ASSAULT ON FAMILY OR HOUSEHOLD MEMBER

G.L. c. 265, § 13M

The defendant is charged with having committed an assault upon a family or household member, namely *[alleged victim]*. An assault may be committed in either of two ways. It is *either* an attempted battery *or* an immediately threatened battery. A battery is a harmful or an unpermitted touching of another person. So an assault can be either an attempt to use some degree of physical force on another person — for example, by throwing a punch at someone — or it can be a demonstration of an apparent intent to use immediate force on another person — for example, by coming at someone with fists flying. The defendant may be convicted of assault if the Commonwealth proves *either* form of assault.

In order to establish the first form of assault — an attempted battery — the Commonwealth must prove beyond a reasonable doubt that the defendant intended to commit a battery — that is, a harmful or an unpermitted touching — upon *[alleged victim]*, took some overt step toward accomplishing that intent, and came reasonably close to doing so. With this form of assault, it is not necessary for the Commonwealth to

show that *[alleged victim]* **was put in fear or was even aware of the attempted battery.**

In order to prove the second form of assault — an imminently threatened battery — the Commonwealth must prove beyond a reasonable doubt that the defendant intended to put *[alleged victim]* **in fear of an imminent battery, and engaged in some conduct toward** *[alleged victim]* **which** *[alleged victim]* **reasonably perceived as imminently threatening a battery.**

In either case, the Commonwealth must prove that the defendant and *[alleged victim]* **were family or household members.**

Under the law, two persons are "family or household members" if

(they are or were married to each other)

(they have a child in common)

(they are or have been in a "substantive dating relationship." To determine whether they were in a "substantive dating relationship," you should consider (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the defendant and; *[alleged victim]* **; and [if applicable] (4) the length of time that has elapsed since the termination of the relationship. A relationship need not be exclusive or**

committed to be a substantive dating relationship.)

"The existence of a 'substantive dating relationship' is to be determined as a case-by-case basis." *C.O. v. M.M.*, 442 Mass. 648, 651 (2004). Especially where minors are involved, a "substantive dating relationship" may be conducted electronically. *E.C.O. v. Compton*, 464 Mass. 558, 564-565 (2013). Accordingly, three months of regular electronic communication between a minor and an adult that included intimate conversation and a mutual desire to engage in sexual relations could constitute a "substantive dating relationship." *Id.* at 564. By contrast, the statute does not "apply to acquaintance or stranger violence," and a single date at the cinema is insufficient to support a finding of a "substantive dating relationship." *C.O.*, 442 Mass. at 653-654. A relationship need not be exclusive or "committed" to be a "substantive dating relationship." *Brossard v. West Roxbury Div. of the Dist. Ct. Dep't*, 417 Mass. 183, 185 (1994). Ultimately, the courts "recognize[] the need for flexibility" in applying the definition. *C.O.*, 442 Mass. at 652.

Here instruct on Intent (Instruction 3.120), since both branches of assault are specific intent offenses. If additional language on the first branch of assault is appropriate, see Instruction 4.120 (Attempt).

Commonwealth v. Barbosa, 399 Mass. 841, 845 n.7 (1987) (an assault is "any manifestation, by a person, of that person's present intention to do another immediate bodily harm"); *Commonwealth v. Delgado*, 367 Mass. 432, 435-437 & n.3 (1975) ("an act placing another in reasonable apprehension that force may be used is sufficient for the offense of criminal assault"; words threatening future harm are insufficient to constitute an assault unless "they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person") (italics omitted); *Commonwealth v. Chambers*, 57 Mass. App. Ct. 47, 49 (2003) (threatened-battery branch "requires proof that the defendant has engaged in objectively menacing conduct with the intent of causing apprehension of immediate bodily harm on the part of the target"); *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 524 (1995) (threatened-battery branch of assault requires specific intent to put victim in fear or apprehension of immediate physical harm), *aff'd*, 421 Mass. 610 (1996); *Commonwealth v. Spencer*, 40 Mass. App. Ct. 919, 922 (1996) (same); *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1008 (1988) (necessary intent inferable from defendant's overt act putting another in reasonable fear, irrespective of whether defendant intended actual injury); *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 990 (1984) (assault is "an overt act undertaken with the intention of putting another person in fear of bodily harm and reasonably calculated to do so, whether or not the defendant actually intended to harm the victim"). See *Commonwealth v. Hurley*, 99 Mass. 433, 434 (1868) (assault by joint venture by intentionally inciting assault by others); *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 421-422, 426-430 (1984) (assault by joint venture).

NOTES:

1. **Certified batterer's intervention program.** Any sentence or continuance without a finding for strangulation or suffocation must include a condition that the defendant complete a certified batterer's intervention program unless "the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention." G.L. c. 265, § 13M(d).

2. **Multiple victims of single assault**. Where the defendant assaults multiple victims in a single act, the defendant may be convicted of multiple counts of assault and, in the judge's discretion, given consecutive sentences. *Commonwealth v. Dello Iacono*, 20 Mass. App. Ct. 83, 89-90 (1985) (firing gun into house with several residents).

3. **Simultaneous assault and property destruction**. A single act may support simultaneous convictions of assault by means of a dangerous weapon upon the victim who was assaulted and of malicious destruction of property (G.L. c. 266, § 127) with respect to the area where the victim was standing. *Domingue*, 18 Mass. App. Ct. 987, 990 (1984) (firing gun in order to damage bar and frighten bartender).

4. **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.

5. **Victim's apprehension or fear.** The first (attempted battery) branch of assault does not require that the victim was aware of or feared the attempted battery. *Commonwealth v. Gorassi*, 432 Mass. 244, 248 (2000)*; Commonwealth v. Richards*, 363 Mass. 299, 303 (1973)*; Commonwealth v. Slaney*, 345 Mass. 135, 138-139 (1962).

The second (threatened battery) branch of assault requires that the victim was aware of the defendant's objectively menacing conduct. *Chambers*, 57 Mass. App. Ct. at 48-52. Some older decisions seem to suggest that under the second branch of assault the victim must have feared as well as perceived the threatened battery. In *Chambers*, the Appeals Court determined that awareness of the threat was all that was required. *Id.* at 51-53. Other recent decisions appear to be in accord. See *Gorassi*, 432 Mass. at 248-249; *Commonwealth v. Gordon*, 407 Mass. 340, 349 (1990); *Slaney*, 345 Mass. at 139-141. See also the extended discussion of this issue in Richard G. Stearns, *Massachusetts Criminal Law: A Prosecutor's Guide* (28th ed. 2008). The model instruction requires perception, but not subjective fear, by the victim under the second branch of assault.

6. **Verdict slip.** Where the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery, the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433 (2010). A verdict slip need not distinguish between a conviction for an attempted battery and a threatened battery even when the Commonwealth proceeds upon both theories. The jury may return a unanimous verdict for assault even if they are split between the two theories. "Because attempted battery and threatened battery 'are closely related,' *Commonwealth* v. *Santos*, 440 Mass. 281, 289 (2003), we do not require that a jury be unanimous as to which theory of assault forms the basis for their verdict; a jury may find a defendant guilty of assault if some jurors find the defendant committed an attempted battery (because they are convinced the defendant intended to strike the victim and missed) and the remainder find that he committed a threatened battery (because they are convinced that the defendant intended to frighten the victim by threatening an assault). See *id.* at 284, 289 (jury were not required to be unanimous as to which form of assault was relied on to satisfy assault element of armed robbery)." *Commonwealth v. Porro*, 458 Mass. 526 (2010). Accord *Arias*, 78 Mass. App. Ct. at 432-433.