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Assault[1]

[Note to Judge: There are two theories of assault: attempted battery and threatened battery. Instruct on either theory or both, based on the evidence.]

Dft is charged with committing an assault on Avm on [Date].

USE THIS WHEN INSTRUCTING ON BOTH THEORIES OF ASSAULT[2]

The crime of assault can be committed in two ways. First, an assault can be committed by **attempting** to use physical force on another person. Second, an assault can be committed by **threatening** another person with bodily harm. The Commonwealth can prove Dft guilty under either form of assault. The jury need not be unanimous as to the form of assault, but for Dft to be convicted, all jurors must agree that the Commonwealth has proved at least one form of assault beyond a reasonable doubt.

Attempting to Use Physical Force on Another

To prove Dft guilty of the first type of assault, the Commonwealth must prove three elements beyond a reasonable doubt:

1. Dft attempted to use physical force on Avm;
2. Dft intended to cause bodily harm to Avm; and
3. Dft came reasonably close to accomplishing the intended harm.[3]

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[1] G.L. c. 265, § 13A(a) states: "Whoever commits an assault . . . upon another shall be punished."

[2] The jury should not be asked to complete a special verdict slip requiring them to elect between the theories. *Commonwealth v. Porro*, 458 Mass. 526 (2010); *Commonwealth v. Santos*, 440 Mass. 281, 289 (2003); *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433 (2010).

[3] Although the theories of assault often are referred to as "attempted battery" and "threatened battery," this instruction does not use "battery" in defining the elements of either theory but instead uses more descriptive language set out in the caselaw. The phrasing of the first and second elements, for both theories, is taken from *Commonwealth* v. *Gorassi*, 432 Mass. 244,

As to the first element, give the words their ordinary meaning.

The second element requires the Commonwealth to prove what Dft intended. Intent is a state of mind. It means a person's purpose or objective. To prove that Dft acted with an intent to cause bodily harm to Avm, the Commonwealth must prove that Dft had the specific purpose or objective to cause bodily harm when Dft acted. The decision to act for that purpose requires some period of thought, however brief.

As to the third element, once again, give the words their ordinary meaning.

For this type of assault, the Commonwealth does not have to prove that Avm was afraid of being hurt or that Avm even knew what Dft was doing or intending.

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248 (2000) ("[A]ssault is defined as either an attempt to use physical force on another, or as a threat of use of physical force. . . . In the case of an attempted battery type of assault, . . . the Commonwealth must prove that the defendant attempted to do bodily harm." (citations omitted)). See also, e.g., *Commonwealth* v. *Arias*, 78 Mass. App. Ct. 429, 433 (2010) ("In the circumstances of an assault, the methods of committing an assault – attempted battery force or the threat of battery – are closely related and may work in combination."); *Commonwealth* v. *Werner*, 73 Mass. App. Ct. 97, 102 (2008).

By requiring proof of physical force and intent to cause or instill apprehension of bodily harm, this instruction departs from the District Court's model instruction. The above instruction does not allow conviction of assault based on an attempted or threatened touching that, even if offensive, is not harmful. To date, no reported Massachusetts appellate decision has addressed whether an attempted or threatened nonharmful but offensive touching suffices to prove assault. See *Commonwealth v. Vieira*, 483 Mass. 417, 423–424 (2019), and cases cited (offensive battery is an unconsented-to, nonharmful, intentional touching, however slight, committed without justification or excuse; "[t]he affront to the victim's personal integrity is what makes the touching offensive"; "[s]uch 'de minimis touchings' may include tickling . . . spitting . . . or moving someone from one room to another"). A judge may wish to fashion an appropriate supplemental instruction in a case that reasonably raises the possibility of an assault based on an attempted or threatened touching that may be offensive but not harmful.

Threatening Another with Bodily Harm

To prove Dft guilty of the second type of assault, the Commonwealth must prove three different elements beyond a reasonable doubt:

1. Dft did some act that would cause a reasonable person in Avm's position to fear or recognize a risk of immediate bodily harm;
2. Dft intended to cause Avm to fear immediate bodily harm; and
3. As a result of Dft's action, Avm feared or recognized a risk of immediate bodily harm.

As to the first element, words alone generally do not rise to the level of an assault without some action by the defendant.[4]

The second element is that Dft intended to place Avm in fear of immediate bodily harm. The Commonwealth must prove that Dft had the specific purpose or objective to cause Avm to fear immediate bodily harm when Dft acted. The decision to act for that purpose requires some period of thought, however brief.

For the third element, the Commonwealth must prove that, as a result of Dft's action, Avm recognized a risk of immediate bodily harm. It is not necessary that Avm was actually afraid.

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[4] In a rare instance, informational words may suffice as a substitute for action. See *Commonwealth* v. *Delgado*, 367 Mass. 432, 436–437 & n.3 (1975), and secondary authority cited. But see *Commonwealth* v. *Roy*, 92 Mass. App. Ct. 1120, 2018 WL 3468450 at *1 (July 19, 2018) (Rule 1:28 decision) (defendant's words alone – "Good, so I can kill you" or "I could kick your ass" – did not "convey[ ] sufficient information about carrying out the threat" to constitute assault). A judge should proceed cautiously when instructing in a truly "words only" case. In such a case, the following additional charge may be appropriate:

> "Words alone may be enough but only if the words convey information that substitutes for action. For example, saying 'I have a gun' may suggest the presence of a weapon and may be a substitute for the act of pulling back one's coat to reveal a gun. Threatening words alone are not enough to constitute an assault and will not substitute for the act required to commit the crime of assault."

[Where there is evidence the defendant may not have had the actual ability to complete the act]

For either theory of assault, the Commonwealth does not have to prove that Dft actually had the ability at the time of the alleged assault to cause the attempted or threatened harm. Appearing to have the ability is enough.[5]

[5] *Commonwealth v. Buttimer*, 482 Mass. 754, 767 (2019).

USE THIS WHEN INSTRUCTING ONLY ON THEORY OF ATTEMPTED PHYSICAL FORCE:

To prove Dft guilty of assault, the Commonwealth must prove three elements beyond a reasonable doubt:

1. Dft attempted to use physical force on Avm;
2. Dft intended to cause bodily harm to Avm; and
3. Dft came reasonably close to accomplishing the intended harm.[6]

As to the first element, give the words their ordinary meaning.

The second element requires the Commonwealth to prove what Dft intended. Intent is a state of mind. It means a person's purpose or objective. To prove that Dft acted with an intent to cause bodily harm to Avm, the Commonwealth must prove that Dft had the specific purpose or objective to cause bodily harm when Dft acted. The decision to act for that purpose requires some period of thought, however brief.

As to the third element, once again, give the words their ordinary meaning.

The Commonwealth does not have to prove that Avm was afraid of being hurt or that Avm even knew what Dft was doing or intending.

[Where there is evidence that the defendant may not have had the actual ability to complete the act]

The Commonwealth does not have to prove that Dft actually had the ability at the time of the alleged assault to cause the attempted harm. Appearing to have the ability is enough.[7]

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[6] See n. 3, supra.

[7] See n. 5, supra.

USE THIS WHEN INSTRUCTING ONLY ON THEORY OF THREATENING BODILY HARM:

To prove the defendant guilty of assault, the Commonwealth must prove three elements beyond a reasonable doubt:

1. Dft did some act that would cause a reasonable person in Avm's position to fear or recognize a risk of immediate bodily harm;
2. Dft intended to cause Avm to fear immediate bodily harm; and
3. As a result of Dft's action, Avm feared or recognized a risk of immediate bodily harm.

As to the first element, words alone generally do not rise to the level of an assault without some action by the defendant.[8]

The second element is that Dft intended to place Avm in fear of immediate bodily harm. The Commonwealth must prove that Dft had the specific purpose or objective to cause Avm to fear immediate bodily harm when Dft acted. The decision to act for that purpose requires some period of thought, however brief.

For the third element, the Commonwealth must prove that, as a result of Dft's action, Avm recognized a risk of immediate bodily harm. It is not necessary that Avm was actually afraid.

[Where there is evidence that the defendant may not have had the actual ability to complete the act]

The Commonwealth does not have to prove that Dft actually had the ability at the time of the alleged assault to cause the threatened harm. Appearing to have the ability is enough.[9]

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[8] See n. 4, supra.

[9] See n. 5, supra.