

**ASSAULT AND BATTERY ON A PERSON
PROTECTED BY AN ABUSE PREVENTION ORDER**

The defendant is charged with having committed (an intentional) (or) (a reckless) assault and battery upon [the alleged victim] when the defendant knew at the time that a court had issued an order protecting [the alleged victim] from abuse by (him) (her).

G.L. c. 265, § 13A(b)(iii).

If the Commonwealth relies solely upon a theory of intentional assault and battery, continue with "I" below. If the Commonwealth relies upon both intentional and reckless theories of assault and battery, continue with both "I" and "II.A" below. If the Commonwealth relies solely upon a theory of reckless assault and battery, skip to "II.B" below.

**I. INTENTIONAL ASSAULT AND BATTERY ON A PERSON
PROTECTED BY AN ABUSE RESTRAINING ORDER**

In order to prove an intentional assault and battery upon a person protected by a court order, the Commonwealth must prove six things beyond a reasonable doubt:

First: That the defendant touched the person of [the alleged victim] without having any right or excuse for doing so;

Second: That the defendant intended to touch [the alleged victim] ;

Third: That the touching was either likely to cause bodily harm to

[the alleged victim] or was done without (her) (his) consent;

Fourth: That a court had issued an order (or) (a judgment) pursuant to chapter 209A of our General Laws against the defendant ordering (him) (her):

(to [vacate] [and] [stay away from] particular premises)

(or) (to stay a certain distance away from [the alleged victim])

(or) (not to contact [the alleged victim])

(or) (not to abuse [the alleged victim]).

Fifth: That the order was in effect at the time of the alleged assault and battery; and

Sixth: That the defendant knew that the pertinent term(s) of the order (was) (were) in effect.

To prove that the defendant had knowledge of the order's terms, there must be proof that the defendant received a copy of the order or learned of it in some other way.

If additional language on intent is appropriate. **As I just mentioned, to prove an intentional assault and battery, the Commonwealth must prove beyond a reasonable doubt that the defendant *intended to touch* [the alleged victim], in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not merely accidental or negligent. The Commonwealth is not required to prove that the defendant specifically intended to cause injury to [the alleged victim].**

**II. RECKLESS ASSAULT AND BATTERY ON A PERSON
PROTECTED BY AN ABUSE RESTRAINING ORDER**

A. Continue here if the jury is to be charged on both intentional and reckless assault and battery.

There is a second way in which a person may commit the crime of assault and battery on a person protected by an abuse prevention order. Instead of intentional conduct, it involves a reckless touching that results in bodily injury.

B. Begin here if the jury is to be charged solely on reckless assault and battery. **The defendant is (also) charged with having committed an assault and battery by reckless conduct on a person protected by an abuse prevention order. In order to**

prove the defendant guilty of this offense, the Commonwealth must prove the following five things beyond a reasonable doubt:

First: That the defendant acted recklessly;

Second: That the defendant's reckless conduct included an intentional act which resulted in bodily injury to [the alleged victim] ;

Third: That a court had issued (an order) (or) (a judgment) pursuant to chapter 209A of our General Laws against the defendant ordering (him) (her):

(to [vacate] [and] [stay away from] particular premises)

(or) (to stay a certain distance away from [the alleged victim])

(or) (not to contact [the alleged victim])

(or) (not to abuse [the alleged victim]).

Fourth: That the order was in effect at the time of the alleged reckless conduct; and

Fifth: That the defendant knew that the pertinent term(s) of the order (was) (were) in effect.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond

mere negligence and amounted to recklessness. The defendant acted recklessly if (he) (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but (he) (she) ran that risk and went ahead anyway.

The defendant must have intended (his) (her) acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that (he) (she) intended to injure or strike the alleged victim, or that (he) (she) foresaw the harm that resulted. If the defendant actually realized in advance that (his) (her) conduct was very likely to cause substantial injury and decided to run that risk, such conduct would of course be reckless. But even if (he) (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Commonwealth v. Burno, 396 Mass. 622, 487 N.E.2d 1366 (1986).

The injury must be sufficiently serious to interfere with the alleged

victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

SUPPLEMENTAL INSTRUCTION

Victim injured while escaping.

As I mentioned earlier, the defendant's touching must have directly caused the [alleged victim's] injury or must have directly and substantially set in motion a chain of events that produced the injury in a natural and continuous sequence. Here you have heard some evidence suggesting that [alleged victim] was injured while escaping from [place]. To establish that element of the offense — that the defendant caused the injury which occurred as a result of the escape — the Commonwealth must prove beyond a reasonable doubt: (1) that the defendant caused [the alleged victim] reasonably to fear an immediate attack from the defendant; (2) that this fear led (him) (her) to try to (escape) (or) (defend himself) (defend herself) from the defendant; and (3) that [the alleged victim]

received more than a trifling bodily injury from or during that attempt to (escape) (or) (defend).

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 522 N.E.2d 2 (1988).

Here the jury must be instructed on "Accident" (Instruction 9.100) if the issue of accident is supported by the evidence.

NOTES:

1. **Violations of other types of restraining orders.** This instruction is for assault and battery on a person protected by orders issued pursuant to G.L. c. 209A, §§ 3, 4 and 5. Violations of other restraining orders, specifically G.L. c. 208, §§ 18, 34B, 34C; G. L. c. 209, § 32 and G. L. c. 209C, §§ 15 or 20, are also criminally punishable under G.L. 265, § 13A(b)(iii), and the elements of the offense are the same for each type of order. The instruction should be modified by inserting the proper statutory reference.

2. **Assault on a protected person.** If the Commonwealth charges assault only on a person protected by an abuse prevention order, pursuant to G.L. c. 265 § 13A (b)(iii), the jury must be instructed on "Assault" (Instruction 6.120) in addition to an instruction which includes the fourth, fifth and sixth elements provided in the "Intentional Assault and Battery on a Protected Person" instruction provided above.

3. See Instruction 6.300 (Assault and Battery by Means of a Dangerous Weapon) for additional notes.