

**UNLAWFUL SURVEILLANCE IN THE SECOND DEGREE**  
**PENAL LAW 250.45(3)**  
**(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 no legitimate purpose, he or she intentionally  
uses or installs, or  
permits the utilization or installation of an imaging device

to surreptitiously view,<sup>1</sup> broadcast or record a person

in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a motel, hotel or inn, 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.<sup>2</sup>

[BROADCAST means electronically transmitting a visual

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<sup>1</sup>In *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.

<sup>2</sup> Penal Law § 250.40(2).

image with the intent that it be viewed by a person.<sup>3]</sup>

Intent means conscious objective or purpose. Thus, a person INTENTIONALLY uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person when his or her conscious objective or purpose is to do so.<sup>4</sup>

Under our law, when a person uses or installs, or permits the utilization or installation of an imaging device in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a hotel, motel or inn, you may, but are not required to, infer that such person did so for no legitimate purpose.<sup>5</sup>

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, both of the following two 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 in

*Select appropriate alternative(s):*

a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a motel, hotel or inn,

without such person's knowledge or consent; and

2. That the defendant did so intentionally for no legitimate purpose.

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<sup>3</sup> Penal Law § 250.40(4).

<sup>4</sup> See Penal Law § 15.05(1).

<sup>5</sup> See Penal Law § 250.45(3)(b) which uses the term "rebuttable presumption." The language "you may infer" has been used in the pattern jury charge for clarity and to facilitate juror comprehension.

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

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