

SHOPLIFTING [CARRYING AWAY]
N.J.S.A. 2C: 20-11(b)(1)

[Count _____ of] [T]he indictment charges the defendant with shoplifting.

[READ INDICTMENT OR APPLICABLE COUNT]

The statute provides in pertinent part that it is a crime:

For any person to purposely take possession of, carry away, transfer or cause to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the full retail value thereof.

In order for you to find the defendant guilty of shoplifting, the State must prove each of the following elements beyond a reasonable doubt:

1. That defendant purposely [took possession of] [carried away] [caused to be carried away] [transferred] [caused to be transferred] any merchandise displayed, held, stored or offered for sale by [name of commercial establishment];
2. That [name of commercial establishment] was a store or other retail mercantile establishment; and
3. That defendant did so with the purpose of depriving the merchant of the possession, use, or benefit of such merchandise [OR of converting such merchandise to his/her use] without paying the merchant the full retail value thereof.

The first element that the State must prove beyond a reasonable doubt is that defendant purposely [took possession of] [carried away] [caused to be carried away] [transferred] [caused to be transferred] any merchandise displayed, held, stored or offered for sale by [name commercial establishment]. The term “merchandise” means any goods, chattels, foodstuffs or wares of any type and description, regardless of the value thereof.¹

A person acts purposely with respect to the nature of his/her conduct or a result of his/her conduct if it is his/her conscious object to engage in conduct of that nature or to cause

¹ N.J.S.A. 2C:20-11(a)(3).

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such a result. That is, a person acts purposely if he/she means to act in a certain way or to cause a certain result. A person acts purposely with respect to attendant circumstances if he/she is aware of the existence of such circumstances or believes or hopes that they exist.²

To “possess” an item under the law, one must have a knowing, intentional control of that item accompanied by a knowledge of its character. So, a person who possesses an item such as **(IDENTIFY RELEVANT ITEM(S))** must know or be aware that he/she possesses it, and he/she must know what it is that he/she possesses or controls. **[WHERE APPLICABLE, charge: Possession cannot merely be a passing control, fleeting or uncertain in its nature.]** In other words, to “possess” an item, one must knowingly procure or receive an item or be aware of his/her control thereof for a sufficient period of time to have been able to relinquish his/her control if he/she chose to do so.

The State must prove beyond a reasonable doubt that a possessor acted knowingly in possessing the item. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of the high probability of their existence. A person acts knowingly as to a result of his/her conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result. Knowing, with knowledge, or equivalent terms have the same meaning.

A person may possess (an item) even though it was not physically on his/her person at the time of the arrest, if he/she had in fact, at some time prior to his/her arrest, had control over it. Possession means a conscious, knowing possession, either actual or constructive.

[CHARGE THOSE FOLLOWING PARAGRAPHS AS APPLY TO YOUR CASE]

ACTUAL POSSESSION

A person is in actual possession of an item when he/she first, knows what it is: that is, he/she has knowledge of its character, and second, knowingly has it on his/her person at a given time.

CONSTRUCTIVE POSSESSION

Possession may be constructive instead of actual. Constructive possession means possession in which the possessor does not physically have the item on his/her person but is

² N.J.S.A. 2C:2-2(b)(1).

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aware that the item is present and is able to and has the intention to exercise control over it. So, someone who has knowledge of the character of an item and knowingly has both the power and the intention at a given time to exercise control over it, either directly or through another person or persons, is then in constructive possession of that item.

JOINT POSSESSION

Possession may be sole or joint. If one person alone has actual or constructive possession of an item, possession is sole. If two or more persons share actual or constructive knowing possession of an item, possession is joint.

The second element that the State must prove beyond a reasonable doubt is that [name of commercial establishment] was a store or other retail mercantile establishment. The term “store or other retail mercantile establishment” means a place where merchandise is displayed, held, stored, or sold or offered to the public for sale.³

The third element that the State must prove beyond a reasonable doubt is that defendant acted with the purpose of depriving the merchant of the possession, use or benefit of such merchandise [OR converting such merchandise to his/her use] without paying the merchant the full retail value of the merchandise. I have already defined "purpose" for you earlier in these instructions.

The term "full retail value" means the merchant's stated or advertised price of the merchandise.⁴

The term “deprive” means to withhold property permanently or for so extended a period as to appropriate a substantial portion of its economic value.⁵

[OR: The term "converting" or "conversion" means to exercise wrongful control over property owned by another in a manner inconsistent with the owner's rights].⁶

The term “merchant” means any owner or operator of any store or other retail mercantile establishment, or any agent, servant, employee, lessee, consignee, officer,

³ N.J.S.A. 2C:20-11(a)(2).

⁴ N.J.S.A. 2C:20-11(a)(7).

⁵ N.J.S.A. 2C:20-1(a)(1).

⁶ Port-O-San Corporation v. Teamsters, 363 N.J. Super. 431, 440 (App. Div. 2003), quoting Commercial Insurance Company of Newark v. Apgar, 111 N.J. Super. 108, 114-15 (Law Div. 1970). See also Black's Law Dictionary 333 (7th Ed. 1999).

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director, franchisee, or independent contractor of such owner or proprietor.⁷

Purpose and knowledge are states of mind. A state of mind is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. Therefore, it is not necessary, members of the jury, that the State produce witnesses to testify that defendant said he/she had a certain state of mind when he/she engaged in a particular act. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of defendant's acts and his/her conduct, and from all he/she said and did at the particular time and place, and from all of the surrounding circumstances.

PERMISSIVE INFERENCE [WHERE APPROPRIATE]⁸
(N.J.S.A. 2C:20-11(d))

If you find that defendant purposely concealed unpurchased merchandise of any store either on the premises or outside the premises of such store or other retail mercantile establishment, you may infer that defendant so concealed such merchandise for the purpose of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof. The term "conceal" means to conceal merchandise so that, although there may be some notice of its presence, it is not visible through ordinary observation.⁹

If you find that defendant concealed or caused to be concealed such merchandise

⁷ N.J.S.A. 2C:20-11(a)(4).

⁸ A court should exercise care in deciding if the factual scenario presented at trial requires instruction on the presumption. See generally Cannel, *New Jersey Criminal Code Annotated* (2005 ed.), Comment 6 to N.J.S.A. 2C:20-11 and Comment 6, N.J.S.A. 2C:1-13(e). Before the statutory presumption is used, it must also be determined that its use would satisfy constitutional requirements of due process to make sure its use does not improperly shift the burden of proof by directing a verdict on an essential element of the crime. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979) and *State v. Ingram*, 98 N.J. 489 (1985). The statutory language contained in N.J.S.A. 2C:20-11(d) has been interpreted to be constitutional in *Carollo v. Supermarkets General Corp.*, 251 N.J. Super. 264, 268-69 and n. 1 (App. Div. 1991). See also *State v. Fitzmaurice*, 126 N.J. Super 361 (App. Div.), *certif. den.* 65 N.J. 562 (1974) (assessing the precursor statutory language of N.J.S.A. 2A:170-99).

⁹ N.J.S.A. 2C:20-11(a)(6). In *Henry v. Shopper's World*, 200 N.J. Super. 14, 18 (App. Div. 1985), the Court held that 'the term "concealed unpurchased merchandise" ... may be construed as applying to items in plain view but worn or carried as though they had been purchased.' However, the phrase that the Court was construing is found in N.J.S.A. 2C:20-11(e), which provides civil and criminal immunity to merchants or others under certain circumstances, and the opinion does not refer to the term 'conceal' in subsection (a)(6). See also *State v. Evans*, 340 N.J. Super. 244, 251 (App. Div. 2001).

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upon his/her person or among his/her belongings, or upon the person or among the belongings of another, you may infer that defendant did so purposely. An inference is a deduction of fact that may be drawn logically and reasonably from another fact or group of facts established by the evidence. Whether or not an inference should be drawn is for you to decide using your own common sense, knowledge and everyday experience. Ask yourselves is it probable, logical and reasonable. However, you are never required or compelled to draw an inference. You alone decide whether the facts and circumstances shown by the evidence support an inference and you are always free to draw or not to draw an inference. If you draw an inference, you should weigh it in connection with all the other evidence in the case, keeping in mind that the burden of proof is upon the State to prove all the elements of the crime beyond a reasonable doubt.

To summarize, in order for you to find defendant guilty of shoplifting, the State must prove these elements beyond a reasonable doubt:

1. That defendant purposely [took possession of] [carried away] [caused to be carried away] [transferred] [caused to be transferred] any merchandise displayed, held, stored or offered for sale by [name of commercial establishment];
2. That [name of commercial establishment] was a store or other retail mercantile establishment; and
3. That defendant did so with the purpose of depriving the merchant of the possession, use, or benefit of such merchandise [OR of converting such merchandise to his/her use] without paying the merchant the full retail value thereof.

If you find that the State has proven all of these elements beyond a reasonable doubt, then you must find the defendant guilty. If the State has failed to prove any of these elements, you must find defendant not guilty.

VALUE OF MERCHANDISE (N.J.S.A. 2C:20-11(c))

If you find the State has proven all of the previous elements beyond a reasonable doubt, you must then determine whether the State has proven beyond a reasonable doubt that the full retail value of the merchandise involved

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[CHOOSE APPROPRIATE ALTERNATIVES]

- (1) is \$75,000 or more; or
- (2) exceeds \$500 but is less than \$75,000; or
- (3) is at least \$200, but does not exceed \$500; or
- (4) is less than \$200.

I have already defined "full retail value" for you earlier in these instructions.