

POSSESSION OF AMMUNITION¹

G.L. c. 269, § 10(h)

The defendant is charged with unlawfully possessing ammunition. To prove the defendant guilty of this offense, the Commonwealth must prove (four) (five) things beyond a reasonable doubt:

***First:* That the defendant possessed an item;**

***Second:* That the item meets the legal definition of ammunition;**

***Third:* That the defendant knew that they possessed that ammunition; and**

***Fourth:* That the defendant did not have valid license to possess ammunition.**

If there is evidence that the defendant was exempt.

and Fifth: That the defendant did not qualify for one of the statutory exemptions.

General Laws c. 140, § 129C lists a number of exemptions from the requirement of a license to carry or a firearms identification card.

¹ General Laws c. 269, § 10(h) punishes “own[ing]” or “transfer[ring] possession” as well as possession, and is applicable to a “firearm, rifle, shotgun or ammunition”. In cases with such fact patterns, the model instruction may be adapted accordingly.

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed an item. What does it mean to possess something? A person obviously possesses something if they have direct physical control of it at a given time.

If defendant does not have physical control and/or the Commonwealth alleges constructive possession:

However, the law does not require that someone necessarily have actual physical custody of an object to possess it. An object is in a person's possession without physical custody if they have:

- knowledge of the object;
- the ability to exercise control over that object, either directly or through another person; and
- the intent to exercise control over the object.

For example, the law considers you to be in possession of things which you keep (in your bureau drawer at home) (in a safe deposit box at your bank).

Whether the defendant possessed an item is something that you must determine from all the evidence

and any reasonable inferences that you may draw from the evidence. I caution you to remember that merely being present in the vicinity of an item, even if one knows that it is there, does not amount to possession.

Where the issue is constructive possession rather than actual physical possession, the Commonwealth must prove that "in addition to knowledge and the ability to exercise control over the firearm, the defendant must have the intention to do so." *Commonwealth v. Costa*, 65 Mass. App. Ct. 227, 234 (2005), citing *Commonwealth v. Sann Than*, 442 Mass. 748, 755 (2004). See also note 5.

Instruction on guilt by association.

Possession is not proved simply because the defendant was associated with a person who controlled the item or the property where it was found.

Mere presence is not enough.

Merely being present where ammunition is found is not sufficient by itself to permit an inference that the person knew about the presence of the ammunition without other indications of knowledge. Further, being present where ammunition is found, even with evidence that the defendant knew about the ammunition, is not sufficient to prove possession, without evidence of intent to control that ammunition.

See also *Commonwealth v. Romero*, 464 Mass. 648, 654 (2013) (presence alone is not sufficient to establish knowledge, ability and intent to control; instead, presence must be

augmented by additional inculpatory evidence); *Commonwealth v. Brown*, 401 Mass. 745, 747 (1988) (insufficient evidence to prove personal knowledge of defendant who was driving car where car was reported stolen and two firearms were found under passenger seat).

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the item meets the legal definition of ammunition. Ammunition is defined in our law as cartridges or cartridge cases, primers (igniters), (tear gas cartridges), bullets or propellant powder designed for use in any firearm, rifle or shotgun.

G.L. c. 269, § 10(o) (¶ 2).

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that they possessed ammunition. This requires you to make a decision about the defendant's state of mind at that time. You may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine the extent of the defendant's knowledge at the time.

See Instruction 3.140 (Knowledge). *Commonwealth v. Marrero*, 484 Mass. 341, 346-347 (2020), quoting *Commonwealth v. Sampson*, 383 Mass. 750, 762 (1981) (Commonwealth only required to prove that defendant had knowledge that the "instrument is a firearm within the generally accepted meaning of that term"); *Commonwealth v. Bacon*, 374 Mass. 358, 359 (1978) (knowledge need not be alleged in complaint); *Commonwealth v. Jackson*, 369 Mass. 904, 916-917 (1976) (knowledge must be proved); *Commonwealth v. Boone*, 356 Mass. 85, 87 (1969) ("control" in vehicle requires knowledge); *Commonwealth v. Papa*, 17 Mass. App. Ct. 987, 987-988 (1984) (defendant need not know that the firearm met the legal definition).

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant had neither a valid license to carry nor a firearm identification card at the time they possessed the ammunition.

Because ammunition may be lawfully possessed with either a License to Carry or a Firearm Identification Card, the Commonwealth must prove that the defendant had neither the license nor the card. See G.L. c. 140 § 129B-C, § 131.

If there is evidence that the defendant was exempt.

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant did not qualify for the statutory exemption of _____.

See G. L. c. 140, § 129C for the list of statutory exemptions.

If the Commonwealth has proven all (four) (five) of the elements of this offense beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove any one of the elements beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. *Knowledge of license to carry or firearm identification card requirement.*

This instruction is recommended only when it is necessary to correct the misimpression that the Commonwealth must prove that the defendant knew that the law requires a license to carry or firearms identification card.

You have heard some mention that the defendant did not know that they were required to have a license to carry or a firearm identification card before possessing ammunition. The Commonwealth is *not* required to prove that the defendant knew that the law required them to have a license to carry or firearm identification card before possessing ammunition. For that reason, the issue of knowledge of the requirement of a license to carry or firearm identification card is not relevant to your deliberations in this case, and therefore you should put it out of your mind and do not discuss it at all during your deliberations.

NOTES:

1. **Notice of affirmative defense.** The issuance of firearm identification cards and licenses to carry are governed by G.L. c. 140, §§ 129B and 131, respectively. Section 129C lists a number of statutory exemptions. Generally, these exemptions cover nonresidents in various circumstances, federally licensed firearms manufacturers or wholesale dealers and persons employed by them, persons in the military, police officers and other peace officers of any jurisdiction either in performance of their duties or who are duly authorized to possess, members of a veteran's organization when on official parade duty or ceremonial occasions, to list a few. G.L. c. 140, § 129C, ¶ 4 (a) - (u).

Under Mass. R. Crim. P. 14(b)(3), a defendant who intends to rely upon an affirmative defense of exemption must file advance notice of such a defense with the prosecutor and the clerk-magistrate. If the defendant fails to comply with the requirement, the defendant may not rely upon such a defense. The judge may allow late filing of the notice, order a continuance, or make other appropriate orders.

2 Duplicative convictions. A conviction for unlawful possession of ammunition is duplicative of a conviction for unlawful possession of a loaded firearm where all of the ammunition in question is loaded in the firearm. *Commonwealth v. Johnson*, 461 Mass. 44, 53-54 (2011) (separate sentences for each crime violated the double jeopardy clause because the defendant was punished twice for possession of the same ammunition). This is distinguishable from situations where ammunition is found loaded in a firearm and also found elsewhere in the possession of the defendant, as the jury can be instructed to distinguish among the ammunition. *Id.* at 53.

3. Commonwealth must prove defendant not licensed. The Commonwealth must prove that the defendant was not licensed to carry a firearm as an element of unlawful possession of a firearm under G.L. c. 269, § 10(a). *Commonwealth v. Guardado*, 491 Mass. 666, 668 (2023). This new rule applies prospectively and to those cases that were active or pending on direct review as of June 23, 2022, the date of the issuance of *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022), in which the Supreme Court held that the Second Amendment to the United States Constitution protects an individual's right to carry a firearm in public. As a result of this ruling, in *Guardado*, the Supreme Judicial Court overturned Massachusetts precedent that licensure is an affirmative defense and instead, placed the burden on the Commonwealth to prove that the defendant did not have a license at the time of the offense. See *id.* at 668, 690.

4. Proof of absence of license. The Commonwealth may seek to admit statements by the defendant about the absence of a license or card. See G. L. c. 140, § 129C, paragraph 9 (obligation to produce firearm license upon request of a police officer). The Commonwealth may also seek to introduce properly certified or attested official government records from a local police department or the Firearms Records Bureau (or both). G.L. c. 233, §§ 76, 78 and 79J; Mass. R. Crim. P. 40 (a). While such agency certificates or affidavits stating that there is no record of a firearm license issued to a defendant may not run afoul of hearsay or evidentiary rules, the Confrontation Clause would likely prohibit their admission without a testifying witness from the agency responsible for keeping such records, and who is familiar with how the records are kept, made, and stored. *Guardado, supra* at 695 (Lowy, J., concurring). Whether a witness other than the one who undertook the search was qualified to testify about the search would be a preliminary question for the trial judge to decide. *Id.* at 702-703.

5. Constructive possession requires knowledge, ability, and intention to control. In order to prove constructive possession of an item, the Commonwealth must show "knowledge coupled with the ability and intention to exercise dominion and control." *Commonwealth v. Romero*, 464 Mass. 648, 653 (2013), quoting *Commonwealth v. Brzezinski*, 405 Mass. 401, 409 (1989). Proof of constructive possession may be established by circumstantial evidence and the reasonable inferences drawn from the evidence. See *id.* "Presence alone cannot show the requisite knowledge, power, or intention to exercise control over [contraband], but presence, supplemented by other incriminating evidence, 'will serve to tip the scale in favor of sufficiency.'" *Commonwealth v. Albano*, 373 Mass. 132, 134 (1977), quoting *United States v. Birney*, 529 F.2d 103, 108 (6th Cir. 1976). Even with evidence of knowledge of a firearm and the ability to control it, the Commonwealth must prove that the defendant had the intent to control the firearm. *Romero, supra* at 654. Presence in a vehicle with a firearm must be "augmented by additional exculpatory evidence". *Id.*

See *Commonwealth v. Santos*, 95 Mass. App. Ct. 791, 800 (2019) (sufficient evidence of knowledge, ability and intent to control firearm where car was registered to defendant's mother and controlled by him, shotgun was partially in plain view and within his reach, defendant concealed shotgun, gave false information to police, and engaged in repair of shotgun); *Commonwealth v. Albano*, 373 Mass. 132, 134-136 (1977) (sufficient evidence where gun in plain view; defendant acted suspiciously); *Commonwealth v. Bailey*, 29 Mass. App. Ct. 1007, 1008 (1990) (gun in plain view near defendant's feet; car had been broken into; attempted escape); *Commonwealth v. Montgomery*, 23 Mass. App. Ct. 909, 910 (1986) (gun on defendant's side of auto and defendant had appropriate ammunition clip); *Commonwealth v. Lucido*, 18 Mass. App. Ct. 941, 943 (1984) (gun in glove compartment with defendant's personal letters); *Commonwealth v. Donovan*, 17 Mass. App. Ct. 83, 85-86 (1983) (gun under seat of borrowed auto surrounded by defendant's acknowledged property); *Diaz, supra* (gun in plain view on floor in front of defendant). Compare *Commonwealth v. Brown*, 401 Mass. 745, 747 (1988)

(insufficient evidence to prove defendant had knowledge of firearm, where defendant drove stolen car, guns were found under passenger seat, both occupants bent forward in unison when stopped and no admissions); *Commonwealth v. Almeida*, 381 Mass. 420, 422-423 (1980) (insufficient proof of knowledge of defendant where gun was inside covered console of borrowed auto); *Commonwealth v. Boone*, 356 Mass. 85, 87 (1969) (insufficient proof of knowledge where defendant was passenger in a car with gun under driver's seat); *Commonwealth v. Hill*, 15 Mass. App. Ct. 93, 94-97 (1983) (insufficient to prove gun inside woman's purse at male passenger's feet).