

## Armed Robbery<sup>1</sup>

The [first] indictment charges DFT with armed robbery of AVM on or about [Date]. To prove this offense, the Commonwealth must prove four elements beyond a reasonable doubt:

1. DFT was armed with a dangerous weapon;
2. DFT either applied force to AVM's body,<sup>2</sup> or put him/her in fear by threatening words or gestures;
3. DFT took money [property]<sup>3</sup> from AVM or from his/her immediate control; and
4. DFT intended to steal the money [property].

**First**, the Commonwealth must prove that DFT was armed with a dangerous weapon. A dangerous weapon is any object that by its design or how it is used can cause serious bodily injury or death, or that a reasonable person could perceive as being capable of causing such injury. For instance, an object such as a gun, dagger, sword, or the like<sup>4</sup> is a dangerous weapon based on its designed purpose to cause serious bodily injury or death.

[< *If the object is dangerous by use, include:*> Another object, such as a pocket knife, baseball bat, shoe, or even a pencil may not be designed to

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<sup>1</sup> G.L. c. 265, § 17 states: "Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished."

<sup>2</sup> The traditional phrase "force and violence" is redundant and has been omitted. See *Commonwealth v. Benitez*, 464 Mass. 686, 689–690 (2013), citing *Commonwealth v. Rogers*, 459 Mass. 249, 252 n.4, *cert. denied*, 565 U.S. 1080 (2011) ("crime of armed robbery" required "Commonwealth to prove that the defendant or [co-defendant] . . . either applied actual force or violence to the body of the person identified in the indictment, or by words or gestures put him in fear") (emphasis added).

<sup>3</sup> If both money and property are at issue, the judge should globally replace this phrase with "money or property" throughout this instruction.

<sup>4</sup> See G.L. c. 269, §§ 10, 12.

cause injury or harm, but becomes a dangerous weapon if used to cut, strike, or otherwise injure someone.]

[< ***If weapon is fake, include:***> A toy gun or other fake weapon is considered a dangerous weapon if AVM reasonably believed it to be a real weapon capable of inflicting bodily injury.<sup>5</sup>]

[< ***If the object is dangerous by use, include:***> If the object that DFT possessed is not designed to cause serious bodily injury or death, in order to prove DFT was armed with a dangerous weapon while taking the property or escaping, the Commonwealth must prove that DFT used the item in a way to cause injury to AVM or to cause a reasonable person in AVM's position to be put in fear of injury. Simply possessing such an item without using it in some way is insufficient to convert the item into a dangerous weapon.]

To be "armed with a dangerous weapon" means to possess physically or control the dangerous weapon. It does not matter when DFT became armed with the dangerous weapon as long as DFT was armed with a dangerous weapon while taking the property or escaping from the scene of the robbery.<sup>6</sup>

[< ***If no weapon is introduced, include:***> The Commonwealth does not have to recover a weapon or introduce a weapon into evidence, as long as the Commonwealth proves beyond a reasonable doubt that DFT was armed with a dangerous weapon at the relevant time.]

**Second**, the Commonwealth must prove that DFT either applied force to AVM or put him/her in fear by threatening words or gestures. If he used actual force, the Commonwealth must prove that he applied that force to

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<sup>5</sup> *Commonwealth v. Powell*, 433 Mass. 399, 401–402 (2001). This instruction does not apply to the crime of armed robbery with a firearm. See *Commonwealth v. Garrett*, 473 Mass. 257, 259–264 (2015).

<sup>6</sup> See *Commonwealth v. Rogers*, 459 Mass. 249, 253 (2011) ("conviction of armed robbery must be based on a conclusion that the defendant was armed with a dangerous weapon during his taking of the property or his escape from the scene").

AVM's body. The amount of force does not matter as long as it was enough for DFT to obtain AVM's money [property] against his/her will. When a person uses actual force, the Commonwealth does not have to prove that the person put the alleged victim in fear.

If DFT threatened AVM by words or gestures, the Commonwealth must prove both that AVM was aware of the threat and that s/he was put in fear. [*<If threat is made to someone other than AVM, include:>* The threatening words or gestures do not have to be directed at AVM, as long as AVM was aware that they were directed at another person and was thereby put in fear.]

The actual force, or the threatening words or gestures, must be the cause of DFT obtaining possession of the money [property]. [*<If the object is dangerous by use, include:>* If a threat involved an object that is not designed to cause serious bodily injury or death, like a pocket knife, a baseball bat, a shoe, or a pencil, the Commonwealth must prove from all the circumstances that DFT's words and actions would cause fear in a reasonable person in AVM's position and that DFT intended to create that fear in order to steal the money [property].<sup>7</sup>]

**Third**, the Commonwealth must prove that DFT took money [property] from AVM or from AVM's immediate control. [*<If the evidence presents a question about whether the money [property] was taken, include:>*

A person "takes" money [property] when they transfer money [property] from the alleged victim's control to their own. It does not matter how far he carried the money [property], as long as DFT transferred possession or control from AVM to himself.<sup>8</sup>]

AVM did not have to own or physically possess the money [property]. The money [property] was within AVM's "immediate control" if s/he could have readily possessed it physically, but violence or fear overcame his/her will or

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<sup>7</sup> *Commonwealth v. Tarrant*, 367 Mass. 411, 416-417 (1975).

<sup>8</sup> *Commonwealth v. Flowers*, 1 Mass. App. Ct. 415, 418-419 (1973).

ability to do so. [The value of the property does not matter as long as it has some value.]

**Fourth**, the Commonwealth must prove that DFT intended to steal the money [property]. The Commonwealth must prove that DFT intended to deprive AVM of it permanently at the time s/he took the money [property] against AVM's will. Intent is a state of mind. It means a person's purpose or objective. DFT acted with an intent to deprive AVM of possession of an object permanently, if he had the specific purpose or objective of permanently depriving AVM of possession of the object when he did the act.

#### SUPPLEMENTAL INSTRUCTIONS<sup>9</sup>

##### **Lesser Included Offence—Unarmed Robbery<sup>10</sup>**

If you do not find DFT guilty of armed robbery, you should consider what we call a "lesser-included offense." In this case, the lesser included offense is unarmed robbery. However, the Commonwealth is entitled to a verdict on the most serious charge that it has proven beyond a reasonable doubt. In this case, armed robbery [armed robbery while masked; armed robbery while armed with a firearm] is the most serious charge.

Unarmed robbery has all the same elements as armed robbery, except the Commonwealth does not have to prove the first element of armed robbery, namely that DFT was armed with a dangerous weapon. To prove DFT guilty of unarmed robbery, the Commonwealth must prove three elements beyond a reasonable doubt:

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<sup>9</sup> Unarmed robbery is a lesser included offense of armed robbery. Unarmed robbery and armed robbery are lesser included offenses of armed robbery while masked and armed robbery with a firearm. There are separate model instructions for stand-alone indictments for Armed Robbery and Armed Robbery of a Person over the Age of 60.

<sup>10</sup> G.L. c. 265, § 19(b) states: "Whoever, not being armed with a dangerous weapon, by force and violence, or by assault and putting in fear robs, steals or takes from the person of another, or from his immediate control, money or other property . . . shall be punished."

*<Insert elements two through four from the armed robbery charge, and the description of those elements as relevant. Make sure not to include the optional insert to the description of the second element of armed robbery regarding objects that are dangerous by use.>*

## Armed Robbery while Masked<sup>11</sup>

*<Armed robbery while masked has one element in addition to those required for armed robbery. Add the following element to the instructions for armed robbery:>*

5. At the time of the robbery, DFT was masked, disguised, or had his features distorted.

*<Add the following explanation of the additional element:>*

Fifth, the Commonwealth must prove that at the time of the robbery, DFT was masked, disguised, or had his features distorted.<sup>12</sup> The terms “masked,” “disguised,” and “distorted” are used with their common, everyday meanings. They require an intention or conscious effort to conceal one’s identity.<sup>13</sup>

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<sup>11</sup> G.L. c. 265, § 17 states: “Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished . . . provided, however, that any person who commits any offence described herein while masked or disguised or while having his features artificially distorted shall” be subject to a mandatory minimum sentence.

<sup>12</sup> “The fact that the victim never saw the mask” of a joint venturer is not conclusive as to the enhanced penalty for that joint venturer, “as long as one of the participants in the robbery of that victim used a mask.” *Commonwealth v. Knight*, 16 Mass. App. Ct. 622,626–627 (1983).

<sup>13</sup> See *Commonwealth v. Santos*, 41 Mass. App. Ct. 621, 623–624 (1996) (robber who wore baseball hat and sunglasses in the summer not “masked” or “disguised” because the hat and sunglasses “are everyday items of apparel that are commonly worn and which, by themselves, do not suggest or even remotely imply an intention or conscious effort to conceal identity”) (and cases cited giving examples of masks or disguises).

## Armed Robbery with a Firearm<sup>14</sup>

*< Armed robbery with a firearm has a more particular first element than the first element required for armed robbery. Substitute the following element for the first element of armed robbery:>*

1. DFT was armed with a [*<Insert as charged:>* firearm, shotgun, rifle, machine gun, or assault weapon.]

*< Substitute the following explanation of the first element for the explanation of the first element of armed robbery:>*

First, the Commonwealth must prove that DFT was armed with a [*< Insert as charged>* firearm, shotgun, rifle, machine gun, or assault weapon.]

[*< If a "firearm" is charged:>* A "firearm" means a pistol, revolver, or other weapon of any description, loaded or unloaded, with a barrel length of less than 16 inches from which a shot or bullet can be discharged. It does not include an air rifle or BB gun.<sup>15</sup>]

[*< If a "shotgun" is charged:>* A "shotgun" means a weapon having a smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches, and capable of discharging a shot or bullet for each pull of the trigger.<sup>16</sup>]

[*< If a "rifle" is charged:>* A "rifle" means a weapon having a rifled bore with a barrel length equal to or greater than 16 inches and capable of discharging a shot or bullet for each pull of the trigger.<sup>17</sup>]

[*< If a "machine gun" is charged:>* A "machine gun" means a weapon of any description, by whatever name known, loaded or unloaded, from which a

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<sup>14</sup> G.L. c. 265, § 17 states: "Whoever commits [armed robbery] while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished."

<sup>15</sup> *Commonwealth v. Garrett*, 473 Mass. 257, 259–264 (2015).

<sup>16</sup> G.L. c. 140, § 121 ("shotgun").

<sup>17</sup> G.L. c. 140, § 121 ("rifle").

number of shots or bullets may be rapidly or automatically discharged by one continuous activation of the trigger, including a submachine gun. A "machine gun" includes bump stocks and trigger cranks.<sup>18]</sup>

[<If an "assault weapon" is charged: An "assault weapon" is defined to include <insert as relevant>.<sup>19]</sup>

To be "armed with a [<Insert as charged:> firearm, shotgun, rifle, machine gun, or assault weapon"] means to possess physically or control the

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<sup>18</sup> G.L. c. 140, § 121 ("machine gun").

<sup>19</sup> The Massachusetts firearms laws define "assault weapon" as having "the same meaning as a semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act," 18 U.S.C. § 921(a)(30) (Sept. 13, 1994), including certain specified weapons. See G.L. c. 140, § 121 ("assault weapon"). The 1994 version of 18 U.S.C. § 921(a)(30) defines a "semiautomatic assault weapon" as:

(A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as -- (i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC-70); (iv) Colt AR-15; (v) Fabrique National FN/FAL, FN/LAR, and FNC; (vi) SWD M-10, M-11, M-11/9, and M-12; (vii) Steyr AUG; (viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and (ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12;

(B) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of -- (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a bayonet mount; (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and (v) a grenade launcher;

(C) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of -- (i) an ammunition magazine that attaches to the pistol outside of the pistol grip; (ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; (iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned; (iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and (v) a semiautomatic version of an automatic firearm; and

(D) a semiautomatic shotgun that has at least 2 of -- (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a fixed magazine capacity in excess of 5 rounds; and (iv) an ability to accept a detachable magazine."

See Pub. L. 103-322, Title XI, § 110105(2) (Sept. 13, 1994).

[ <*Insert as charged:*> firearm, shotgun, rifle, machine gun, or assault weapon.] It does not matter when DFT became armed with the [ <*Insert as charged:*> firearm, shotgun, rifle, machine gun, or assault weapon] as long as DFT was armed while taking the property or escaping from the scene of the robbery.<sup>20</sup>

[ <*If no weapon is introduced, include:* The Commonwealth does not have to recover a weapon or introduce a weapon into evidence, as long as the Commonwealth proves beyond a reasonable doubt that DFT was armed with a <*Insert as charged:* firearm, shotgun, rifle, machine gun, or assault weapon> at the relevant time.]

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<sup>20</sup> See *Commonwealth v. Rogers*, 459 Mass. 249, 253 (2011) (“conviction of armed robbery must be based on a conclusion that the defendant was armed with a dangerous weapon during his taking of the property or his escape from the scene”).