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Assault[1]

DFT is charged with committing an assault on AVM on [DATE].

[*<If the evidence supports both theories:* 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 defendant guilty under either form of assault.]

<If the evidence only supports one theory, charge only on that theory.>

<If instructing on both theories, use the bracketed language.>

To prove DFT guilty [of the first type] of assault [(attempt)], 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.[2]

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

[2] The phrasing of the elements, particularly the first and second element, does not use the term "battery," but attempts to define the elements as set out in the caselaw. The phrasing of the first and second elements is taken from *Commonwealth* v. *Gorassi*, 432 Mass. 244, 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). Our proposed phrasing would not permit a conviction of assault under either theory if the unconsented-to touching that was attempted or threatened was not potentially harmful.

We have found no Massachusetts appellate decision to the contrary. There is considerable caselaw, however, that states that assault is an attempted or threatened "battery," see *Commonwealth* v. *Porro*, 458 Mass. 526, 530-531 (2010), and then looks to what constitutes assault and battery to define battery as "the intentional and unjustified use of force upon the

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.

[But] To prove DFT guilty of [the second type of] assault [(threatening)], 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.

Words alone generally do not rise to the level of an assault without some action by DFT.[3] It is not necessary that AVM was actually in fear, but the

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person of another, however slight," *id.*, quoting *Commonwealth* v. *McCan*, 277 Mass. 199, 203 (1931), which may be either "physically harmful" or "nonharmful" (i.e. without consent). *Porro*, 458 Mass. at 529, quoting *Commonwealth* v. *Burke*, 390 Mass. 480, 481 (1983). We are hard pressed to envision a scenario where an attempted, unconsented-to nonharmful touching could involve physical force or could be animated by an intent to do bodily harm. Still, it bears considering whether, for example, a person's unsuccessful attempt to spit on another might be deemed an assault, even without an intent to do bodily harm. See, e.g., *Commonwealth* v. *Cohen*, 55 Mass. App. Ct. 358, 359-360 (2002) (spitting on another will support a conviction for assault and battery as a nonharmful, unconsented-to touching).

It is notable that our formulation departs from the District Court's model instruction, which defines assault as "an attempted battery or an immediately threatened battery" and defines "battery" as "a harmful or an unpermitted touching."

Finally, our instruction is drafted in the face of language from C.J. Gants in *Porro* to the effect that assault, based on an attempted battery theory, "is clearly a lesser included offense of intentional assault and battery" because "the elements are the same except that intentional assault and battery contains the additional element that the battery be completed by an actual touching of the victim." 458 Mass. at 533. While *Porro* does not address directly an attempted or threatened nonharmful battery, it would seemingly be impossible for an attempted battery on our formulation (an attempt to use physical force coupled with an intent to do bodily harm) to be a lesser included offense of an intentional assault and battery allegedly committed by way of an unconsented-to nonharmful touching.

[3] In a rare instance, informational words may suffice as a substitute for an action. See *Commonwealth* v. *Delgado*, 367 Mass. 432, 436 (1975) (distinguishing informational words, which might substitute for a threatening act; from threatening words). *Delgado* involved

Commonwealth must prove that AVM was aware of the risk of immediate bodily harm.

The second element [of both types of assault] requires the Commonwealth to prove what DFT intended. Intent is a state of mind. It means a person's purpose or objective. A person acts with an intent [to cause bodily harm to AVM (and/or) to cause AVM to fear immediate bodily harm ***<use as appropriate>***] if the person has in mind the specific purpose or objective [to cause bodily harm (and/or) to cause AVM to fear immediate bodily harm ***<use as appropriate>***] when the person does the act. The decision to do the act for that purpose requires some period of thought and deliberation, however brief.

[***<If the evidence suggests that defendant may not have had the actual ability to complete the act:>***
[In both types of assault,] The Commonwealth does not have to prove that DFT actually had the ability at the time of the alleged assault to carry out the [attempted or threatened ***<use as appropriate>***] act. Appearing to have the ability is enough. For example, if a person points an unloaded gun

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charges of armed robbery and assault by means of a gun. The acts related to robbery were independently established. Therefore, defendant's words – "Hold him or I'm going to shoot him." – came into play only to prove possession of a gun. In this context, the SJC deemed defendant's words "clearly informational," "particularly in the circumstances of an ongoing robbery," because they were "impliedly informing the victim of the presence and possession of a gun." 367 Mass. at 437. In *Delgado*, defendant uttered his words in connection with his actions in the robbery. We are not aware of a Massachusetts appellate decision where words, without any action, have supported an assault conviction. See, e.g., *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 trial judge should proceed cautiously in instructing in a truly "words only" case. In such a case, the following additional charge may be appropriate: "Words alone are enough only if the words convey information that substitutes for an action. For example, saying 'I have a gun' suggests the presence of a weapon and may be a substitute for the action 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."

at another, the person may not actually have the ability to shoot another, but may appear to have the ability.[4]]

[4] If the case involves a firearm, another example may be more appropriate.