

UNLAWFUL SURVEILLANCE IN THE SECOND DEGREE
Penal Law § 250.45(2)
(Committed on or after Aug. 11, 2003)

The (specify) count is Unlawful Surveillance in the Second Degree.

Under our law, a person is guilty of Unlawful Surveillance in the Second Degree when, for his or her own, or another person's sexual arousal or sexual gratification, he or she intentionally

uses or installs, or
permits the utilization or installation of an imaging device

to surreptitiously view,¹ broadcast or record a person dressing or undressing or the sexual or other intimate parts of such person

at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent.

The following terms used in that definition have a special meaning:

IMAGING DEVICE means any mechanical, digital or electronic viewing device, camera or any other instrument capable of recording, storing or transmitting visual images that can be utilized to observe a person.²

¹In *People v. Lema*, 152 A.D.3d 440 (1st Dept. 2017), the defendant used a phone camera to record underneath women's skirts on a subway train, but "no image of their 'sexual or other intimate parts' (Penal Law § 250.45 [4]) resulted because of the dark lighting conditions." The Court, however, held that "the statute is satisfied so long as a defendant attempts to create such an image....it can fairly be said that defendant used the device 'to . . . record,' that is, for the purpose of creating a recording, even though that recording was never successfully made." A trial court faced with a *Lema* issue may wish to adapt the language of that case for inclusion in the charge.

²Penal Law § 250.40(2)

[BROADCAST means electronically transmitting a visual image with the intent that it be viewed by a person.³]

SEXUAL OR OTHER INTIMATE PARTS means the human male or female genitals, pubic area or buttocks, or the female breast below the top of the nipple, and shall include such part or parts which are covered only by an undergarment.⁴

PLACE AND TIME WHEN A PERSON HAS A REASONABLE EXPECTATION OF PRIVACY means a place and time when a reasonable person would believe that he or she could fully disrobe in privacy.⁵

Intent means conscious objective or purpose. Thus, INTENTIONALLY uses or installs, [or permits the utilization or installation of] an imaging device to surreptitiously view, broadcast or record a person dressing or undressing, or the sexual or other intimate parts of such person, when his or her conscious objective or purpose is to do so.⁶

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, each of the following three elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), used or installed, or permitted the utilization or installation of, an imaging device to surreptitiously view, broadcast or record a person dressing or undressing, or the sexual or other intimate parts of such person, at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent;

³ Penal Law § 250.40(4).

⁴ Penal Law § 250.40(3).

⁵ Penal Law § 250.40(1).

⁶ See Penal Law 15.05(1).

2. That the defendant did so intentionally; and
3. That the defendant did so for his/her own, or another's sexual arousal or sexual gratification.

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.