendant intended to direct that conduct to alleged victim;

**Third:** That alleged victim was aware of the defendant's offensive and disorderly conduct;

**Fourth:** That this conduct was offensive to a reasonable person; and

**Fifth:** That alleged victim was a person of the opposite sex.

To prove the first element of the offense, the Commonwealth must prove beyond a reasonable doubt *either* that the defendant committed a disorderly act (or acts) *or* that (he) (she) used disorderly language.

To be disorderly, the defendant's act (or acts) or language must involve one of the following four things without a legitimate reason:

- **it must involve fighting or violent or tumultuous behavior; or**
- **it must create a hazardous condition; or**
- **it must create a physically offensive condition that amounts to an invasion of personal privacy; or**
- **it must be threatening.**

**A threat may take many forms. It may be an explicit threat, a comment, or an act that would make a reasonable person fearful, not just uncomfortable. The Commonwealth is not required to prove that the defendant intended any threat to be immediately followed by actual violence or the use of physical force. You may consider all of the evidence and any reasonable inferences you choose to draw from the evidence to determine whether any act or language was reasonably viewed as truly threatening.**

SUPPLEMENTAL INSTRUCTION

*If sexually explicit language is involved.*

**Sexually explicit language may be inherently threatening when it is directed at particular individuals in settings in which such communications are inappropriate and likely to cause severe distress.**

"The term 'true threat' has been adopted to help distinguish between words that literally threaten but have an expressive purpose such as political hyperbole, and words that are intended to place the target of the threat in fear, whether the threat is veiled or explicit." *Commonwealth v. Chou*, 433 Mass. 229, 741 N.E.2d 17 (2001). See *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9, 21-22, 865 N.E.2d 1158, 1167-1168 (2007) (defendant staring at complainant at swimming pool and singing her a song about "falling in love with a little girl" insufficient to infer that he intended her to fear that harm would befall her). See *Chou, supra*.

**To prove the second element, the Commonwealth must prove that the conduct was directed at and received by the alleged victim.**

**To prove the third element, the Commonwealth must prove that alleged victim knew of the defendant's offensive and disorderly conduct.**

**To prove the fourth element of the offense, the Commonwealth must prove beyond a reasonable doubt that the disorderly act(s) or language would be offensive to a reasonable person in the complainant's position.**

**An act or language is offensive when it is repugnant or offensive to contemporary standards of decency and causes real displeasure, anger, or resentment. An act or language is offensive when it is contrary to the prevailing sense of what is decent or moral.**

*Commonwealth v. Cahill*, 446 Mass. 778, 781 & 783, 847 N.E.2d 344, 346 & 348 (2006) (Commonwealth must prove that defendant's behavior was offensive and disorderly to a reasonable person).

NOTES:

1. **Offensive and disorderly are distinct elements.** The Commonwealth must prove both that the conduct was offensive and disorderly. *Commonwealth v. Lombard*, 321 Mass. 294, 73 N.E.2d 465 (1947).
2. **A single act sufficient.** The statute originally penalized "persons who with offensive and disorderly act or language accost or annoy persons of the opposite sex." In 1983, the word "act" was changed to "acts." St. 1983, c. 66, § 1. Nevertheless, "the change had no impact on the statute's meaning," *Commonwealth v. Moran*, 80 Mass. App. Ct. 8, 13, 951 N.E.2d 356, 360-361 (2011), and proof of a single disorderly and offensive act is sufficient.

3. **Invasion of privacy need not be extreme.** The word "extreme" was deleted from this instruction after the decision in *Commonwealth v. Cahill*, 446 Mass. 778, 782, 847 N.E.2d 344, 347 (2006) (statute not limited to extreme invasions of personal privacy), rev'g *Commonwealth v. Cahill*, 64 Mass. App. Ct. 911, 834 N.E.2d 1238 (2005).

4. **"Physically offensive condition."** If the act was physically offensive, it need not also be threatening, *Cahill*, 446 Mass. at 783, 847 N.E.2d at 348, and vice versa, *Commonwealth v. Chou*, 433 Mass. 229, 741 N.E.2d 12 (2001) (distribution of sexually derogatory flyers concerning victim was not physically offensive but was threatening).

"Offensive acts are those that cause 'displeasure, anger or resentment; esp., repugnant to the prevailing sense of what is decent or moral.'" *Cahill*, 446 Mass. at 781, 847 N.E.2d at 346, quoting Black's Law Dictionary 1113 (8th ed. 2004). Conduct is physical when it is "of or relating to the body." *Ramirez*, 69 Mass. App. Ct. at 17, 865 N.E.2d at 1164-1165. Physical contact with a victim's person is not necessary to render one's actions physically offensive, however. *Id.*, citing *Commonwealth v. LePore*, 40 Mass. App. Ct. 543, 548, 666 N.E.2d 152, 156 (1996) (physically offensive conduct where defendant removed screen from bedroom window of ground floor apartment wherein woman lay sleeping and stood there smoking cigarettes). Cf. *Ramirez, supra* (no physically offensive conduct where defendant merely stared at complainant at swimming pool and sang her a song about "falling in love with a little girl").

5. **Public or private.** The offense may be committed in public or in private. *Cahill*, 446 Mass. at 782 n.6, 847 N.E.2d at 347 n.6; *Chou, supra*.

STATUTORY ADDENDUM

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STATUTORY ADDENDUM

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G.L. c. 272, § 53

**Section 53**  
**Penalty for certain offenses**

Section 53. (a) Common night walkers, common street walkers, both male and female, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, keepers of noisy and disorderly houses, and persons guilty of indecent exposure shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than \$200, or by both such fine and imprisonment.

(b) Disorderly persons and disturbers of the peace, for the first offense, shall be punished by a fine of not more than \$150. On a second or subsequent offense, such person shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than \$200, or by both such fine and imprisonment.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

2014 SITTING

NO. SJC-11568

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COMMONWEALTH OF MASSACHUSETTS,

APPELLEE,

V.

JOSEPH SULLIVAN,

APPELLANT.

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ON APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT

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BRIEF FOR THE COMMONWEALTH

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