

**[WEAPON OTHER THAN A FIREARM]
POSSESSION OF WEAPON WITH A PURPOSE TO USE IT UNLAWFULLY AGAINST
THE PERSON OR PROPERTY OF ANOTHER WHILE COMMITTING CERTAIN
DRUG CRIMES
(N.J.S.A. 2C:39-4.1b)**

[Defendant] is charged with possessing a weapon with a purpose to use it unlawfully against the person or property of another while in the course of committing, attempting to commit, or conspiring to commit a violation of certain laws.¹ This charge is based on a statute which reads:

Any person who has in his possession any weapon with a purpose to use it unlawfully against the person or property of another, while in the course of committing, attempting to commit, or conspiring to commit a violation of [certain drug crimes] is guilty of a crime ...

For you to find [defendant] guilty of this charge, the State must prove beyond a reasonable doubt the following elements:

1. That there was a weapon.
2. That [defendant] possessed the weapon.
3. That he/she possessed the weapon with the purpose to use it against another person or the property of another.
4. That his/her purpose was to use the weapon unlawfully.
5. That, at that time, [defendant] was in the course of committing, attempting to commit, or conspiring to commit, _____[the specific drug offense charged].

The first element that the State must prove beyond a reasonable doubt is that there was a weapon. A "weapon" is anything readily capable of lethal use or of inflicting serious bodily injury. "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Many objects have innocent uses. For example, ordinarily, a knife is neither a weapon nor is its possession against the law. An otherwise harmless object such as a baseball bat, however, could

¹ The citations contained within N.J.S.A. 2C:39-4.1 are: N.J.S.A. 2C:35-3; N.J.S.A. 2C: 35-4; N.J.S.A. 2C:35-5, N.J.S.A. 2C:35-5.2 or 2C:35-5.3, N.J.S.A. 2C:35-6, N.J.S.A. 2C:35-7, N.J.S.A. 2C:35-7.1 or N.J.S.A. 2C:35-11.

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inflict serious bodily harm if used to strike another person. If the State establishes beyond a reasonable doubt that the object is capable of being used to inflict serious bodily injury, it may be considered a weapon.

The second element that the State must prove beyond a reasonable doubt is that [defendant] possessed the weapon. The word possess as used in criminal statutes signifies a knowing, intentional control of a designated thing, accompanied by a knowledge of its character. Therefore, [defendant] must have known or have been aware that he/she possessed the weapon, and he/she must have known that what he/she possessed was a weapon. The possession cannot merely be a passing control, fleeting or uncertain in its nature. So, to possess within the meaning of the law, [defendant] must have knowingly procured or received the weapon or must have been aware of his/her control of it for a sufficient period of time to have been able to relinquish control if he/she chose to do so. 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.

Possession means a conscious, knowing possession. Someone may possess an object even though it was not physically on his/her person at the time if he/she had in fact at some time prior to his/her arrest control over it.

Possession may be either actual or constructive. A person is in actual possession of an item if he/she knows what it is [that is, he/she has knowledge of its character] and knowingly has it on his/her person at a given time. Alternatively, possession may be constructive, instead of actual. Constructive possession is possession in which the person does not physically have the property, but although the property is not physically on his/her person, he/she is aware of the presence of the property and is able to and has the intention to exercise control over it. So, a person who, although not in actual possession, has knowledge of its character, and knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

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Similarly, possession can be either sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession over a thing, they possess the thing jointly if they knowingly share control over it.

[If possession is in a motor vehicle: charge Model Jury Charge on Possession of Weapon, etc., in Motor Vehicle, per N.J.S.A. 2C:39-2].

The third element that the State must prove beyond a reasonable doubt is that [defendant]'s purpose in possessing the weapon was to use it against another person or the property of another. Purpose, like knowledge or "knowing," is a condition of the mind. It cannot be seen. Often, a condition of the mind can only be determined by inferences from conduct, words or acts. In determining that purpose which existed at the time, you may consider that a person acts purposely with respect to the nature of his/her conduct or a result of his/her conduct if it is the person's conscious object to engage in conduct of that nature or to cause 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 the person is aware of the existence of such circumstances or believes or hopes that they exist. So, one's purpose or conscious object to use the weapon against another person may be found to exist at any time he/she is in possession of the object and need not have been his/her original purpose in possessing the object.

"Purposely" refers to a condition of the mind. It cannot be seen. Often, it can be determined only by inferences drawn from a defendant's conduct, words or acts as presented in the evidence you have heard and seen. So, it is not necessary that the State produce a witness or witnesses to testify that an accused said, for example, that he/she acted purposely when he/she engaged in the conduct with which he/she is charged. You may find that proof of purpose has been furnished beyond a reasonable doubt by inferences which you may draw from the nature of the acts and the circumstances surrounding the conduct under investigation as you have heard from the evidence.

The fourth element that the State must prove beyond a reasonable doubt is that while [defendant] was committing, attempting to commit, or conspiring to commit [the specific drug crime], he/she had a purpose to use the weapon in a manner prohibited by law. This requires that

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you find that [defendant] possessed a weapon with the conscious objective, design or specific intent to use it against the person or property of another in an unlawful manner as charged in this case and not for some other purpose. The State contends here that [defendant's] unlawful purpose in possessing the weapon was _____.

The defense disputes this contention. You must not consider your own notions of the unlawfulness of this purpose. You must consider whether the State has proven the specific unlawful purpose charged.²

The fifth element is that [defendant] must be shown, beyond a reasonable doubt, to have been in the course of committing, attempting to commit, or conspiring to commit the crime of _____ at that time.

The term "in the course of committing" means that, at the time [defendant] possessed the weapon, he/she was also committing a drug crime, namely _____.

**[IF APPLICABLE, USE MODEL CHARGE FOR ATTEMPT,
CONSPIRACY OR BOTH]**

If the State has proven each of these elements beyond a reasonable doubt, you must find [defendant] guilty. However, if the State has failed to prove, beyond a reasonable doubt, any one of these elements, you must find him/her not guilty of this charge.

² In State v. Banko, 364 N.J. Super. 210 (App. Div. 2003), the Appellate Division addressed a circumstance where an alleged weapon, a BB gun, was originally held by defendant for a lawful purpose. Defendant then allegedly threatened the victim with the weapon, at which point his possession became unlawful. The Appellate Division held: "... the trial court's failure to properly instruct the jury as to which point in time the State claimed defendant's lawful purpose in possessing the BB gun became unlawful, deprived the jury of crucial guidance on a critical element of the offense." Therefore, the instructions to the jury on the details of the unlawful possession should be related to the facts of the case. Certification was granted by the New Jersey Supreme Court on February 13, 2004.