

Prosecution Instruction No,  
Assault With a Dangerous Weapon

If you find the accused not guilty of the offense alleged, or of the lesser included offense of assault with intent to commit voluntary manslaughter, or ~~assault~~ of the lesser included offense of assault inflicting grievous bodily harm, you should next turn to a consideration of the lesser included offense of assault with a dangerous weapon in violation of Article 128. In order to find the accused guilty of this lesser included offense you must be satisfied by legal and competent ~~proof~~ evidence beyond reasonable doubt:

(a) That, on or about 16 March 1968, between 0830 hours and 1230 hours, at or near a ditch in the eastern section of My Lai (4), Son My Village, Quang Ngai Province, Republic of Vietnam, the accused attempted to do bodily harm to thirty (30) Vietnamese Nationals, more or less;

(b) That he did so by shooting at them with an M-16 rifle;

(c) That the accused did so with a certain weapon, namely, an M-16 rifle;

(d) That the attempt was done with unlawful force or violence;  
and

(e) That such M-16 rifle was used in a manner likely to produce grievous bodily harm.

The court is further advised that an "assault" is an attempt, with unlawful force or violence, to do bodily harm to another, whether or not the attempt is consummated. An act of force or violence is unlawful if done without legal justification or excuse. An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability to do bodily harm to another. The act must be without the lawful consent of the persons affected.

"Bodily harm" means any physical injury to the person of another, however slight. However, by "grievous bodily harm" is meant serious bodily injury. "Grievous bodily harm" does not include minor injuries, such as a black eye or bloody nose, but does include ~~fractured or dislocated bones, deep cuts, torn members of the body,~~ serious damage to internal organs, and other serious bodily injuries.

An assault in which a dangerous weapon ~~or otherwise~~ is employed is an aggravated assault. A weapon is "dangerous" when used in such a manner that it is likely to produce death or grievous bodily harm. A weapon is "likely" to produce death or grievous bodily harm when the natural and probable consequence of its particular use would be death or grievous bodily harm. It is not necessary, however, that death or grievous bodily harm be actually inflicted.

Pain, superficial or trivial wounds, and temporary impairment of some organ of the body do not ordinarily establish "grievous bodily harm." Such effects are common to most ordinary assault and battery cases. The question whether an injury constitutes "grievous bodily harm" is one of fact for the court to determine in the light of the surrounding circumstances. In making the ultimate determination, the absence or presence and extent of factors such as: persistence of the injury and its adverse effects; severity of pain or suffering; time of hospitalization or confinement to bed or room; length and degree of unconsciousness; amount of force or violence applied; extent of interference with normal activities; may properly be taken into consideration.

The offense alleged and this lesser offense differ in that the offense alleged requires, as ~~an~~ essential element, that you be satisfied beyond a reasonable doubt ~~that the accused attempted to do bodily harm;~~ that, ~~at the time,~~ the accused intended to commit murder; that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces, whereas the lesser included offense does not include such elements, but it does require that you be satisfied beyond a reasonable doubt that the ~~accused inflicted~~ ~~bodily harm attempt was made with unlawful force or violence~~ <sup>attempted to do bodily harm</sup> accused ~~did so~~ with a certain weapon, namely, an M-16 rifle; and that such M-16 rifle <sup>was</sup> ~~was~~ used in a manner likely to produce grievous bodily harm.

US v Thompson, 13 USCMA 395, 32 CMR 395 (1962)