

**CARRYING A LOADED FIREARM ON ONE'S PERSON
OR HAVING CONTROL OVER A LOADED FIREARM
IN A VEHICLE WHILE UNDER THE INFLUENCE**

G.L. c. 269, § 10H

The defendant is charged with (carrying a loaded firearm on his person) (having a loaded firearm under his (her) control in a motor vehicle) while under the influence of (intoxicating liquor) (marijuana) (narcotic drugs) (depressants) (stimulant substances).

To prove the defendant guilty of this offense, the Commonwealth must prove the following three things beyond a reasonable doubt:

First: That the defendant (carried a weapon on their person) (had a weapon under their control in a vehicle) that met the legal definition of a firearm;

Second: That the firearm was loaded with ammunition; and

Third: That the defendant was under the influence of (intoxicating liquor) (marijuana) (narcotic drugs) (depressants) (stimulant substances) while they (carried the firearm on their person) (had the firearm under their control in a motor vehicle).

To prove the first element, the Commonwealth must prove the defendant (carried a weapon on their person) (had a weapon under their control in a vehicle) and that the weapon met the legal definition of a “firearm.”

The legal definition of a firearm has three parts. *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

If it is alleged that the defendant carried a firearm

To prove the first element, the Commonwealth must also prove the defendant carried a firearm. A person carries something when they move it, no matter how slight that movement might be. Such movement requires no more than momentary possession of the object.

One carries an object on their person when the object is physically handled by or attached to the person, or is in the person’s clothing.

Whether the defendant carried a firearm on their person is something that you must determine from all the facts and any reasonable inferences that you choose to draw from those facts.

If it is alleged the defendant had control over a firearm in a vehicle

To prove the first element, the Commonwealth must also prove the defendant had control over a firearm in a vehicle. It is not enough for the Commonwealth to prove that the defendant was present in the same vehicle as the firearm. To prove control over the firearm, the Commonwealth must also prove that the defendant knew that the firearm was there, and that the defendant had both the ability and the intention to exercise control over it. The Commonwealth is not required to prove that the defendant had exclusive control over the firearm.

Whether the defendant had control over a firearm in a vehicle is something that you must determine from all the facts and any reasonable inferences that you choose to draw from those facts.

To prove the second element, the Commonwealth must prove the firearm was loaded with ammunition. Ammunition is any

(cartridge or cartridge case) (primer) (igniter) (bullet) (propellant powder) designed for use in a firearm. A firearm is loaded if ammunition is contained in the weapon or within a feeding device attached to it.

G.L. c. 269, § 10(o)

To prove the third element, the Commonwealth must prove that at the time the defendant (carried a loaded firearm on their person) (had a loaded firearm under their control in a vehicle), the defendant was under the influence of (alcohol) (marijuana) (narcotic drugs) (depressants) (stimulant substances).

If the substance is alleged to be alcohol

What does it mean to be “under the influence” of alcohol? Someone does not have to be drunk to be under the influence of alcohol. A person is under the influence of alcohol if he (she) has consumed enough alcohol to reduce their ability to safely (carry a loaded firearm on their person) (have a loaded firearm under their control in a motor vehicle), by decreasing their alertness or judgment. It means that a person has consumed enough alcohol to reduce their mental clarity, self-control or reflexes, and thereby left them with a reduced ability to (carry) (have under their control) a loaded firearm in

a safe manner. The Commonwealth is not required to prove that the defendant actually (carried a loaded firearm) (had a loaded firearm under his [her] control) in an unsafe manner, but it is required to prove that the defendant’s ability to safely (carry a loaded firearm) (have a loaded firearm under their control) was diminished by the consumption of alcohol. The amount of alcohol necessary to do this may vary from person to person. You may rely on your own experience and common sense about the effects of alcohol on a person. You should consider any believable evidence about the defendant’s alleged consumption of alcohol, as well as the defendant’s appearance, condition, and behavior at the time and place in question.

Commonwealth v. Veronneau, 90 Mass. App. Ct. 477, 479-80 (2016) (the standard for intoxication for the crimes of operating a motor vehicle under the influence and carrying a loaded firearm while under the influence are not necessarily the same).

See *Commonwealth v. Riley*, 48 Mass. App. Ct. 463, 465 (2000) (noting that the words “mental clarity, self-control, and reflexes” are “merely examples or factors that the jury may use in determining whether the consumption of alcohol diminished the defendant’s capacity [to carry a loaded firearm]” and that the Commonwealth is not required to prove any of these examples or factors beyond a reasonable doubt).

If there is evidence of a breath or blood test and no per se OUI charge You may also consider whether a (breath) (blood) test showed that the defendant had consumed any alcohol. However, the (breath) (blood) test is not sufficient by itself to prove that the defendant was under

the influence of alcohol.

[As a preliminary matter, in the absence of a judge taking judicial notice upon request of what a breathalyzer measures, a judge should consider what foundational evidence must be introduced before admitting breath or blood test evidence. *Commonwealth v. Colturi*, 448 Mass. 809, 811 (2007) (breath test evidence); *Commonwealth v. Filoma*, 79 Mass. App. Ct. 16, 20-21 (2011) (same). See also *Commonwealth v. Dyer*, 77 Mass. App. Ct. 850, 857 (2010) (blood test evidence).]

If there is evidence of a breath or blood test and defendant is charged with per se OUI

You may also consider whether a (breath) (blood) test showed that the defendant had consumed any alcohol. However, unlike the offense of operating under the influence, no matter what the reading is, the (breath) (blood) test is not sufficient by itself to prove that the defendant was under the influence of alcohol while (carrying a loaded firearm on their person) (having a loaded firearm under their control in a vehicle).

See note 4, *infra*.

If the substance is alleged to be marijuana, narcotic drugs, depressants, or stimulants

What does it mean to be “under the influence” of (marijuana) (narcotic drugs) (depressants) (stimulant substances)? A person is under the influence of (marijuana) (narcotic drugs) (depressants) (stimulant substances) if they have used enough of the substance to reduce their ability to safely (carry a loaded firearm on their person) (have a loaded firearm under their control in a motor vehicle), by

decreasing their alertness or judgment. It means that a person has used enough of the substance to reduce their mental clarity, self-control or reflexes, and thereby left them with a reduced ability (to carry) (have under their control in a motor vehicle) a loaded firearm in a safe and responsible manner. The Commonwealth is not required to prove that the defendant actually (carried a loaded firearm) (had a loaded firearm under their control in a vehicle) in an unsafe manner, but it is required to prove that their ability to safely (carry a loaded firearm) (have a loaded firearm under their control in a vehicle) was diminished by the use of (marijuana) (narcotic drugs) (depressants) (stimulant substances).

You are to decide this from all the believable evidence in this case, together with any reasonable inferences that you draw from the evidence. You may consider evidence about the defendant's appearance, condition and behavior at the time, in order to determine whether the defendant's ability to (carry) (have under their control in a motor vehicle) a loaded firearm in a safe manner was diminished by (marijuana) (narcotic drugs) (depressants) (stimulant substances).

So in summary there are three elements the Commonwealth must prove beyond a reasonable doubt:

***First:* That the defendant (carried a weapon on their person) (had a weapon under their control in a vehicle) that met the legal definition of a firearm;**

***Second:* That the firearm was loaded with ammunition; and**

***Third:* That the defendant was under the influence of (intoxicating liquor) (marijuana) (narcotic drugs) (depressants) (stimulant substances) while they (carried the firearm on their person) (had the firearm under their control in a motor vehicle).**

If the Commonwealth proved all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth failed to prove any element beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. Roadside Assessments

You heard testimony in this case that the defendant, at the request of a police officer, performed or attempted to perform various roadside assessments. These roadside assessments are not

scientific tests of impairment by (alcohol) (marijuana) (narcotic drugs) (depressants) (stimulant substances) use. A person may have difficulty performing these tasks for many reasons unrelated to the consumption of (alcohol) (marijuana) (narcotic drugs) (depressants) (stimulant substances).

It is for you to decide if the defendant's performance on these roadside assessments indicate that their ability to (carry) (have under their control in a motor vehicle) a loaded firearm in a safe manner was diminished by (alcohol) (marijuana) (narcotic drugs) (depressants) (stimulant substances).

You may consider this evidence solely as it relates to the defendant's balance, coordination, mental clarity, ability to retain and follow directions, ability to perform tasks requiring divided attention, and other skills you may find are relevant to safely (carrying) (having under their control in a motor vehicle) a loaded firearm.

It is for you to determine how much, if any, weight to give the roadside assessments. In making your determination, you may consider what the officer asked the defendant to do, the circumstances under which they were given and performed, and all of the other evidence in this case.

Finally, evidence of how a defendant performed in roadside assessments, standing alone, is never enough to convict a defendant of (carrying) (having under their control in a motor vehicle) a loaded firearm while under the influence.

See Commonwealth v. Gerhardt, 477 Mass. 775, 785, 789 (2017).

2. Factors that may affect reliability of breath or blood testing

In deciding whether to rely on evidence about a (breath) (blood) test, you may consider evidence, if any, about:

- **whether the test was administered within a reasonable time of operation;**
- **whether the person who gave the test was properly certified, and your assessment of (his) (her) credibility;**
- **the pre-test procedures that were employed;**
- **whether the testing device was in good working order at the time the test was administered;**
- **whether the test was administered properly; and**
- **any other evidence pertaining to the administration of the test.**

3. If there is an issue regarding any delay in blood or breath testing

A passage of up to three hours between testing and the time of the alleged offense may be reasonable, however the facts and circumstances of the case may suggest that a greater or lesser time period might apply. Ultimately it is up to you to decide what is reasonable.

NOTES:

1. **Carrying versus Possession.** Section 10H of chapter 269 was enacted after the change to section 10(a) by which carrying was equated with possession. Presumably, the Legislature would have been aware of the distinction and used the word “carrying” in § 10H intentionally.

2. **Knowledge that the firearm was loaded is not required.** There is no appellate decision requiring proof that the defendant knew the firearm was loaded. Unlike, § 10(a), section 10H does not include the modifier “knowingly” and therefore that has not been included as an element in this offense. Additionally, if this offense is construed as a strict liability offense, then there is no *mens rea* requirement that the Commonwealth must prove. See *Commonwealth v. Kelly*, 484 Mass. 53, 60 (2020).

3. **Knowledge of legal definition of firearm.** The Commonwealth is not required to prove that the defendant *knew* that the firearm met the *legal* definition of a firearm. *Commonwealth v. Papa*, 17 Mass. App. Ct. 987, 987 (1984).

4. **Firearm License.** The statutory language of G.L. c. 269, § 10H providing that “*whoever, having in effect a license to carry firearms . . . carries on his person, or has under his control in a vehicle, a loaded firearm. . . while under the influence . . .*” is not intended to require the Commonwealth to prove that the person is licensed in order to prove a violation of this statute. Rather, this language, like other statutes, appears to be intended to differentiate this crime from the crime of unlawful possession of a firearm in violation of G.L. c. 269, § 10(a). See e.g., *Commonwealth v. Dobbins*, 96 Mass. App. Ct. 593, 595-96 (2019) (holding Commonwealth is not required to prove victim is over the age of 14 to prove indecent assault and battery on a person over the age of 14 in violation of G.L. c. 265, § 13H; the age language in § 13H “was intended to differentiate that crime from the crime of indecent assault and battery on a child under age fourteen” which has enhanced penalties).

5. **Breathalyzer result.** “The only ‘legal [breath test result] limit’ recognized by the Commonwealth in the context of criminal conduct is the presumption of intoxication when driving an automobile with a BAC or .08 per cent or above.” *Commonwealth v. Wall*, 469 Mass. 652, 670-71 (2014). Despite their common language, the statutes prohibiting operating under the influence and carrying a firearm under the influence concern different instrumentalities and activities. *Commonwealth v. Veronneau*, 90 Mass. App. Ct. 477, 479 (2016).