

UNLAWFUL SURVEILLANCE IN THE SECOND DEGREE
PENAL LAW 250.45(4)
(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, without the knowledge or consent of a person, he or she intentionally

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

to surreptitiously view,¹ broadcast or record, under the clothing being worn by such person, the sexual or other intimate parts of such person.

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

[BROADCAST means electronically transmitting a visual

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.

² Penal Law § 250.40(2).

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

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, under the clothing being worn by such person, the sexual or other intimate parts of such person, when his or her conscious objective or purpose is to do so.⁵

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, under the clothing being worn by a person, the sexual or other intimate parts of such person without his/her knowledge or consent; and

2. That the defendant did so intentionally.

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.

³ Penal Law § 250.40(4).

⁴ Penal Law § 250.40(3).

⁵ See Penal Law § 15.05(1).

