

POSSESSION OF A FIREARM

G.L. c. 269, § 10(h)

The defendant is charged with unlawfully possessing a firearm. In order to prove the defendant guilty of this offense, the Commonwealth must prove (three) (four) things beyond a reasonable doubt:

First: That the defendant possessed an item;

Second: That the item meets the legal definition of a “firearm”; (and)

Third: That the defendant knew that (he) (she) possessed that firearm.

If there is evidence of one of the statutory exceptions, use one of the following:

A. If there is evidence that the defendant had a firearm ID card. And Fourth:

That the defendant did *not* have a valid firearm ID card.

B. If there is evidence that the defendant was exempt. And Fourth: That

the defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a valid firearm ID card.

See Instruction 3.160 (License or Authority).

G.L. c. 278, § 7; *Commonwealth v. Jones*, 372 Mass. 403, 406-07 (1977). The

issuance of firearm identification cards is governed by G.L. c. 140, §§ 129B-129D. Section 129B also lists a number of exemptions from the requirement of a firearms identification card. See *also* Op. A.G. No. 86/87-4 (Oct. 31, 1986) (18 U.S.C. § 926A provides a defense to a charge under § 10[h] for a non-resident traveling through the Commonwealth with an unloaded and inaccessible handgun who is in compliance with the firearms laws of the states of origin and destination).

Here define "possession" (Instruction 3.220).

A "firearm" is defined in our law as:

"a pistol, revolver or other weapon . . .

loaded or unloaded,

from which a shot or bullet can be discharged

and . . . the length of [whose] barrel is less than sixteen inches."

That definition can be broken down into three requirements: *First*, it must be a weapon; *Second*, it must be capable of discharging a shot or bullet; and *Third*, it must have a barrel length of less than 16 inches. The term "barrel length" refers to "that portion of a firearm . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 140, § 121; *Commonwealth v. Sampson*, 383 Mass. 750, 753 (1981); see *Commonwealth v. Tuitt*, 393 Mass. 801, 810 (1985) (jury can determine from inspection that a weapon admitted into evidence is a "firearm"); *Commonwealth v. Fancy*, 349 Mass. 196, 204 (1965) (same); *Commonwealth v. Sperrazza*, 372 Mass. 667, 670 (1977) (testimony about "revolver" or "handgun" will support inference that barrel was under 16 inches); *Commonwealth v. Bartholomew*, 326 Mass. 218, 219 (1950) (not necessary that firearm be loaded).

As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that (he) (she) (possessed this item) (or) (had this item under [his] [her] control in a vehicle), and also knew that the item was a “firearm,” within the common meaning of that term. If it was a conventional firearm, with its obvious dangers, the Commonwealth is not required to prove that the defendant knew that the item met the *legal* definition of a firearm.

See Instruction 3.140 (Knowledge).

General Laws c. 269, § 10(h) punishes “own[ing]” or “transfer[ring]” possession as well as possession, and is applicable to a “rifle, shotgun or ammunition” as well as a firearm. In cases with such fact patterns, the model instruction may be adapted accordingly. See G.L. c. 140, § 121 for definitions of “rifle,” “shotgun,” and “ammunition.”

Commonwealth v. Sampson, 383 Mass. 750, 762 (1981); *Commonwealth v. Bacon*, 374 Mass. 358, 359 (1978) (knowledge need not be alleged in the charging document); *Commonwealth v. Jackson*, 369 Mass. 904, 916-17 (1976) (knowledge must be proved); *Commonwealth v. Boone*, 356 Mass. 85, 87 (1969) (same); see *Commonwealth v. Papa*, 17 Mass. App. Ct. 987, 987-88 (1984) (defendant need not know that the firearm met the legal definition).

SUPPLEMENTAL INSTRUCTIONS

1. *Absence of evidence of firearm ID card.*

You have heard some reference to (a firearm ID card) (a legal exemption from the requirement of a firearm ID card). There was no evidence in this case that the defendant had a firearm ID, and no evidence that

the defendant qualified for one of the legal exemptions that are a substitute for having a firearm ID card. For that reason, the issue of a firearm ID card or exemption is not relevant to your deliberations in this case, and therefore you should put it out of your mind.

This instruction is recommended only when, in the jury's presence, there has been some reference to, but not evidence of, a firearm ID card or exemption.

2. *Knowledge of firearm ID card requirement.*

You have heard some mention that the defendant did not know that (he) (she) was required to have a firearm ID card before possessing a firearm. The Commonwealth is *not* required to prove that the defendant knew that the law required (him) (her) to have a firearm ID card before (possessing a firearm) (or) (having a firearm under [his] [her] control in a vehicle).

This instruction is recommended only when it is necessary to correct such a misimpression.

3. *Expired licensed.*

One of the exemptions to the requirement of a valid firearm ID card provided by law is for certain persons with an expired firearm ID card. This exemption is intended to

exempt from criminal punishment persons whose licenses became invalid inadvertently but who would otherwise not be disqualified from holding a valid license.

The defendant is entitled to this exemption if (his) (her) license to carry was expired and (he) (she) had not been notified of any revocation or suspension of the license, or pending revocation or suspension of the license, or denial of a renewal application. The Commonwealth has the burden to establish beyond a reasonable doubt that the exemption does not apply. To prove this, the Commonwealth must prove beyond a reasonable doubt one of the following things:

One, that the defendant never had a valid firearm ID card;

Two, that the defendant had been notified that the license was revoked or suspended or that revocation or suspension was pending, and that the revocation or suspension was not because of failure to provide a change of address; or

Three, that the defendant had been notified of the denial of an application to renew (his) (her) firearm ID card.

G.L. c. 140, § 131(m); *Commonwealth v. Indrisano*, 87 Mass. App. Ct. 709, 716-17 (2015). The mere production of an expired license is insufficient to warrant this instruction, but testimony that the defendant had never applied to renew the license, had never received notice of denial, and had never received notice of revocation or suspension entitles a defendant to the instruction. *Indrisano*, 87 Mass. App. Ct. at 714.

NOTES:

1. **Possession of a firearm (§ 10[h]) as a lesser included offense of carrying a firearm (§ 10[a]).** Prior to 1991, possession of a firearm (§ 10[h]) was a lesser included offense of carrying a firearm (§ 10[a]). See *Commonwealth v. Nesselini*, 19 Mass. App. Ct. 1016, 1016 (1985). Stat. 1990, c. 511 (effective January 2, 1991) amended § 10(h) to provide that “[a] violation of this subsection shall not be considered a lesser included offense to a violation of subsection (a) nor shall any one prosecute as a violation of [§ 10(h)] the mere possession of a firearm, rifle, or shotgun by an unlicensed person not being present in or on his residence or place of business, nor shall the court allow an attempt to so prosecute.” However, this provision was deleted when the statute was rewritten by St. 1998, c. 180, § 69 (effective October 21, 1998).
2. **Non-firing firearm.** See the first supplemental instruction to Instruction 7.600 (Carrying a Firearm).
3. **Passenger in vehicle.** See the third supplemental instruction to Instruction 7.600 (Carrying a Firearm).