IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v. [*case number*]

Hon. [*name*]

[*name-all caps*],

 Defendant.

DEFENDANT’S INSTRUCTION NO. \_\_\_\_

 Count \_\_ of the indictment charges the defendant with Battery. You may return one of three verdicts under this Count of the indictment:

(1) guilty of Battery;

(2) guilty of Assault; or

(3) not guilty.

 Battery occurs when a person unlawfully and intentionally makes physical contact with force capable of causing physical pain or injury to another person, or when a person unlawfully and intentionally causes physical pain or injury.

 Assault occurs when any person unlawfully attempts to use physical force capable of causing physical pain or injury to another person, or unlawfully commits an act that places another in reasonable apprehension of immediately suffering physical pain or injury.

 The burden is on the State to prove the defendant’s guilt beyond a reasonable doubt and the defendant is not required to prove [himself] [herself] innocent. The law presumes the defendant to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

 Before the defendant can be convicted of Battery, the State must overcome the presumption the defendant is innocent and prove beyond a reasonable doubt that:

1. the defendant,

2. in [insert county] County, West Virginia,

3. on or about the \_\_ day of [insert month], [insert year],

4. did unlawfully and intentionally {make physical contact with force capable of causing physical pain or injury to [insert name(s) of victim(s)]} {cause physical pain or injury to [insert name(s) of victim(s)]}.

 If, after impartially considering, weighing, and comparing all the evidence (that of both the State and the defendant), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find defendant guilty of Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the defendant not guilty of Battery (and deliberate on the lesser included offense of Assault as instructed).

 Before the defendant can be convicted of Assault, the State must overcome the presumption the defendant is innocent and prove beyond a reasonable doubt that:

1. the defendant,

2. in [insert county] County, West Virginia,

3. on or about the \_\_ day of [insert month], [insert year],

4. did unlawfully {attempt to use physical force capable of causing physical pain or injury to the person of [insert name(s) of victim(s)]} {commit an act that placed [insert name(s) of victim(s)] in reasonable apprehension of immediately suffering physical pain or injury}.

 If, after impartially considering, weighing and comparing all the evidence (that of both the State and the defendant), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find defendant guilty of Assault as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the defendant not guilty.

GIVEN:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

REFUSED:\_\_\_\_\_\_\_\_\_\_\_\_\_

MODIFIED:\_\_\_\_\_\_\_\_\_\_\_\_

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 JUDGE