

LARCENY BY STEALING

The defendant is charged with larceny. Section 30 of chapter 266 of our General Laws provides as follows:

“Whoever steals . . .
the property of another . . .
shall be guilty of larceny”

Stealing is the wrongful taking of the personal property of another person, with the intent to deprive that person of such property permanently.

In order to prove the defendant guilty of larceny, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant took and carried away property;

Second: That the property was owned or possessed by someone other than the defendant; and

Third: That the defendant did so with the intent to deprive that person of the property permanently.

SUPPLEMENTAL INSTRUCTIONS

1. *“Took and carried away”*. **“Taking and carrying away” was accomplished if the defendant physically transferred the property from the other person’s control to his (her) own. It does not matter if the transfer involved only slight movement, or if it lasted only for a short time.**

Commonwealth v. Fielding, 371 Mass. 97, 117, 353 N.E.2d 719, 731-732 (1976) (any separation of property from victim’s dominion, even if brief in space and time, sufficient); *Commonwealth v. Salerno*, 356 Mass. 642, 648, 255 N.E.2d 318, 321 (1970) (taking can be proved by circumstantial evidence); *Commonwealth v. Luckis*, 99 Mass. 431, 433 (1868) (wallet need not be removed from victim’s pocket, but defendant “must for an instant at least have had perfect control of the property”); *Commonwealth v. Stephens*, 14 Mass. App. Ct. 994, 994-995, 440 N.E.2d 777, 777 (1982) (sufficient that victim put property in bag at defendant’s orders, though defendant never touched it); *Commonwealth v. Bradley*, 2 Mass. App. Ct. 804, 805, 308 N.E.2d 772, 772 (1974) (momentary transfer sufficient); *Commonwealth v. Flowers*, 1 Mass. App. Ct. 415, 418-419, 298 N.E.2d 898, 900-901 (1973) (transfer of property from victim’s control to thief’s sufficient, since literal “carrying away” not required; transfer may be through agent or victim).

2. *“Property.”* **The term “property” includes (money) (movable items of personal property) (bank notes) (public records) (anything that is part of or attached to real estate) (apartment security deposits) (electronically processed or stored data, either tangible or intangible) (domesticated animals, including dogs, birds and other animals ordinarily kept in**

confinement).

This is only a partial list. See G.L. c. 266, § 30(2) for the complete list of items, in addition to those at common law, that may be the subject of larceny. See also *Commonwealth v. Youraski*, 384 Mass. 386, 388, 425 N.E.2d 298, 299 (1981) (intellectual property, such as taped performance, not subject to larceny statute); *Commonwealth v. Beckett*, 373 Mass. 329, 341-343, 366 N.E.2d 1252, 1259-1261 (1977) (intent to commit larceny from welfare department inferable from circumstances).

3. "Of another."

The Commonwealth must prove that the property was owned or possessed by a person other than the defendant. This can be proved by direct evidence that someone else owned or possessed the property. Or, in some cases, it may be reasonable for you to infer this from the surrounding circumstances. The Commonwealth is not required to prove who owned or held the property, as long as it proves that the defendant did *not*.

G.L. c. 277, § 25 (identity of owner need not be alleged if property described with sufficient certainty); G.L. c. 278, § 9 ("owner" includes anyone in actual or constructive possession). *Commonwealth v. Souza*, 397 Mass. 236, 238-239, 490 N.E.2d 1173, 1175 (1986) (identity of owner need not be proved, only that it was not defendant; because of G.L. c. 277, § 35, misnomer of owner is immaterial if defendant not misled); *Commonwealth v. Kiernan*, 348 Mass. 29, 50-51, 201 N.E.2d 504, 516 (1964), cert. denied sub nom. *Gordon v. Mass.*, 380 U.S. 913 (1965) ("owner" includes anyone with a possessory or property interest); *Commonwealth v. Binkiewicz*, 342 Mass. 740, 748, 175 N.E.2d 473, 479-480 (1961) (because of G.L. c. 278, § 9, complaint about "the property of x" in effect reads "the property of x, or of another but in x's actual or constructive possession"; driver with shared dominion over auto registered in spouse's name is "owner"); *Commonwealth v. Finn*, 108 Mass. 466, 467 (1871) (one may steal from thief); *Commonwealth v. Sullivan*, 104 Mass. 552, 554-555 (1870) (person who orders goods is in constructive possession of them once delivered to a common carrier, absent a shipping agreement to the contrary); *Commonwealth v. Arrance*, 5 Allen 517, 517-518 (1862) (because of G.L.

c. 278, § 9, permissible to allege and prove only one co-owner); *Commonwealth v. Pimental*, 54 Mass. App. Ct. 325, 328, 764 N.E.2d 940, 945 (2002) (“Direct proof of ownership, although preferable, is not essential . . .”).

4. *Intent to deprive permanently.* **The Commonwealth must prove**

that the defendant intended to deprive the owner of the property permanently. This may be proved by direct evidence or by inference from the surrounding circumstances. For example, if a person takes the property of another and disposes of it with utter indifference to whether the owner recovers its possession, you might infer from that an intent to deprive the owner of it permanently.

See Instruction 3.120 (Intent).

Salerno, supra; Commonwealth v. Cabot, 241 Mass. 131, 141-143, 135 N.E.2d 465, 469 (1922); *Commonwealth v. Olivera*, 48 Mass. App. Ct. 907, 909, 719 N.E. 2d 515, 517 (1999) (difference between larceny of motor vehicle and use without authority is intent to deprive permanently; the latter assumes returning stolen vehicle to its owner or abandoning it where it might be recovered); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 456-457, 632 N.E.2d 1234, 1236 (1994); *Commonwealth v. Coyle*, 17 Mass. App. Ct. 982, 984, 459 N.E.2d 119, 121 (1984); *Commonwealth v. Ellison*, 5 Mass. App. Ct. 862, 862-863, 365 N.E.2d 1253, 1254 (1977) (intent to make restitution later is not a defense).

5. *Larceny over \$250.* **If you determine that the Commonwealth**

has proved beyond a reasonable doubt that the defendant is

guilty of larceny, you must also go on to determine whether
(if more than one item stolen: all) **the property that was stolen was worth more than \$250 or less than \$250. You need to consider that question only if you find the defendant guilty, so that I will know which range of sentences the law permits in this case.**

So if your verdict is guilty, you must also indicate on your verdict slip whether or not the Commonwealth has also proved beyond a reasonable doubt that the property was worth more than \$250.

You may use your general knowledge in evaluating the value of a piece of property; it is not required that you have any expert evidence of its value.

For a sample verdict slip, see the appendix (Instruction 8.521).

General Laws c. 266, § 30(1) makes the offense a felony “if the property stolen is a firearm . . . or if the value of the property stolen exceeds two hundred and fifty dollars. . . .” The supplemental instruction may be appropriately adapted if the theft is of a firearm.

Commonwealth v. Kelly, 24 Mass. App. Ct. 181, 183-186 & n.4, 507 N.E.2d 777, 778-780 & n.4 (1987), held that, whether or not the value of the property stolen is alleged in the complaint, “the judge should instruct the jury that if they convict, they must determine by their verdict whether the value did or did not exceed [\$250] so that the judge will know what range of punishments is available. Otherwise the judge will be required to sentence as if the value did not exceed” \$250. *Kelly* also indicated that the value of the stolen property need not be alleged in the complaint, since “the value of the property . . . is an element of the punishment but not an element of the offense of larceny” Compare *Commonwealth v. Pyburn*, 26 Mass. App. Ct. 967, 968-970, 527 N.E.2d 1174, 1175-1176 (1988) (in prosecution for wanton destruction of property under G.L. c. 266, § 127, “if there is an allegation in a complaint . . . that

the value of the property so destroyed or injured exceeded" \$250 then jury must determine that issue, but instruction need not present that factor as an essential element of the offense since it is not such) with *Commonwealth v. Beale*, 434 Mass. 1024, 1025 & n.2, 751 N.E.2d 845, 847 & n.2 (2001) ("the value of the property must be treated as an element of the felony of malicious destruction of property" but "the focus of the constitutional inquiry is not a formalistic examination of whether a finding is labeled an 'element' or a 'sentencing factor,' but whether the finding is made by a jury on proof beyond a reasonable doubt"). See also *Commonwealth v. Harrington*, 130 Mass. 35, 36 (1880) (statutory attempt to dispense with need to charge that crime is subsequent offense, where an element of enhanced sentencing, violated art. 12 of Massachusetts Declaration of Rights).

The jury may use its common knowledge, and does not require expert evidence, in evaluating value. *Commonwealth v. Hosman*, 257 Mass. 379, 386, 154 N.E. 76, 78 (1926); *Commonwealth v. McCann*, 16 Mass. App. Ct. 990, 991, 454 N.E.2d 497, 498 (1983).

6. *Single scheme.*

The complaint in this case charges the defendant with stealing property between two dates pursuant to a single scheme. Therefore, in addition to the three elements of larceny that I have just instructed you about, the Commonwealth must also prove beyond a reasonable doubt that during that period of time the defendant acted out of a single, continuing intent to steal; that even though time elapsed between incidents, they were not separately motivated but were part of one general scheme or plan to steal.

If relevant to evidence:

If this is proved beyond a reasonable doubt, you may consider the total value of all property obtained

on all of those occasions cumulatively in deciding whether the value of the property stolen was in excess of \$250.

Commonwealth v. John G. Grant & Sons Co., 403 Mass. 151, 157, 526 N.E.2d 768, 772 (1988) (statutory language making each day of a continuing violation a separate offense prevents charging as single, continuous offense); *Commonwealth v. Murray*, 401 Mass. 771, 519 N.E.2d 1293 (1988) (where several acts of a defendant are involved, successive takings in a single, continuing larcenous scheme may, but need not, be charged as a single scheme); *Commonwealth v. England*, 350 Mass. 83, 86-87, 213 N.E.2d 222, 224-225 (1966) (value of successive larcenies in single scheme may aggregate to grand larceny); *Commonwealth v. Stasiun*, 349 Mass. 38, 45, 206 N.E.2d 672, 677 (1965) (same); *Commonwealth v. Peretz*, 212 Mass. 253, 254, 98 N.E. 1054, 1055 (1912) (same); *Pimental*, 54 Mass. App. Ct. at 329, 764 N.E.2d at 946 (same); *Slater v. United States Fidelity & Guar. Co.*, 7 Mass. App. Ct. 281, 285, 386 N.E.2d 1058, 1061 (1979), rev'd on other grounds, 379 Mass. 801, 400 N.E.2d 1256 (1980) (same); *Donovan*, 395 Mass. at 27-31, 478 N.E.2d at 733-735 (where a single act of a defendant is involved, successive takings in a single, continuing larcenous scheme must be charged as a single offense); *Commonwealth v. Pina*, 1 Mass. App. Ct. 411, 412 n.2, 298 N.E.2d 895, 895 n.2 (1973). Compare G.L. c. 277, § 32 (charging a continuing offense); *Sullivan*, 104 Mass. at 553 (distinct larcenies may be presented in multiple counts; stealing at one time of articles belonging to several owners may be charged either as one larceny or as distinct larcenies). But see *Commonwealth v. Donovan*, 395 Mass. 20, 29, 478 N.E.2d 727, 734 (1985) (only one count of larceny, not seven, where defendant mounted imitation deposit lock box over the real one at a bank, obtaining seven bank deposits from different depositors). See also *Commonwealth v. Baldwin*, 52 Mass. App. Ct. 404, 407, 754 N.E.2d 121, 124 (2001) (*Donovan* inapplicable where circumstances involve more than one discrete offense, such that different property is taken at different times and from different locations).

7. *Claim of right.*

If the defendant took another person's property in an honest and reasonable belief that (he) (she) (another person on whose behalf he [she] was acting) had a legal right to it, then you must find the defendant not guilty, even if that belief was in fact mistaken, because he (she) lacked the intent to steal.

Commonwealth v. Garrity, 43 Mass. App. Ct. 349, 358 n.7, 682 N.E.2d 937, 943 n.7 (1997); *Commonwealth v. Larmey*, 14 Mass. App. Ct. 281, 283-285, 438 N.E.2d 382, 384-385 (1982); *Commonwealth v. Anslono*, 9 Mass. App. Ct. 867, 868, 401 N.E.2d 156, 157 (1980); *Ellison, supra*; *Commonwealth v. White*, 5 Mass. App. Ct. 483, 485-488, 363 N.E.2d 1365, 1367-1368 (1977).

NOTES:

1. **“Breaking and entering and stealing therein.”** See the notes to Instruction 8.100 (Breaking and Entering).

2. **Merger of offenses.** “In a [complaint] for criminal dealing with personal property with intent to steal, an allegation that the defendant stole said property shall be sufficient; and such [complaint] may be supported by proof that the defendant committed larceny of the property, or embezzled it, or obtained it by false pretences.” G.L. c. 277, § 41. “Stealing. Larceny.—The criminal taking, obtaining or converting of personal property, with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement and obtaining by criminal false pretences.” G.L. c. 277, § 39.

“[T]he purpose of the assimilation of offenses was to reduce, if not eliminate, the opportunities for a fatal variance which existed whenever an indictment charged one offence and the proof disclosed a different one.” *Kelly*, 24 Mass. App. Ct. at 184, 507 N.E.2d at 779. Proof of any one of the three alternatives will support a conviction for larceny. *Commonwealth v. Leland*, 311 Mass. 447, 448, 42 N.E.2d 249, 250 (1942); *Commonwealth v. Kelley*, 184 Mass. 320, 324, 68 N.E. 346, 347 (1883). The Commonwealth cannot be required to elect which of the three alternatives it intends to prove. *Commonwealth v. Corcoran*, 348 Mass. 437, 440-442, 204 N.E.2d 289, 292-293 (1965); *Commonwealth v. King*, 202 Mass. 379, 386-389, 88 N.E. 454, 457-458 (1909). A bill of particulars is a limitation only as to the proof to be offered; the judge may charge on any of the three alternatives warranted by the evidence. *Corcoran, supra*; *Commonwealth v. Kenneally*, 10 Mass. App. Ct. 162, 176, 406 N.E.2d 714, 724 (1980), *aff’d* on other grounds, 383 Mass. 269, 418 N.E.2d 1224, cert. denied, 454 U.S. 849 (1981). Precise instructions to the jury on the Commonwealth’s theory of how the defendant stole are critical because traditional larceny, embezzlement, and larceny by false pretenses have different required elements. *Commonwealth v. Mills*, 436 Mass. 387, 399, 764 N.E.2d 854, 865 (2002).

3. **Related offenses.** For instructions for other larceny offenses, see:

Instruction 8.200 (Theft, etc. of Motor Vehicle, G.L. c. 266, § 28)

Instruction 8.400 (Fraudulent Insurance Claim, G.L. c. 266, § 111A)

Instruction 8.420 (Identity Fraud by Posing as Another, G.L. c. 266, § 37E [b])

Instruction 8.440 (Identity Fraud by Obtaining Personal Information, G.L. c. 266, § 37E [c])

Instruction 8.460 (Larceny by Check, G.L. c. 266, § 37)

Instruction 8.480 (Larceny by Embezzlement, G.L. c. 266, § 30)

Instruction 8.500 (Larceny by False Pretenses, G.L. c. 266, § 30)

Instruction 8.540 (Larceny by Stealing in a Building, G.L. c. 266, § 20)

Instruction 8.560 (Larceny from the Person, G.L. c. 266, § 25 [b])

Instruction 8.580 (Larceny of Leased or Rented Personal Property, G.L. c. 266, § 87)

Instruction 8.600 (Receiving Stolen Property, G.L. c. 266, § 60)

Instruction 8.620 (Shoplifting, G.L. c. 266, § 30A)

Instruction 8.640 (Unauthorized Transfer of Sound Recordings, G.L. c. 266, § 143A).

For other specialized larceny offenses, see also G.L. c. 266, §§ 37B-37C (Credit Card Fraud), 33A (Larceny of Commercial Computer Service) and 120F (Unauthorized Access to Computer System).

4. **Stealing and receiving same property.** A defendant cannot be convicted both of stealing and receiving the same goods. *Commonwealth v. Dellamano*, 393 Mass. 132, 134, 469 N.E.2d 1254, 1255 (1984);

Commonwealth v. Haskins, 128 Mass. 60, 61 (1880). A defendant may be charged with both crimes; if the evidence would support either, it is for the jury to decide “under clear and precise instructions” of which to convict. *Commonwealth v. Ross*, 339 Mass. 428, 430-432, 159 N.E.2d 330, 332-334 (1959); *Kelley*, 333 Mass. at 195, 129 N.E.2d at 903; *Commonwealth v. Obshatkin*, 2 Mass. App. Ct. 1, 4-5, 307 N.E.2d 341, 343-344 (1974). See Instruction 5.41 (Larceny by Stealing). Each crime should be charged in a separate count or complaint. *Dellamano*, 393 Mass. at 134 n.7, 469 N.E.2d at 1255 n.7. If the jury incorrectly convicts on both charges, the judge should reinstruct the jury and send them out again. If the jury persists, the charge of receiving stolen property should be dismissed. *Commonwealth v. Nascimento*, 421 Mass. 677, 684-685, 659 N.E.2d 745, 750 (1996).