ASSAULT

The defendant is charged with having committed an assault upon ___*[alleged victim]*___ **. Section 13A of chapter 265 of our General Laws provides that "Whoever commits an assault . . . upon another shall be punished . . . ."**

An assault may be committed in either of two ways. It is *either* an attempted battery *or* an immediately threatened battery. A battery is a harmful or an unpermitted touching of another person. So an assault can be either an attempt to use some degree of physical force on another person — for example, by throwing a punch at someone — or it can be a demonstration of an apparent intent to use immediate force on another person — for example, by coming at someone with fists flying. The defendant may be convicted of assault if the Commonwealth proves *either* form of assault.

In order to establish the first form of assault — an attempted battery — the Commonwealth must prove beyond a reasonable doubt that the defendant intended to commit a battery — that is, a harmful or an unpermitted touching — upon ___*[alleged victim]*___**, took some overt step**

toward accomplishing that intent, and came reasonably close to doing so. With this form of assault, it is not necessary for the Commonwealth to show that ___*[alleged victim]*___ **was put in fear or was even aware of the attempted battery.**

In order to prove the second form of assault — an imminently threatened battery — the Commonwealth must prove beyond a reasonable doubt that the defendant intended to put ___*[alleged victim]*___ **in fear of an imminent battery, and engaged in some conduct toward** ___*[alleged victim]*___ **which** ___*[alleged victim]*___ **reasonably perceived as imminently threatening a battery.**

Here instruct on Intent (Instruction 3.120), since both branches of assault are specific intent offenses. If additional language on the first branch of assault is appropriate, see Instruction 4.120 (Attempt).

Commonwealth v. Barbosa, 399 Mass. 841, 845 n.7, 507 N.E.2d 694, 696 n.7 (1987) (an assault is "any manifestation, by a person, of that person's present intention to do another immediate bodily harm"); *Commonwealth v. Delgado,* 367 Mass. 432, 435-437 & n.3, 326 N.E.2d 716, 718-719 & n.3 (1975) ("an act placing another in reasonable apprehension that force may be used is sufficient for the offense of criminal assault"; words threatening future harm are insufficient to constitute an assault unless "they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person"); *Commonwealth v. Chambers,* 57 Mass. App. Ct. 47, 49, 781 N.E.2d 37, 40 (2003) (threatened-battery branch "requires proof that the defendant has engaged in objectively menacing conduct with the intent of causing apprehension of immediate bodily harm on the part of the target"); *Commonwealth v. Musgrave,* 38 Mass. App. Ct. 519, 649 N.E.2d 784 (1995), aff'd, 421 Mass. 610, 659 N.E.2d 284 (1996) (threatened-battery branch of assault requires specific intent to put victim in fear or apprehension of immediate physical harm); *Commonwealth v. Spencer,* 40 Mass. App. Ct. 919, 922, 663 N.E.2d 268, 271 (1996) (same); *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1008, 530 N.E.2d 805, 807 (1988) (necessary intent inferable from defendant's overt act putting another in reasonable fear, irrespective of whether defendant intended actual injury); *Commonwealth v. Domingue,* 18 Mass. App. Ct. 987, 990, 470 N.E.2d 799, 802 (1984) (assault is "an overt act undertaken with the intention of putting another person in fear of bodily harm and reasonably calculated to do so, whether or not the defendant actually intended to harm the victim"). See

Commonwealth v. Hurley, 99 Mass. 433, 434 (1868) (assault by joint venture by intentionally inciting assault by others); *Commonwealth v. Joyce,* 18 Mass. App. Ct. 417, 421-422, 426-430, 467 N.E.2d 214, 217-218, 220-222 (1984) (assault by joint venture).

NOTES:

1. **Aggravated forms of offense**. It is an aggravated form of assault if it causes serious bodily injury, or if the defendant knows or has reason to know that the victim is pregnant, or if the defendant knows that the victim has an outstanding abuse restraining order against the defendant. G.L. c. 265, § 13A(b). An additionally-aggravated sentence is provided for subsequent offenses.

2. **Assault with a dangerous weapon** (G.L. c. 265, § 15B[b]) has one element in addition to those required for simple assault: that the assault was done by means of a dangerous weapon. *Commonwealth v. Burkett,* 5 Mass. App. Ct. 901, 903, 370 N.E.2d 1017, 1020 (1977). J.R. Nolan, *Criminal Law* § 323 (1976). See *Commonwealth v. Nardi,* 6 Mass. App. Ct. 180, 181-184, 374 N.E.2d 323, 324-326 (1978). Simple assault is a lesser included offense of assault with a dangerous weapon, but assault and battery is not. *A Juvenile v. Commonwealth,* 404 Mass. 1001, 533 N.E.2d 1312 (1989).

Assault with a dangerous weapon on a person 60 years or older (G.L. c. 265, § 15B[a]) is an aggravated form of the offense. The Commonwealth must charge and prove that the victim was 60 years of age or older. The jury may consider the victim's physical appearance as one factor in determining age, but appearance alone is not sufficient evidence of age unless the victim is of "a marked extreme" age, since "[e]xcept at the poles, judging age on physical appearance is a guess . . . ." *Commonwealth v. Pittman*, 25 Mass. App. Ct. 25, 28, 514 N.E.2d 857, 859 (1987). Pror to St. 1995, c. 297, § 6 (effective March 17, 1996), the aggravated offense covered persons 65 years or older.

3. **Multiple victims of single assault**. Where the defendant assaults multiple victims in a single act, the defendant may be convicted of multiple counts of assault and, in the judge's discretion, given consecutive sentences. *Commonwealth v. Dello Iacono,* 20 Mass. App. Ct. 83, 89-90, 478 N.E.2d 144, 148-149 (1985) (firing gun into house with several residents).

4. **Simultaneous assault and property destruction**. A single act may support simultaneous convictions of assault by means of a dangerous weapon upon the victim who was assaulted and of malicious destruction of property (G.L. c. 266, § 127) with respect to the area where the victim was standing. *Domingue, supra* (firing gun in order to damage bar and frighten bartender).

5. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6. **Victim's apprehension or fear.** The first (attempted battery) branch of assault does not require that the victim was aware of or feared the attempted battery. *Commonwealth v. Slaney,* 345 Mass. 135, 138-139, 185 N.E.2d 919, 922 (1962); *Commonwealth v. Richards,* 363 Mass. 299, 303, 293 N.E.2d 854, 857-858 (1973); *Commonwealth v. Gorassi,* 432 Mass. 244, 248, 733 N.E.2d 106, 110 (2000).

The second (threatened battery) branch of assault requires that the victim was aware of the defendant's objectively menacing conduct. *Chambers,* 57 Mass. App. Ct. at 48-52, 781 N.E.2d at 39-42. Some older decisions seem to suggest that under the second branch of assault the victim must have feared as well as perceived the threatened battery. This may have resulted from the inherent ambiguity of the term "apprehend," which may signify either. *Chambers, supra,* concluded that subjective fear is not an element of either branch. Other recent decisions appear to be in accord. See *Commonwealth v. Melton,* 436 Mass. 291, 295 n.4, 763 N.E.2d 1092, 1096 n.4 (2002); *Gorassi,* 432 Mass. at 248-249, 733 N.E.2d at 110; *Commonwealth v. Gordon,* 407 Mass. 340, 349, 553 N.E.2d 915, 920 (1990); *Slaney,* 345 Mass. at 139-141, 185 N.E.2d at 922-923; *Richards,* 363 Mass. at 303-304, 293 N.E.2d at

857-858. See also the extended discussion of this issue in R.G. Stearns, *Massachusetts Criminal Law: A Prosecutor's Guide* (28th ed. 2008). The model instruction requires perception, but not subjective fear, by the victim under the second branch of assault.

7. **Assault with intent to murder & assault with intent to kill.** Assault with intent to murder (G.L. c. 265, § 15) requires assault, specific intent to kill, and malice. The lesser included offense of assault with intent to kill (G.L. c. 265, § 29) requires assault, specific intent to kill, and absence of malice. "[P]erhaps the simplest and most distinct way to describe the difference" is that the lesser offense has an additional element — namely, the presence of mitigation provided by reasonable provocation, sudden combat, or excessive force in self-defense. If there is no evidence of mitigation, the Commonwealth satisfies its burden on the issue of malice simply by proving specific intent to kill. *Commonwealth v. Nardone,* 406 Mass. 123, 130-132, 546 N.E.2d 359, 364-365 (1989); *Commonwealth v. Bourgeois,* 404 Mass. 61, 65, 533 N.E.2d 638, 641 (1989). Assault with intent to kill is, in effect, an assault with intent to commit manslaughter. *Commonwealth v. Cowie,* 28 Mass. App. Ct. 742, 745, 556 N.E.2d 103, 105 (1990). Neither offense is within the final jurisdiction of the District Court.

8. **Armed assault in a dwelling** (G.L. c. 265, § 18A), which is not within the final jurisdiction of the District Court, requires proof of: (1) entry of a dwelling while armed; (2) an assault on someone in the dwelling; and (3) accompanying the assault, a specific intent to commit a felony. The intended felony may be a compounded assault charge (such as ABDW) and need not be an additional, factually distinct felony. *Commonwealth v. Donoghue*, 23 Mass. App. Ct. 103, 111-113, 499 N.E.2d 832, 838 (1986). Where the Commonwealth alleges that the intended felony is an attack on a second victim, it must prove specific intent to commit that second attack. *Commonwealth v. Smith*, 42 Mass. App. Ct. 906, 907, 674 N.E.2d 1096, 1098 (1997). Since § 18A does not require that the weapon be used in the assault, it does not have assault by means of a dangerous weapon (G.L. c. 265, § 15B) as a lesser included offense. *Commonwealth v. Flanagan*, 17 Mass. App. Ct. 366, 371-372, 458 N.E.2d 777, 781 (1984).

9. **Verdict slip.** Where the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery, the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433, 939 N.E.2d 1169, 1173 (2010). A verdict slip need not distinguish between a conviction for an attempted battery and a threatened battery even when the Commonwealth proceeds upon both theories. The jury may return a unanimous verdict for assault even if they are split between the two theories. "Because attempted battery and threatened battery 'are closely related,' *Commonwealth v. Santos*, 440 Mass. 281, 289 (2003), we do not require that a jury be unanimous as to which theory of assault forms the basis for their verdict; a jury may find a defendant guilty of assault if some jurors find the defendant committed an attempted battery (because they are convinced the defendant intended to strike the victim and missed) and the remainder find that he committed a threatened battery (because they are convinced that the defendant intended to frighten the victim by threatening an assault). See *id.* at 284, 289 (jury were not required to be unanimous as to which form of assault was relied on to satisfy assault element of armed robbery)." *Commonwealth v. Porro*, 458 Mass. 526, 393 N.E.2d 1157 (2010). See also *Commonwealth v. Arias*, *supra*.