ASSAULT AND BATTERY ON A CORRECTION OFFICER OR CORRECTIONAL FACILITY EMPLOYEE

G.L. c. 127, § 38B

The defendant is charged with having committed an assault and battery upon a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility] [duly authorized officer or other employee engaged in the transportation of a prisoner for any lawful purpose] while the defendant was in the custody of a correctional facility.

I. INTENTIONAL ASSAULT AND BATTERY

To prove the defendant guilty of committing an intentional assault and battery upon a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility] [duly authorized officer or other employee engaged in the transportation of a prisoner for any lawful purpose], the Commonwealth must prove five (six) elements 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;**

***Fourth*: That the defendant was in the custody of a correctional facility at the time; and**

Fifth:* That the defendant *knew [the alleged victim] **was a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility] [duly authorized officer or other employee of such a correctional facility engaged in the lawful transportation of a prisoner].**

If there is evidence of use of a bodily substance:

***Sixth*: That the touching was by a bodily substance.**

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

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 (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).

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 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.**

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]**.**

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); *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. 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".

To prove the third element, the Commonwealth must prove beyond a reasonable doubt 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. 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 beyond a reasonable doubt that the defendant was in the custody of a correctional facility. A correctional facility includes any jail, house of correction, trial court detention facility, or state prison. Someone is in custody when they are detained awaiting trial on a criminal charge, detained serving a sentence, detained on an arrest warrant, or detained by a court order.

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that [the alleged victim] **was a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility] [duly authorized**

officer or other employee of such correctional facility engaged in the lawful transportation of a prisoner].

It is not enough to prove that a prudent person would have known or believed that [the alleged victim] **was a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility] [duly authorized officer or other employee of such correctional facility engaged in the lawful transportation of a prisoner]. To help determine whether the defendant knew** [the alleged victim] **was a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility], you may examine any evidence regarding the defendant's actions or words, and all of the surrounding circumstances.**

If there is evidence of use of a bodily substance **To prove the sixth element, the Commonwealth must prove beyond a reasonable doubt that the touching was by a bodily substance. A bodily substance is any human secretion, discharge, or emission including, but not limited to, blood, saliva, mucous, semen, urine, or feces.**

If the Commonwealth has proved each of the five (six) elements of intentional assault and battery on a correction officer beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

II. RECKLESS ASSAULT AND BATTERY

A. *If intentional assault and battery instruction was already given.* **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 instruction was not already given.* **The defendant is charged with having committed an assault and battery on a correction officer by reckless conduct.**

To prove the defendant guilty of having committed an assault and battery by reckless conduct on a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility] [duly authorized officer or other employee engaged in the lawful

transportation of a prisoner] while the defendant was in the custody of a correctional facility, the Commonwealth must prove four (five) elements 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;**

Third: **That the defendant was in the custody of a correctional facility; and**

Fourth: **That the defendant *knew*** __[the alleged victim]__ **was a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility] [duly authorized officer or other employee of such correctional facility engaged in the lawful transportation of a prisoner]**

If there is evidence of use of a bodily substance:

Fifth: **That the touching was by a bodily substance.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant intended whatever act or acts that resulted in the touching. In other words, the Commonwealth must prove that the defendant consciously and deliberately intended the act or acts to occur and that (it was) (they were) not accidental.

The Commonwealth must also prove beyond a reasonable doubt that the defendant's actions caused bodily injury to ___[the alleged victim]_____**. To qualify, the 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.**

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).

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that 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 they knew, or should have known, that their actions were very likely to cause substantial harm to someone, but they ran that risk and went ahead anyway. The Commonwealth need not prove that the defendant intended to injure or strike [the alleged victim] **or that the defendant foresaw the harm that resulted, or that they were conscious of the serious danger that was inherent in such conduct. It is enough 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 a substantial injury to another person.**

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))

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].

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant was in the custody of a correctional facility. A correctional facility includes any jail, house of correction, trial court detention facility, or state prison. Someone is in custody when they are detained awaiting trial on a criminal charge, detained serving a sentence, detained on an arrest warrant, or detained by a court order.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant *knew* that [the alleged victim] **was a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility] [duly authorized officer or other employee engaged in the transportation of a prisoner for any lawful purpose].**

It is not enough to prove that a prudent person would have known or believed that [the alleged victim] **was a [(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility] [duly authorized officer or other employee engaged in the transportation of a prisoner for any lawful purpose]. To help you determine whether the defendant knew** [the alleged victim] **was a**

[(correction officer or other employee) (volunteer) (contractor employee) in a correctional facility], you may examine any evidence regarding the defendant's actions or words, and all of the surrounding circumstances.

If there is evidence of use of a bodily substance **To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the substance used was a bodily substance. A bodily substance is any human secretion, discharge or emission including, but not limited to, blood, saliva, mucous, semen, urine or feces.**

If the Commonwealth has proved each of the four (five) elements of reckless assault and battery on a correction officer beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more elements beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. Other bad acts. **The defendant is not charged with committing any crime other than the charge(s) contained in the complaint.**

You have heard that the defendant was in the custody of a correctional facility [or other evidence of bad acts]. You may not take that as a substitute for proof that the defendant committed the crime(s) charged. You may not consider it as proof that the defendant has a criminal personality or bad character.

You may not use it to conclude that if the defendant committed the other act(s), they must also have committed this offense. You may consider it solely on the limited issue of whether the defendant was in the custody of a correctional facility. You may not consider this evidence for any other purpose.

See Instruction 3.760 (Other Bad Acts By Defendant)

2. 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 (by reckless conduct) caused** [the alleged victim] **reasonably to fear an immediate attack from the defendant, which then led** [the alleged victim] **to try to escape from the defendant, and in doing so injured themself.**

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

3. Right of Self Defense if Correction Officer Alleged to Use Excessive Force

People are allowed to use reasonable force to protect themselves from physical harm when excessive or unnecessary force is used. A correction officer may not use excessive or unnecessary force in carrying out official duties. If a correction officer uses excessive or unnecessary force to carry out official duties, people may defend themselves with as much force as reasonably appears necessary. If there is evidence that the correction officer used excessive or unnecessary force, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense.

To prove that the defendant did not act in self-defense, the Commonwealth must prove at least one of the following four things beyond a reasonable doubt:

First: That the correction officer did not use excessive or unnecessary force; or

Second: That the defendant did not reasonably believe that the correction officer was using excessive or unnecessary force and putting the defendant's personal safety in immediate danger; or

Third: That the defendant did not do everything that was reasonable in the circumstances to avoid physical combat before resorting to force; or

Fourth: That the defendant used more force to defend themself than was reasonably necessary in the circumstances.

If there is evidence of self-defense and the Commonwealth has failed to prove one or more of these things beyond a reasonable doubt, you must find the defendant not guilty.

Where the alleged victim is a correction officer, a defendant is entitled to this instruction if, taking all reasonable inferences in favor of the defendant, there is sufficient evidence of self-defense to raise the issue. See *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 651 (2004), citing *Commonwealth v. Pike*, 428 Mass. 393, 395 (1998) and *Commonwealth v. Harrington*, 379 Mass. 446, 450 (1980); *Commonwealth v. Francis*, 24 Mass. App. Ct. 576, 579 (1987).

NOTES:

1. **Applicability**. General Laws c. 127, § 38B applies to any "person in the custody of a correctional facility, including any jail, house of correction, trial court detention facility or state prison, who commits an assault or an assault and battery upon an officer or other employee, any volunteer or employee of a contractor in any such facility or any duly authorized officer or other employee of any such facility engaged in the transportation of a prisoner for any lawful purpose."

In 2010, G.L. c. 127, § 38B was amended to punish "any <u>person</u> in the custody of a correctional facility." Prior to the amendment, the law applied to "a <u>prisoner</u> in the custody of a correctional facility." While cases prior to the amendment focused on the "nature of the offender rather than the location of the offense", the amended statute requires only a determination of whether the location of the offense is a "correctional facility". See *Commonwealth v. Shaheed*, 76 Mass. App. Ct. 598, 601 n. 4 (2010). The term, however, is to be given a "narrow construction". *Id* at 601.

In *Shaheed*, the Appeals Court considered whether a patient of Bridgewater State Hospital was a "prisoner" for purposes of the statute where the patient had served his sentence, was held on a civil commitment, and was not awaiting trial for any criminal offense. See 76 Mass. App. Ct. at 600-602. The Court acknowledged that Bridgewater was under the control of the Department of Correction, but concluded that the person was not a "prisoner" and that if the Legislature intended the statute to apply based on the place of the offense rather than the status of the offender, "it is free to change the law." *Id.* at 601 & n.4. Subsequently, the Legislature amended "prisoner" to "person."

2. **Lesser included offenses**. Assault and battery is a lesser included offense of assault and battery on a correctional officer. *Commonwealth v. Shaheed*, 76 Mass. App. Ct. 598, 602 (2010). 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.

Assault and battery on a public employee is not a lesser included offense. *Commonwealth v. Shaheed*, 76 Mass. App. Ct. 598, 601 n.4 (2010).

3. **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).

4. **Knowledge of alleged victim's status.** Under the intentional prong of assault and battery, the Commonwealth must prove that the defendant intended to strike a public employee. *Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 920 (1982). Even though the statute does not specifically provide for scienter as an element of the offense, older cases suggest that knowledge of the officer's identity was required to establish the common law offense and have continued to include this requirement under the statutory offense. See *Commonwealth v. Kirby*, 2 Cush. 577, 579, 581–582 (1849); *Commonwealth v. Hurley*, 99 Mass. 433, 434 (1868); *Commonwealth v. Sawyer*, 142 Mass. 530, 533 (1886). See also C*ommonwealth v. Deschaine*, 77 Mass. App. Ct. 506, 514-515 (2010) ("assault and battery upon a person of a certain type requires that the defendant know that the other is of a certain type"); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 461 (1994), citing *Commonwealth v. Francis,* 24 Mass. App. Ct. 576, 577 (1987) ("the officer must be engaged in the performance of his duties at the time and the defendant must know that the victim was an officer engaged in the performance of his duties").

Assault and battery on a correctional officer may be done recklessly as well as intentionally, and intent to strike the correctional officer, which is required under the intentional assault and battery theory, is not required under the recklessness analysis. See *Commonwealth v. Correia*, 50 Mass. App. Ct. 455, 457-58 (2000). There is no need for the Commonwealth to prove that the defendant intended the consequences of his action: "only a general intent to commit an assault and battery coupled with knowledge of the correction officer's status is required." *Deschaine*, *supra* at 515.

5. **Transferred intent**. Where this offense requires an intent to strike a specific type of employee, a defendant who inadvertently strikes one of the persons listed in the statute while intending to strike someone else may be convicted only of the lesser included offense of assault and battery. See *Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 920 (1982).

6. **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).

7. **Duties of a correction officer.** The duties of a correction officer include the duty to transport inmates outside of a correctional facility and to prevent their escape. G.L. c. 125, § 3.

8. **Assault and battery by means of a bodily substance**. Assault and battery by means of a bodily fluid upon a correction officer under G.L. c. 127, § 38B (c) carries the same penalty as assault and battery upon a correction officer under G.L. c. 127, § 38B (b).

9. F**rom and after sentencing.** Upon conviction the defendant shall be punished by imprisonment for not more than 2 and one-half years in a jail or house of correction or for not more than 10 years in a state prison. Such sentence shall begin from and after all sentences currently outstanding and unserved at the time of said assault or assault and battery. G.L. c. 127, § 38B.