

SEQ CHAPTER \h \r 1CR27-041 01/26/04

TRANSITION TO LESSER INCLUDED LEWDNESS -- 13 V.S.A. § 2632(a)(8)

[This instruction contemplates a charge of lewd and lascivious conduct, such as the charge described in instruction CR27-031.]

TRANSITION CHARGE

If you decide that the State has not proven each and every one of the essential elements of lewd and lascivious conduct, then you must consider whether (Def) \_\_\_\_\_ is guilty of the offense of lewdness. Or, if you are unable to agree upon a verdict concerning the charge of lewd and lascivious conduct, after all reasonable efforts to reach a unanimous verdict, then you may move on to consider the offense of lewdness. <sup>[1]</sup>

LESSER INCLUDED OFFENSE: LEWDNESS (13 V.S.A. § 2632(a)(8))

The crime of lewdness is considered a lesser offense to the crime of lewd and lascivious behavior. Even if (Def) \_\_\_\_\_ is not guilty of lewd and lascivious behavior, you may still find that the evidence has proven the offense of lewdness.

For (Def) \_\_\_\_\_ to be found guilty of lewdness, you must find that the evidence has proven each of the following essential elements beyond a reasonable doubt: that on the date alleged and at the place alleged,

- (1) (Def) \_\_\_\_\_;
- (2) intentionally engaged in the conduct alleged in the charge, specifically \_\_\_\_\_;
- (3) the conduct was open and gross; and
- (4) the conduct was lewd.

In addressing these essential elements, you should consider the instructions I have already given you. The lewd conduct must be “open” to at least one other person who does not consent to the conduct. The offense of lewdness does not include lasciviousness. The two words, “lewdness” and “lasciviousness,” though similar, have different meanings. Lewdness is defined as “gross and wanton indecency in sexual relations.” Nudity alone is not sufficient to prove lewdness. The State must have

proven lewdness beyond a reasonable doubt. The State need not have proven that (Def) \_\_\_\_\_'s behavior was also lascivious.

### PRESUMPTION OF INNOCENCE

When considering the degree of crime involved in this case, the presumption of innocence plays two roles. First, (Def)\_\_\_\_\_ is presumed to be innocent of any crime. Second, if you find beyond a reasonable doubt that (Def)\_\_\_\_\_ committed a lewd act, then you must give [him] [her] the benefit of any reasonable doubt in deciding the degree of the offense. In other words, you must apply the presumption of innocence, and weigh it against the evidence, at each step of your deliberations. Nevertheless, if all of the evidence, weighed along with the presumption of innocence, convinces you beyond a reasonable doubt that (Def)\_\_\_\_\_ is guilty of lewd and lascivious conduct, then you must find [him] [her] guilty of that charge.

Your verdict on this count will be one of three possible verdicts:

! Guilty of lewd and lascivious conduct; or

! Guilty of lewdness; or

! Not guilty of any crime

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[1] This instruction describes a so-called “soft” transition. Defendant may elect a “hard” transition. State v. Duff, 150 Vt. 329, 335-37 (1988). See the Notes for an example.

## Vermont Model Criminal Jury Instructions

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### Lewd and Lascivious Conduct

- CR27-031. Lewd and Lascivious Conduct, 13 V.S.A. § 2601 (03/03/06)
- CR27-041. Transition to Lesser Included Lewdness Under 13 V.S.A. § 2632(a)(8) (01/26/04)

#### *Reporter's Notes*

**Lewd and Lascivious Conduct.** The instruction for lewd and lascivious conduct, under 13 V.S.A. § 2601, contains an element of general intent. The instruction does not elaborate upon intent, because there is no specific intent element (i.e. that the defendant intended to achieve a specific harm or result), and it is not clear whether it is necessary to give any instruction on intent. The judicial guidance concerning this statute derives from State v. Millard, 18 Vt. 574 (1846), where the Court explained: “The common sense of community, as well as the sense of decency, propriety, and morality, which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it.” *Id.* at 577. The Court also concluded that the conduct in question there was sufficient to support the conviction, as follows (at 577-78):

That the conduct of the respondent, in this case, was lewd and lascivious is beyond question. A public exposure of himself to a female, in the manner this respondent did, with a view to excite unchaste feelings and passions in her and to induce her to yield to his wishes, is lewd, and is gross lewdness, calculated to outrage the feelings of the person, to whom he thus exposed himself, and to show, that all sense of decency, chastity, or propriety of conduct, was wanting in him, and that he was a proper subject for the animadversion of criminal jurisprudence.

More recently, the Court has held that § 2601 does not contain an element of specific intent on the part of the defendant that he or she be seen committing the act. State v. Maunsell, 170 Vt. 543, 544 (1999). The Court explained that, if the Legislature had intended to include a specific intent to achieve a precise harm or result, it would have done so in § 2601, as it did in § 2602. *Id.* at 544 (citing State v. Grenier, 158 Vt. 153, 156 (1992)). *Also see State v. Gabert*, 152 Vt. 83, 85 (1989) (court need not discuss specific intent as part of Rule 11 colloquy when accepting guilty plea for lewd and lascivious conduct). In an unpublished opinion, the Supreme Court held that specific intent is not an element of § 2601. *See State v. Gall*, No. 2001-512 (unp. decision, December 2002).

The model instruction, CR27-031, includes an element that the defendant intentionally engaged in the conduct alleged in the charge. This is designed as a general intent instruction; it has been modified from an earlier version to make clear that there is no essential element of specific intent. This is one of the few instructions from this project containing a general intent instruction. See notes under Chapter 6.

The instructions as drafted address the difference between lewd and lascivious conduct, under 13 V.S.A. § 2601, and lewdness under 13 V.S.A. § 2632(a)(8). The conduct under § 2601 must be lewd and lascivious, whereas the conduct under § 2632(a)(8) need only be lewd. For an instruction on lewdness under § 2632(a)(8), see CR27-041, which includes lewdness as a lesser included offense to lewd and lascivious conduct under § 2601.

**Transition to Lesser Included Lewdness.** The defendant has a right to choose between a “hard” or “soft” transition. The hard transition requires a verdict on the highest offense before the jury considers any lesser included offenses. The soft transition allows jurors to consider the lesser offense if they are unable to agree upon a verdict on the higher offense “after all reasonable efforts to reach a unanimous verdict.” *State v. Duff*, 150 Vt. 329, 336-37 (1988). The committee has generally used “soft” transitions, because most defendants prefer “soft” transitions over “hard.” The following is an example of a “hard” transition, in case the defendant prefers that approach:

You must first consider the charge of lewd and lascivious conduct. If the State has proven each of the essential elements of that charge, then you must find (Def) \_\_\_\_\_ guilty of that charge, and you will be done with your deliberations. If you decide that the State has not proven each and every one of the essential elements of lewd and lascivious conduct, then you must find (Def) \_\_\_\_\_ not guilty of that charge, and then you must consider whether [he] [she] is guilty of the offense of lewdness.

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**Vermont Model Criminal Jury Instructions**

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