

POSSESSION OF A DESTRUCTIVE DEVICE
(N.J.S.A. 2C:39-3a)

The defendant is charged in count ____ of the indictment with the crime of possession of a destructive device.

[Read count of Indictment]

The statute upon which this charge is based provides:

Any person who knowingly has in his possession any destructive device is guilty of a crime.

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

1. (That Exhibit S- ____ is a destructive device) **or** (that there was a destructive device);
2. That the defendant knowingly possessed (Exhibit S- ____) (a destructive device).

The first element the State must prove beyond a reasonable doubt is (that Exhibit S ____ is a destructive device) **or** (that there was a destructive device).

“Destructive device” means any device, instrument or object designed to explode or produce uncontrolled combustion, including (1) any explosive or incendiary bomb, mine or grenade; (2) any rocket having a propellant charge of more than four ounces or any missile having an explosive or incendiary charge of more than one-quarter of an ounce; (3) any weapon capable of firing a projectile of a caliber greater than 60 caliber, except a shotgun or shotgun ammunition generally recognized as suitable for sporting purposes; (4) any Molotov cocktail or other device consisting of a breakable container containing flammable liquid and having a wick or similar device capable of being ignited. The term “destructive device” does not include any device manufactured for the purpose of illumination, distress signaling, line-throwing, safety or similar purposes.¹

New Jersey classifies a destructive device as a prohibited weapon. This means that the mere knowing possession of a destructive device in this State violates this section of the law.²

The second element the State must prove beyond a reasonable doubt is that the defendant knowingly possessed (Exhibit S ____) **or** (the destructive device) at the time and place alleged. Here,

¹ N.J.S.A. 2C:39-1c.

² See State v. Smith, 197 N.J. 325, 335-36 (2009); State v. Ingram, 98 N.J. 489, 495 n.1 (1985); State v. Lee, 96 N.J. 156, 160 (1984); State v. Dunlap, 181 N.J. Super. 71, 76 (Law. Div. 1981).

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the State alleges the following: _____. [**Charge if appropriate:** The defendant claims the following: _____].

A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that the conduct is of that nature or that such circumstances exist or the person is aware of a high probability of their existence. A person acts knowingly with respect to a result of the 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 inference from the defendant's conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she did a particular thing. 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 his/her acts and conduct and from all he/she said and did at the particular time and place and from all surrounding circumstances established by the evidence.

Thus, the person must know or be aware that he/she possessed the item, here, a destructive device.

Defendant's possession cannot merely be a passing control that is fleeting or uncertain in its nature. In other words, to "possess" within the meaning of the law, the defendant must knowingly procure or receive the item possessed 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.

When we speak of possession, we mean a conscious, knowing possession. The law recognizes two kinds of possession: actual possession and constructive possession.

A person is in actual possession of a particular article or thing when 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. A person who, with knowledge of its character, knowingly has direct physical control over a thing, at a given time, is in actual possession of it.

Constructive possession means possession in which the possessor does not physically have the property on his or her person but is aware that the item is present and is able to and has the

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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.

The law recognizes that possession may be 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 of a thing, possession is joint; that is, if they knowingly share control over the article.³

[If the defendant raises one of the enumerated statutory defenses to this charge, read the following and charge the appropriate section(s)]

In this matter, the defendant alleges that he/she was permitted to possess the explosive device because of the following reason(s):

[Charge appropriate section(s)]

This statute (or charge) does not apply to any member of the Armed Forces of the United States or the National Guard, or except as otherwise provided, to any law enforcement officer while actually on duty or traveling to or from an authorized place or duty, provided that his possession of the prohibited device has been duly authorized under the applicable laws.⁴

[or]

This statute (or charge) does not apply to the possession of any device by a law enforcement officer who has confiscated, seized or otherwise taken possession of said device as evidence of the commission of a crime or because he/she believed it to be possessed illegally by the person from whom it was taken, provided that said law enforcement officer promptly notifies his/her superiors of his/her possession of such prohibited device.⁵

[Or]

charge appropriate section and include definition of antique cannon section]

This statute (or charge) does not apply to an unloaded antique cannon that is being

³ If a destructive device is found in a vehicle, the jury should be instructed on the permissive inference of possession allowed by N.J.S.A. 2C:39-2a. See State v. Bolton, 230 N.J. Super. 476, 480-81 (App. Div. 1989) (construing the statutory presumption in N.J.S.A. 2C:39-2a to permit only an inference for the jury's consideration). See also N.J.R.E. 303 ("presumption against the accused in criminal cases").

⁴ N.J.S.A. 2C:39-3g.

⁵ N.J.S.A. 2C:39-3g.

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transported by one eligible to possess it, in compliance with regulations the superintendent [of the State Police] may promulgate, between its permanent location and place of purchase or repair.⁶

[or]

This statute (or charge) does not apply to antique cannons that are being loaded or fired by one eligible to possess an antique cannon, for purposes of exhibition or demonstration at an authorized target range or in the manner as has been approved in writing by the chief law enforcement officer of the municipality in which the exhibition or demonstration is held, or if not held on property under the control of a particular municipality, the superintendent [of the State Police], provided that performer has given at least 30 days' notice to the superintendent.⁷

[or]

This statute (or charge) does not apply to the transportation of unloaded antique cannons directly to or from exhibitions or demonstrations authorized under law, provided that the transportation is in compliance with safety regulations the superintendent may promulgate. Nor does this section apply to transportation directly to or from exhibitions or demonstrations authorized under the law of another jurisdiction, provided that the superintendent has been given 30 days' notice and that the transportation is in compliance with safety regulations the superintendent may promulgate.⁸

[Definition of antique cannon; charge if appropriate]

An "antique cannon" means a destructive device if, as the case may be, is incapable of being fired or discharged, or which does not fire fixed ammunition, regardless of date of manufacture, or was manufactured before 1898 for which cartridge ammunition is not commercially available, and is possessed as a curiosity or ornament or for its historical significance or value.⁹

[Resume Main Charge in all cases]

If you find that the State has proven both elements of this crime beyond a reasonable doubt [and disproven the assertion that the defendant was permitted to possess the explosive device beyond

⁶ N.J.S.A. 2C:39-6d(3).

⁷ N.J.S.A. 2C:39-6d(4).

⁸ N.J.S.A. 2C:39-6d(5).

⁹ N.J.S.A. 2C:39-1a. Please note that antique cannons were added to this section by L. 1985, c. 360. Discussion of fixed ammunition or cartridge ammunition not commercially available may be limited to a discussion of antique firearms not including antique cannons but this section does not differentiate between these various "antique firearms," as that term is used to include rifle, shotgun or antique cannon.

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a reasonable doubt], then you must find the defendant guilty of possession of a destructive device. On the other hand, if you find that the State has failed to prove any element of this crime by proof beyond a reasonable doubt [or failed to disprove the assertion that the defendant was permitted to possess the explosive device beyond a reasonable doubt], then you must find the defendant not guilty of possession of a destructive device.