

**ASSAULT 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 with the intent to intimidate a person because of that person's** *(read all that may apply based on the prosecution's theory of the case: [race] [color] [national origin] [sexual orientation] [gender identity] [disability] [religion]).*

**Attempted Battery**

**To prove the defendant guilty, the Commonwealth must prove four things beyond a reasonable doubt:**

***First:*** the defendant intended to commit a battery upon [the alleged victim];

***Second:*** the defendant took some overt step toward accomplishing that intent;

***Third:*** the defendant came reasonably close to doing so; and

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

To prove the first element, the Commonwealth must prove that the defendant intended to commit a battery. A battery is a touching that is *either* likely to cause bodily harm to [the alleged victim] or is offensive. A touching is offensive when it is without consent.

[The judge may continue here or choose to use the extended instruction on specific intent in model instruction 3.120.]

A person's intent is their purpose or objective. This 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 commit a battery.

To prove the second element, the Commonwealth must prove that the defendant took some overt step toward accomplishing that intent. In other words, the defendant must take some demonstrable action toward committing a battery. However, it is not necessary for the Commonwealth to show that [the alleged victim] was put in fear or was even aware of the attempted battery.

To prove the third element, the Commonwealth must prove that the defendant came reasonably close to accomplishing a battery.

To prove the fourth element, the Commonwealth must prove that, at the time of the assault, 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).

### **Immediately Threatened Battery**

**The defendant is (also) charged with having committed an assault by making an immediately threatened battery with the intent to intimidate a person because of that person's [race] [color] [national origin] [sexual orientation] [gender identity] [disability] [religion].**

**To prove the defendant guilty, the Commonwealth must prove three things beyond a reasonable doubt:**

***First:*** the defendant intended to put  [the alleged victim]  in fear of an immediate battery;

***Second:*** the defendant engaged in some conduct toward  [the alleged victim]  which  [the alleged victim]  reasonably perceived as immediately threatening a battery; and

***Third:*** 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 prove the first element, the Commonwealth must prove that the defendant intended to put  [the alleged victim]  in fear of an imminent battery. A battery is a touching that is *either* offensive or likely to cause bodily harm to  [the alleged victim] .

[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.]

**A person's intent is their purpose or objective. This 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 commit a battery.**

**To prove the second element, the Commonwealth must prove that the defendant engaged in some conduct toward [the alleged victim] which [the alleged victim] reasonably perceived as immediately threatening a battery. This requires you to consider any evidence about what [the alleged victim] perceived and also whether that perception was reasonable.**

**To prove the third element, the Commonwealth must prove that, at the time of the assault, 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).

## 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.