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

G.L. c. 265, § 13A(b)(iii)

The defendant is charged with having committed an assault and battery on a person protected by an abuse prevention order.

I. INTENTIONAL ASSAULT AND BATTERY

In order to prove the defendant guilty of committing an intentional assault and battery on a person protected by an abuse prevention order, the Commonwealth must prove six things beyond a reasonable doubt:

***First*: That the defendant touched the person of** [the alleged victim] **;**

***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 offensive; and**

***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.

Commonwealth v. Welch, 58 Mass. App. Ct. 408 (2003).

To prove the first element, the Commonwealth must prove the defendant touched [the alleged victim] . **A touching is any physical contact, however slight.**

If the touching was indirect. **A touching may be direct as when a person strikes another, or it may be indirect as when a person sets in motion some force or instrumentality that strikes another.**

To prove the second element, the Commonwealth must prove 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.**

If additional language on intent is appropriate. **The Commonwealth is not required to prove that the defendant specifically intended to cause injury to** [the alleged victim] **.**

Where there is evidence that the touching may be justified by a legally recognized "right" or "excuse," the jury should be instructed with the specific "right" or "excuse" instructions (e.g., accident (9.100); necessity (9.240); self-defense (9.260). See *Commonwealth v. Wood*, 90 Mass. App. Ct. 271, 286-86 (2016) (where evidence did not raise a claim of right or excuse, the jury need not consider whether the touching was without right or excuse); *Commonwealth v. Conley*, 34 Mass. App. Ct. 50, 58 (1993) (where no evidence of self-defense, jury need not be instructed that right or excuse may justify the touching).

To prove the third element, the Commonwealth must prove that the touching was either likely to cause bodily harm to [the alleged victim] **, or was offensive. A touching is offensive when it is without consent.**

Commonwealth v. Burke, 390 Mass. 480, 484 (1983) (in a prosecution for a nonharmful battery, the Commonwealth must prove that the touching was nonconsensual); *Commonwealth v. Colon*, 81 Mass. App. Ct. 8 (offensive battery requires proof that the defendant intentionally touched the victim and that the touching, however slight, occurred without the victim's consent); *Commonwealth v. Hartnett*, 72 Mass. App. Ct. 467, 477 (2008) ("what makes the touching offensive is not that it is an affront to the victim's personal integrity as the defendant posits, but only that the victim did not consent to it. Nothing more is required.")

The model instruction does not separately define assault, since "[e]very battery includes an assault" as a lesser included offense. *Commonwealth v. Burke*, 390 Mass. 480, 482 (1983); see *Commonwealth v. Porro*, 458 Mass. 526, 533-35 (2010). If the evidence would also permit a jury finding of simple assault, the jury should be instructed on lesser included offenses (Instruction 2.280), followed by Instruction 6.120 (Assault), beginning with the second paragraph.

Commonwealth v. Ford, 424 Mass. 709, 711 (1997) (assault and battery is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Burke*, 390 Mass. at 482-83, 487 (any touching likely to cause bodily harm is a battery regardless of consent, but an offensive but nonharmful battery requires lack of consent or inability to consent); *Commonwealth v. McCan*, 277 Mass. 199, 203 (1931) ("An assault and battery is the intentional and unjustified use of force upon the person of another, however slight, or the intentional doing of a wanton or grossly negligent act causing personal injury to another"); accord *Commonwealth v. Bianco*, 390 Mass. 254, 263 (1983) (same); *Commonwealth v. Campbell*, 352 Mass. 387, 397 (1967) (same); *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 521 (1995) (approving instruction for threatened-battery branch of assault that "when we say intentionally we mean that [defendant] did so consciously and voluntarily and not by accident, inadvertence or mistake"), aff'd, 421 Mass. 610 (1996); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 457-60 (1994) (intentional branch of assault and battery requires proof "that the defendant intended that a touching occur" and not merely "proof that the defendant did some intentional act, the result of which was a touching of the victim"); *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 584 (1991) (intentional branch of assault and battery requires proof "that the defendant's conduct was intentional, in the sense that it did not happen accidentally"); see *Commonwealth v. Bianco*, 388 Mass. 358, 366-367 (1983) (assault and battery by joint venture); *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876) (mutual consent is no defense to cross-complaints of assault and battery; "such license is void, because it is against the law").

II. RECKLESS ASSAULT AND BATTERY

A. *If intentional assault and battery was already charged on.* **There is a second way in which a person may be guilty of an assault and battery. Instead of intentional conduct, it involves reckless conduct that results in bodily injury.**

B. *If intentional assault and battery was not already charged on.* **The defendant is charged with having committed an assault and battery by reckless conduct upon a person protected by an abuse prevention order.**

In order to prove the defendant guilty of having committed an assault and battery by reckless conduct on a person protected by an abuse prevention order, the Commonwealth must prove five things beyond a reasonable doubt:

***First*: That the defendant intentionally engaged in actions which caused bodily injury to [the alleged victim];**

***Second*: That the defendant's actions amounted to reckless conduct; and**

***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 assault and battery; and**

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

To prove the first element, the Commonwealth must prove that the defendant intended (his) (her) acts which resulted in the touching, in the sense that the defendant consciously and deliberately intended the act or acts to occur and that the act or acts did not happen accidentally.

The Commonwealth must also prove that the defendant's acts caused bodily injury to [the alleged victim]. Under the law, a bodily 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.

To prove the second element, the Commonwealth must prove the defendant acted recklessly. 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.

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 harm 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. Correia, 50 Mass. App. Ct. 455, 457-58 (2000) (statute prohibiting assault and battery sets forth the common law crime which includes both intentional and reckless forms of the crime). *Commonwealth v. Burno*, 396 Mass. 622, 625-627 (1986) ("the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another"; injury must have "interfered with the health or comfort of the victim. It need not have been permanent, but it must have been more than transient and trifling. For example, if an alleged victim were shaken up but by his own admission not injured, or if an alleged victim were to have a sore wrist for only a few minutes, the 'injury' in each instance would be transient and trifling at most.") (citation omitted); *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 273-77, rev. denied, 390 Mass. 1102 (1983) ("The law recognizes . . . an alternative form of assault and battery in which proof of a wilful, wanton and reckless act which results in personal injury to another substitutes for . . . intentional conduct"; elements are [1] that the act involved a high degree of likelihood that substantial harm would result to another, and [2] that the victim suffered physical injury as a result of that act). See also *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4 (1987) (" 'The standard of wanton or reckless conduct is at once subjective and objective' . . . . It depends on what the defendant knew (subjective) and how a reasonable person would have acted (objective) knowing those facts.") (quoting *Commonwealth v. Welansky*, 316 Mass. 383, 398 (1944)); *Commonwealth v. Godin*, 374 Mass. 120, 129 (1977) (standard "is at once both a subjective and objective standard, and is based in part on the knowledge of facts which would cause a reasonable man to know that a danger of serious harm exists. Such knowledge has its roots in experience, logic, and common sense, as well as in formal legal standards."); *Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944) ("Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences").

SUPPLEMENTAL INSTRUCTIONS

Victim injured while escaping. **The defendant may be convicted of assault and battery if the Commonwealth has proved beyond a reasonable doubt that the defendant caused** [the alleged victim] **reasonably to fear an immediate attack from the defendant, which then led (him) (her) to try to (escape) (*or*) (defend) (himself) (herself) from the defendant, and in doing so injured (himself) (herself).**

Commonwealth v. Parker, 25 Mass. App. Ct. 727, 731, 734, rev. denied, 402 Mass. 1104 (1988)

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. Persons protected by 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. c. 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 property 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 above.

3. **Transferred intent**. Where this offense requires an intent to strike a person protected by an abuse prevention order, a defendant who inadvertently strikes a person protected by an abuse prevention order while intending to strike someone else may be convicted only of the lesser included offense of assault and battery. *Cf. Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 920 (1982).

4. **No verdict slip or specific unanimity instruction required where both intentional and reckless assault and battery are alleged.** Where the evidence warrants instructing on both intentional assault and battery and reckless assault and battery, the jurors need not be unanimous on whether the assault and battery was intentional or reckless. The judge, therefore, need not give a

specific unanimity instruction or provide verdict slips for the jury to indicate the basis of its verdict. *Commonwealth v. Mistretta*, 84 Mass. App. Ct. 906, 906-07, rev. denied, 466 Mass. 1108 (2013). This is because "the forms of assault and battery are . . . closely related subcategories of the same crime." *Id*. at 907. "Specific unanimity is not required, because they are not 'separate, distinct, and essentially unrelated ways in which the same crime can be committed.' " *Id*. (quoting *Commonwealth v. Santos*, 440 Mass. 281, 288 (2003)).

5. **Medical testimony.** In a prosecution for assault and battery, medical testimony about the victim's injuries is admissible to establish that the defendant's assault on the victim was intentional and not accidental. *Commonwealth v. Gill*, 37 Mass. App. Ct. 457, 463-64 (1994).

6. **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.