Revised 10/22/18

POSSESSION OF A FIREARM WITH A PURPOSE TO USE IT UNLAWFULLY AGAINST THE PERSON OR PROPERTY OF ANOTHER

N.J.S.A. 2C:39-4(a)

The _____ count of the Indictment charges the defendant, _____ _____, with the crime of possession of a firearm with a purpose to use it unlawfully against the person or property of another. The statute on which this count of the Indictment is based reads in pertinent part:

> Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime.

In order for you to find the defendant guilty of this charge, the State has the burden of proving beyond a reasonable doubt each of the following four elements of this crime:

1. Exhibit _____ is a firearm. (or, there was a firearm)
2. Defendant possessed the firearm.
3. Defendant possessed the firearm with the purpose to use it against the person or property of another.[1]
4. Defendant's purpose was to use the firearm unlawfully.

The first element that the State must prove beyond a reasonable doubt is that exhibit_____ is a firearm (or, that there was a firearm).

A "firearm" means any handgun,[2] rifle, shotgun, machine gun, automatic or semi-automatic rifle, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectable ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of

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[1] The person/property distinction is not an element of the crime and need not be specifically determined by the jury verdict. State v. Camacho, 153 N.J. 54, 69, 72 (1998). The court, therefore should not inquire of the jury through a special interrogatory whether its verdict distinguishes between person or property. Ibid. Rather, the person/property distinction is relevant for sentencing purposes only, not for obtaining a conviction. Ibid. If the State elects to proceed on only one theory, either person or property, then the court should only instruct the jury on the theory elected throughout the charge. If both theories are alleged, then the court should include the phrase "against the person or property of another" throughout the charge.

[2] Handgun means any pistol, revolver or other firearm originally designed or manufactured to be fired by the use of a single hand. N.J.S.A. 2C:39-1(k). The handgun need not be presently operable. State v. Gantt, 101 N.J. 573 (1986).

flammable or explosive substances. It shall also include, without limitation, any firearm which is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person.

The second element that the State must prove beyond a reasonable doubt is that defendant possessed the firearm.

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 (that it is _____). [**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 the conduct will cause such a result. Knowing, with knowledge, or equivalent terms have the same meaning.

Knowledge is a condition of the mind. It cannot be seen. It can only be determined by inferences from conduct, words or acts. Therefore, it is not necessary for the State to produce witnesses to testify that a particular defendant stated, for example, that he/she acted with knowledge when he/she had control over a particular thing. It is within your power to find that proof of knowledge has been furnished beyond a reasonable doubt by inference which may arise from the nature of the acts and the surrounding circumstances.

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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 THEY 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

The law recognizes that possession may be constructive instead of actual. A person who, with knowledge of its character, knowingly has direct physical control over an item at a given time is in actual possession of it.

Constructive possession means possession in which the possessor does not physically have the item on his or her person but is 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.

[MERE PRESENCE – Read if Appropriate[3]]

Defendant's mere presence at or near a place where [contraband] is/are discovered is not in itself, without more, proof beyond a reasonable doubt that defendant was in constructive possession of [that contraband]. It is, however, a circumstance to be considered with the other evidence in determining whether the State has proven possession of the [contraband] beyond a reasonable doubt.

Where defendant is one of the persons found in the area where [contraband] is/are discovered, you may not conclude, without more, that the State has proven beyond a reasonable

doubt that he/she had possession of the [contraband] unless there are other circumstance(s) tending to permit such an inference to be drawn.[4] Such evidence can include, but is not limited to [choose as appropriate]: placement and accessibility of the [contraband]; defendant's access to and connection with the place where the [contraband] was/were found; his/her proximity to the place where the [contraband] was/were found; his/her demeanor when confronted by police after the [contraband] was/were found; whether defendant made any inculpatory statements after the [contraband] was/were found; whether defendant possessed other [contraband] on his/her person or property when the [contraband] was/were found; [any other evidence deemed part of the totality of circumstances].[5]

In summary, the State must prove more than defendant's mere presence at the time that the [contraband] was/were found. There must be other circumstance(s) tying defendant to the [contraband] in order for the State to prove constructive possession beyond a reasonable doubt.[6]

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 third element that the State must prove beyond a reasonable doubt is that defendant's purpose in possessing the firearm was to use it against the person or property of another. Purpose is a condition of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts.

In determining the defendant's purpose in possessing the firearm, you may consider that a person acts purposely with respect to the nature of his/her conduct or a result of his/her conduct

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[3] State v. Randolph, 228 N.J. 566, 590-93 (2017).

[4] State v. Jackson, 326 N.J. Super. 276, 280 (App. Div. 1999); See State v. Brown, 80 N.J. 587, 593 (1979) and State v. Sapp, 71 N.J. 476 (1976), rev'g on dissent 144 N.J. Super. 455, 460 (1975).

[5] State v. Randolph, 228 N.J. at 590-93, citing State v. Palacio, 111 N.J. 543, 549-54 (1988) and State v. Shipp, 216 N.J. Super. 662, 664-66 (App. Div. 1987). See Palacio, Shipp, and State v. Montesano, 298 N.J. Super. 597, 615 (App. Div. 1997), certif. denied 150 N.J. 27 (1997), for circumstances more specifically related to presence in or near an automobile in which drugs are found.

[6] State v. Whyte, 265 N.J. Super. 518, 523 (App. Div. 1992), aff'd o.b. 133 N.J. 481 (1993); Jackson, 326 N.J. Super. at 280.

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.

The defendant's purpose or conscious objective to use the firearm against another person or the property of another may be found to exist at any time he/she is in possession of the object and need not have been the defendant's original intent in possessing the object.[7]

The fourth element that the State must prove beyond a reasonable doubt is that the defendant had a purpose to use the firearm in a manner that was prohibited by law. I have already defined purpose for you. This element requires that you find that the State has proven beyond a reasonable doubt that the defendant possessed a firearm 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 the indictment, and not for some other purpose.

In this case, the State contends that the defendant's unlawful purpose in possessing the firearm was _____

_____

(Describe the unlawful purpose of defendant's possession of the weapon)[8]

You must not rely upon your own notions of the unlawfulness of some other undescribed purpose of the defendant; rather, you must consider whether the State has proven the specific unlawful purpose charged.[9] The unlawful purpose alleged by the State may be inferred from all that was said or done and from all of the surrounding circumstances of this case.[10] However, the State need not prove that defendant accomplished his/her unlawful purpose of using the firearm [or, if appropriate, specifically define the elements of the crime defendant allegedly intended to

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[7] See, State v. Daniels, 231 N.J. Super. 555 (App. Div. 1989); State v. Harmon, 104 N.J. 189 (1986). Indeed, the State is not required to prove defendant's original purpose in possessing the firearm. State v. Diaz, 144 N.J. 628, 636 (1996); State v. Petties, 139 N.J. 310, 316 (1995). See State v. Villar, 150 N.J. 503, 512 (1997).

[8] State v. Petties, 139 N.J. at 316. See State v. Villar, 150 N.J. at 511.

[9] State v. Jenkins, 234 N.J. Super. 311, 316 (App. Div. 1989). See State v. Villar, 150 N.J. at 511.

[10] State v. Petties, 139 N.J. at 316; State v. Diaz, 144 N.J. at 636.

commit with the firearm].[11]

[Charge if applicable:] The defense on the other hand contends that _____.

[If the defendant raises the issue of protective purpose, charge the following paragraphs]

I have already told you that the State must prove beyond a reasonable doubt that defendant had an unlawful purpose at the time in question. If you find that the defendant had a lawful purpose, for example, to use the firearm to protect himself/herself or another against the use of unlawful force, or to protect his/her property, or if you have a reasonable doubt as to the defendant's purpose, then the State has failed to carry its burden of proof on this element beyond a reasonable doubt.[12]

I instruct you that for purposes of this offense, if defendant honestly believed that he/she needed to use a firearm to protect (himself/herself/another/property), the law does not require that this belief be reasonable. In other words, if defendant had an honest though unreasonable belief that he/she needed to use the weapon to protect (himself/herself/another), this negates the purposeful mental state required for this offense.

[Choose appropriate]

Later on in the charge, I will instruct you on the concept of self-defense/defense of another as it applies to the offense(s) of _____. The concept of self-defense/defense of another as it applies to those offenses is different than that of protective purpose that applies to this count of the indictment. When applied to that/those offense(s), self-defense requires defendant to have both an honest AND a reasonable belief in the need to use force.

OR

Earlier in the charge, I instructed you on the concept of self-defense as it applies to the offense(s) of _____. The concept of self-defense/defense of another as it applies to that/those offense(s) is different than that of protective purpose that applies to this count of the indictment. When applied to that/those offense(s), self-defense requires a defendant

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[11] State v. Mello, 297 N.J. Super. 452, 464-67 (App. Div. 1997).
[12] State v. Harmon, 104 N.J. at 189.

to have an honest AND a reasonable belief in the need to use force.[13]

[Charge in every case]

If you find that the State has failed to prove any of the elements of the crime beyond a reasonable doubt, your verdict must be not guilty. On the other hand, if you are satisfied that the State has proven each and every element of the crime beyond a reasonable doubt, your verdict must be guilty.

[13] State v. Williams, 168 N.J. 323 (2001).