

POSSESSION, USE, OR PLACEMENT OF HOAX DEVICE
G.L. c. 266, § 102 (b)

The defendant is charged with (possessing) (using) (placing) a hoax (explosive) (destructive or incendiary device or substance) (chemical, biological, or nuclear weapon). To prove the defendant guilty of this offense, the Commonwealth must prove four elements beyond a reasonable doubt that:

***First*, the defendant [(possessed) (used) (placed) a device or item] [caused another person to (possess) (use) (place) a device or item];**

***Second*, the device or item was a hoax (explosive) (destructive or incendiary device or substance) (chemical, biological, or nuclear weapon);**

***Third*, the defendant [(possessed) (used) (placed)] [caused another person to (possess) (use) (place)] the device or item with the intent that it cause anxiety, unrest, fear, or personal discomfort to any person or group of persons; and**

***Fourth*, the defendant did so without lawful authority.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant [(possessed) (used) (placed) a device or item] [caused another person to (possess) (use) (place) a device or 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. In that sense, you possess whatever you have in your pocket, purse, or backpack right now.

However, the law does not require that someone necessarily have actual physical custody of an item to “possess” it. An item is considered to be in a person’s possession if they have:

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

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

Whether the defendant possessed an item is something that you must determine from all the facts and any reasonable inferences that

you can draw from the facts. However, 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. Additionally, it is not enough to prove that the defendant was associated with a person who controlled the item or the property where the item was found.

To show possession, there must be evidence justifying a conclusion that the defendant had knowledge of the item coupled with the ability and intent to exercise control over the item. Only then may the defendant be considered to have possessed the item.

Commonwealth v. Than, 442 Mass. 748, 754-755 (2004); *Commonwealth v. Sespedes*, 442 Mas. 95, 99 (2004).

Joint possession. A person can also “possess” something even if they are not its sole owner or holder. For example, a person is considered to “possess” something which they own or hold jointly with another person, who is keeping it for both of them. A person is also considered to “possess” something which they own or hold jointly with another person, and which they agreed to deposit somewhere where both of them will have access to it.

Commonwealth v. Beverly, 389 Mass. 866, 870 (1983) (possession of controlled substance need not be exclusive; it may be joint and constructive).

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the device or item the defendant possessed was a hoax (explosive) (destructive or incendiary device or substance) (chemical, biological or nuclear weapon). A “hoax” device, article, or substance is inoperable, but would appear to a reasonable person to be (an explosive) (a destructive or incendiary device or substance) (or) (a chemical, biological or nuclear weapon, harmful radioactive substance or poison) capable of causing bodily injury.

See G.L. c. 266, § 101 for further details regarding the following definitions.

Explosive. An “explosive” is defined as any element, compound or mixture manufactured, designed or used to produce an explosion that would cause physical harm to persons or property. An explosive contains an oxidizer, fuel or other ingredient that when ignited may cause a sudden generation of highly-heated gases capable of causing physical harm to persons or property.

See G.L. c. 266, § 101: “Explosive shall not include a pyrotechnic, small-arms ammunition, small-arms ammunition primers, smokeless powder weighing less than 50 pounds and black powder weighing less than 5 pounds, unless possessed or used for an illegal purpose.”

Destructive or incendiary device or substance. **A destructive or incendiary device or substance is an explosive, article or device designed to cause physical harm to persons or property by means of fire, explosion, or detonation and consisting of substance capable of being ignited.**

Chemical weapon. **There are two types of chemical weapons. One is a toxic chemical or substance, including the ingredients used to create any toxic chemical or substance. Another is ammunition or a device designed to cause death or bodily harm by means of the release of a toxic chemical or substance.**

Biological weapon. **A “biological weapon” is a weapon specifically prepared to cause death, disease or other biological malfunction in any living organism, deterioration of food, water, equipment supplies or material of any kind, or negative alteration of the environment. It includes any microorganism, virus, infectious substance or biological product engineered as a result of biotechnology. It also includes any naturally occurring or bioengineered**

component of any such microorganism, virus, infectious substance or biological product.

Nuclear weapon. A “nuclear weapon” is a device designed for the purpose of causing bodily injury or death through the release of radiation or radiological material either through nuclear fission or any other energy source.

General Laws c. 266, § 101 also defines a nuclear weapon as one designed to cause “denial of access.” That term is defined as “contamination to an area, including any structures thereon, which poses a health risk to humans, animals or plants and which precludes the safe use of such area until the contaminant becomes inactive, decays or is removed.”

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant [(possessed) (used) (placed)] [(caused another person to (possess) (use) (place))] the device with the intent that the device cause anxiety, unrest, fear or personal discomfort to any person or group of persons. Obviously, it is impossible to look directly into a person’s mind. But in our everyday affairs, we often decide from the actions of others what their state of mind is. In this case, you may examine the defendant’s actions and words, and all the surrounding circumstances, to help you determine what their intent or knowledge was at the time in question.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant acted without lawful authority. The Commonwealth must prove that the defendant had no legal justification for [(possessing) (using) (placing)] [(causing another to (possess) (use) (place))] the device or item.

Commonwealth v. Aldana, 477 Mass. 790, 799 (2017).

If the Commonwealth has proven all four elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.