

**ASSAULT AND BATTERY TO INTIMIDATE  
BASED ON RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEXUAL  
ORIENTATION, GENDER IDENTITY, OR DISABILITY**

G.L. c. 265, § 39(a)

**The defendant is charged with having committed an assault and battery with the intent to intimidate a person because of that person's**

*(read all that apply based on prosecution's theory of the case: [race] [color]*

**[national origin] [sexual orientation] [gender identity] [disability]**

**[religion])).**

**To prove the defendant guilty, the Commonwealth must prove four (five) 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];**

**and,**

***Third:* That the touching was *either* likely to cause bodily harm to [the alleged victim], *or* was offensive; and**

***Fourth:* That the defendant intended to intimidate [the alleged victim] because of that person's [race] [color] [national origin] [sexual orientation] [gender identity] [disability] [religion].**

*Fifth element: If a bodily injury is charged:*

**And Fifth:** That the defendant's actions resulted in a  
bodily injury to [the alleged victim].

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, 20-21 (2011) (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.")

**To prove the fourth element, the Commonwealth must prove that, at the time of the assault and battery, the defendant intended to intimidate  [the alleged victim]  because of that person's perceived or actual [race] [color] [national origin] [sexual orientation] [gender identity] [disability] [religion]. To intimidate means to make timid or fearful with acts or words that would instill fear in a reasonable person. While the Commonwealth must prove the defendant intended to intimidate  [the alleged victim]  because of that person's perceived or actual [race] [color] [national origin] [sexual orientation] [gender**

**identity] [disability] [religion], it is not required to prove that the defendant was successful in intimidating [the alleged victim].**

See *Commonwealth v. Perez*, 460 Mass. 683, 703 (2011); *Commonwealth v. Rivera*, 76 Mass. App. Ct. 530, 535 (2010); *Commonwealth v. Barnette*, 45 Mass. App. Ct. 486, 490-491 (1998).

**The perceived or actual [race] [color] [national origin] [sexual orientation] [gender identity] [disability] [religion] of [the alleged victim] need not be the only motivating factor, but it must be one of the factors that led to the commission of the crime. In other words, the assault and battery must be motivated at least in part by hatred, bias, or prejudice due to the [race] [color] [national origin] [sexual orientation] [gender identity] [disability] [religion] of [the alleged victim].**

See *Commonwealth v. Kelly*, 470 Mass. 682, 690-691 (2015).

[The judge may continue here or choose to use the extended instruction on specific intent in model instruction 3.120. If the Commonwealth is pursuing both theories, the judge may avoid repetition by reminding jurors that the instruction on intent just given applies equally here.]

**The allegation that the defendant intended to intimidate [the alleged victim] on this basis requires you to make a decision about the defendant's state of mind at that time. You may consider any evidence about the actions or words of the defendant, and all of the surrounding circumstances, to help you determine whether the defendant intended to intimidate [the alleged victim] due to their [race]**

**[color] [national origin] [sexual orientation] [gender identity]  
[disability] [religion].**

*Commonwealth v. Barnette*, 45 Mass. App. Ct. 486, 490 (1998).

*Fifth element: If a bodily injury is charged:*

**To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant's actions resulted in a bodily injury to [the alleged victim]. Under the law, a bodily injury is a substantial impairment of the physical condition. It is an injury to any body part that considerably or significantly compromises its usual bodily function such as, but not limited to: (a burn) (a fracture of any bone) (a subdural hematoma) (injury to any internal organ) (any injury which occurs as a result of repeated harm to any bodily function or organ, including human skin).**

#### SUPPLEMENTAL INSTRUCTIONS

1. *Disability.* The term “disability” means (a) a physical or mental impairment which substantially limits one or more

**major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment.**

The term “impairment” does not include current, illegal use of alcohol or a controlled substance as defined in section one of chapter ninety-four C. See G.L. c. 265, § 39(a), referring to G.L. c. 151B, § 1(17).

2. **Gender identity.** The term “gender identity” means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth.

See G.L. c. 4, § 7 ¶ 59.

3. **Sexual orientation.** The term “sexual orientation” means having an orientation for or being identified as having an orientation for heterosexuality, bisexuality or homosexuality.

See G.L. c. 112, § 275.

4. **Race.** Under the law, in the context of racial discrimination, the term race refers to traits historically associated with race, including, but not limited to, hair texture, hair type, hair length and protective hairstyles,

such as braids, locks, twists, Bantu knots, hair coverings  
and other formations.

See G.L. c. 4, § 7 ¶¶ 62, 63.

## **Conclusion**

**If the Commonwealth has proved all of the elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must find the defendant not guilty.**

### NOTES:

- 1. Unanimity.** The jury verdict need not be unanimous as to the means by which the assault was committed. See *Commonwealth v. Arias*, 78 Mass. App. Ct. 429 (2010) (an attempted battery and an immediately threatened battery are alternative methods of establishing the crime, not distinct theories requiring unanimity).
- 2. Statement of reasons required if imprisonment not imposed.** In sentencing for a conviction of this or any other c. 265 crime against the person, a jury session judge 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.
- 3. Evidence of Gender Identity.** “Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.” G.L. c. 4, § 7.
- 4. Lesser included offense.** Simple assault is a lesser included offense. See Instruction 6.120.
- 5. Sentencing where bodily injury found.** The statute indicates that the maximum sentence for a conviction of assault and battery to intimidate causing a bodily injury is no more than five years in state prison and does not specifically list a house of correction alternative. Based on a complete reading of the statute, which allows for a house of correction sentence for both greater and lesser offenses, the District Court has jurisdiction over this charge, as it does with all felonies punishable by no more than five years in state prison. See G.L. c. 218, § 26. As such, a defendant convicted of causing a

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bodily injury may be sentenced to no more than two and one half years in the house of correction. See also G.L. c. 279, § 5 ("If no punishment for a crime is provided by statute, the court shall impose such sentence, according to the nature of the crime, as conforms to the common usage and practice in the commonwealth.")