

## ASSAULT BY MEANS OF A DANGEROUS WEAPON

G.L. c. 265, § 15B

*[The judge should inquire of the prosecutor as to which theory or theories the Commonwealth intends to pursue. The judge should then instruct on attempted battery, immediately threatened battery, or both, depending on the evidence. Bracketed material is to be used when both theories are advanced. The definition of “dangerous weapon” in Supplemental Instruction A or B should be read prior to the conclusion.]*

**The defendant is charged with having committed an assault with a dangerous weapon.**

[When instructing on both theories] **An assault with a dangerous weapon can be proven in either of two ways - either as an attempted battery or as an immediately threatened battery.**

### **Attempted Battery**

**To prove the defendant guilty of assault with a dangerous weapon as an attempted battery, the Commonwealth must prove four things beyond a reasonable doubt:**

**First:** the defendant intended to commit a battery upon the named  
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 committed the assault with a dangerous weapon.

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* offensive or likely to cause bodily harm to [the named victim].

[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 named 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 the defendant attempted to commit the battery with a dangerous weapon.

[If only charging on attempted battery, skip to the instruction defining a dangerous weapon, *infra*.]

### **Immediately Threatened Battery**

The defendant is (also) charged with assault with a dangerous weapon by making an immediate threat to commit a battery with a dangerous weapon.

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

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

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

***Third:* the assault was committed with a dangerous weapon.**

**To prove the first element, the Commonwealth must prove that the defendant intended to put [the named victim] in fear of an imminent battery. A battery is a touching that is *either* offensive or likely to cause bodily harm to [the named 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 named victim] which [the named victim] reasonably perceived as immediately threatening a battery. This requires you to consider any evidence about what [the named victim] perceived and also whether that perception was reasonable.**

**To prove the third element, the Commonwealth must prove that the immediate threat of a battery was committed with a dangerous weapon.**

**Dangerous Weapon**

**A. If the alleged weapon is inherently dangerous.**

**A dangerous weapon is an item which is designed for the purpose of causing serious injury or death. I instruct you, as a matter of law, that \_\_\_\_\_ is a dangerous weapon.**

See Notes 1 & 2 regarding inherently dangerous weapons. If the weapon alleged is a knife, consider using Instruction B, below.

**B. If the alleged weapon is not inherently dangerous.**

**An item that is normally used for innocent purposes can become a dangerous weapon if it is used in a dangerous or potentially dangerous fashion. The law considers an item to be used in a dangerous fashion if it is used in a way that it reasonably appears to be capable of causing serious injury or death to another person. [For example, a (brick) (baseball) can be a dangerous weapon if it is thrown at someone's head.] In deciding whether an item was used as a dangerous weapon,**

**you may consider the circumstances surrounding the alleged crime, the nature, size, and shape of the item, and the manner in which it was handled or controlled.**

### **Conclusion**

**Your verdict, whether guilty or not guilty, must be unanimous as to whether the Commonwealth proved beyond a reasonable doubt that the defendant committed an assault with a dangerous weapon.**

*[If the Commonwealth is proceeding on both theories:]*

**[You do not all have to agree as to whether the Commonwealth proved an attempted battery or an imminently threatened battery. If each juror finds the Commonwealth has proved one or the other beyond a reasonable doubt, you should return a verdict of guilty. If all jurors agree that the Commonwealth has not proved either an attempted battery or an imminently threatened battery beyond a reasonable doubt, you must return a verdict of not guilty.]**

NOTES:

**1. Unanimity.** The jury verdict must be unanimous as to whether the defendant is guilty of an assault by means of a dangerous weapon, but it 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. “Dangerous weapon.”** A weapon is “an instrument of offensive or defensive combat; . . . anything used, or designed to be used, in destroying, defeating, or injuring an enemy.” *Commonwealth v. Sampson*, 383 Mass. 750, 754 (1981). A dangerous weapon is “any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm.” *Commonwealth v. Farrell*, 322 Mass. 606, 614-615 (1948).

**3. “Inherently Dangerous.”** If a weapon is inherently dangerous, it need not have been used in a dangerous fashion. *Commonwealth v. Appleby*, 380 Mass. 296, 307 n.6 (1980). For the list of weapons which are considered inherently dangerous, see G.L. c. 269, § 10(a) & (b), and *Appleby*, 380 Mass. at 303 (item is inherently dangerous “if designed for the purpose of bodily assault or defense”). See *Commonwealth v. Lord*, 55 Mass.App.Ct. 265, 267 (2002) (mace spraying device dangerous per se).

**4. Usually Innocent Items.** Usually-innocent items are also considered to be dangerous weapons if used in a dangerous or potentially dangerous fashion. *Appleby*, *supra* at 303-304, 307 (riding crop; and collecting cases on particular items). See also *Commonwealth v. Scott*, 408 Mass. 811, 822-823 (1990) (gag); *Commonwealth v. Gallison*, 383 Mass. 659, 667-668 (1981) (lit cigarette); *Commonwealth v. Barrett*, 386 Mass. 649, 654-656 (1980) (aerosol can sprayed in eyes of operator of moving vehicle); *Commonwealth v. Fettes*, 64 Mass. App. Ct. 917, 918 (2005) (dog). However, the fact that an appellate court previously held that the object was capable of being used as a dangerous weapon does not make it such in all future cases, regardless of circumstances. *Appleby*, *supra*. “The essential question, when an object which is not dangerous per se is alleged to be a dangerous weapon, is whether the object, as used by the defendant, is capable of producing serious bodily harm.” *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 922 (1984). This is determined by how the object’s potential for harm would have appeared to a reasonable observer. *Commonwealth v. Tarrant*, 367 Mass. 411, 414 (1975). This determination is normally for the jury, to be decided on the basis of the circumstances surrounding the crime, the nature, size and shape of the object, and the manner in which it was handled or controlled. *Appleby*, 380 Mass. at 307 n.5; *Marrero*, *supra*; *Commonwealth v. Davis*, 10 Mass. App. Ct. 190, 193 (1980). “That a dangerous weapon was used can be inferred from the victim’s injuries.” *Commonwealth v. Roman*, 43 Mass. App. Ct. 733, 736, S.C., 427 Mass. 1006 (1998). Whether an item is a dangerous weapon turns on how it is used, and not the subjective intent of the actor. *Commonwealth v. Lefebvre*, 60 Mass. App. Ct. 912, 913 (2004); *Commonwealth v. Connolly* 49 Mass. App. Ct. 424, 425 (2000).

**5. Specific Examples.** To qualify as a dangerous weapon, an item need not be capable of being wielded, possessed or controlled, and may be stationary. *Commonwealth v. Sexton*, 425 Mass. 146, 152 (1997) (concrete pavement against which victim’s head was repeatedly struck; and collecting cases). See also *Commonwealth v. McIntosh*, 56 Mass. App. Ct. 827, 829 (2002) (windowpane). It may not, however, be a human body part. *Davis*, 10 Mass. App. Ct. at 192-193 (teeth and other body parts). The ocean is not a dangerous weapon for purposes of § 15A where the victim is abandoned far from shore, *Commonwealth v. Shea*, 38 Mass. App. Ct. 7, 15-16, (1995), but perhaps it would be if the victim’s head were held underwater, see *Sexton*, 425 Mass. at 150 & n.1.

**6. Knives.** Not all knives are dangerous *per se*. By statute, “any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches” is a dangerous

**ASSAULT BY MEANS OF A DANGEROUS WEAPON**

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weapon *per se*. *Id.* at 749-50, citing G.L. c. 269, § 10(b). See *Commonwealth v. Miller*, 22 Mass. App. Ct. 694, 694 n.1 (1986) (noting Legislature has not designated all knives as dangerous *per se*, and discussing the definition of “dirk knife”). Beyond this list, no individual feature is dispositive of the question whether a knife is dangerous *per se*. *Commonwealth v. Wynton W.*, 459 Mass. 745, 754 & n.5 (2011). Rather, the question is whether the knife is “designed for the purpose of bodily assault or defense” and “to produce death or great bodily harm”. *Commonwealth v. Wynton W.*, 459 Mass. 745, 754 & n.5 (2011).

**7. Shod foot.** “Footwear, such as a shoe, when used to kick, can be a dangerous weapon.” *Commonwealth v. Tevlin*, 433 Mass. 305, 311 (2001); *Commonwealth v. Fernandez*, 43 Mass. App. Ct. 313, 315 (1997) (sneakers); *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 922 (1984) (boots or sneakers); *Commonwealth v. Zawatsky*, 41 Mass. App. Ct. 392, 398-399 (1996) (unnecessary for prosecutor to prove exactly what type of shoes defendant wore where there was evidence that defendant was wearing shoes and gave victim a vicious kick to the head resulting in injury). Compare *Commonwealth v. Charles*, 57 Mass. App. Ct. 595, 599 (2003) (kicking was “not so minimal as to foreclose an inference” that shod feet were being used as dangerous weapons capable of causing serious injury) with *Commonwealth v. Mercado*, 24 Mass. App. Ct. 391, 397 (1987) (jury may infer that foot was shod, but no more than a nudge was insufficient).

**8. Unseen weapon.** A defendant who claimed to have a weapon may be taken at his word, if it is possible that he did have such a weapon. See *Commonwealth v. Hastings*, 22 Mass. App. Ct. 930, 930 (1986) (where victim felt sharp object against her, defendant claiming to have unseen knife may be convicted of assault and battery by means of a dangerous weapon).

**9. Specification of dangerous weapon.** The particular type of dangerous weapon with which the offense was committed is not an essential element of assault by means of a dangerous weapon. See *Commonwealth v. Salone*, 26 Mass. App. Ct. 926, 929 (1988). It is therefore surplusage in a complaint and, if the defendant is not surprised, its specification in the complaint may be amended at any time to conform to the evidence. See G.L. c. 277, § 21.

**10. Aggravated forms of offense.** Assault by means of a dangerous weapon on a person 60 years or older (G.L. c. 265, § 15B[a]) is an aggravated form of ADW (§ 15B[b]). The Commonwealth must charge and prove that the victim was 60 years of age or older. The jury may consider the victim’s physical appearance as one factor in determining age, but appearance alone is not sufficient evidence of age unless the victim is of “a marked extreme” age, since “[e]xcept at the poles, judging age on physical appearance is a guess . . . .” *Commonwealth v. Pittman*, 25 Mass. App. Ct. 25, 28 (1987). A further-aggravated sentence is provided for subsequent offenses.

**11. 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.