

**THEFT, PURCHASE, RECEIPT, POSSESSION OR CONCEALMENT
OF STOLEN MOTOR VEHICLE;
MALICIOUS DAMAGE TO MOTOR VEHICLE;
STEALING PARTS FROM MOTOR VEHICLE TAKEN WITHOUT AUTHORITY;
CONCEALING MOTOR VEHICLE THIEF**

G.L. c. 266, § 28

The defendant is charged with (stealing a motor vehicle) (malicious damage to a motor vehicle) (possessing a stolen motor vehicle) (receiving a stolen motor vehicle) (stealing motor vehicle parts) (concealing motor vehicle theft).

A. *Stealing motor vehicle.*

In order to prove the defendant guilty of this offense, the Commonwealth must prove beyond a reasonable doubt:

First, that the defendant took the motor vehicle;

Second, that the motor vehicle 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 motor vehicle permanently.

This instruction is modeled after Instruction 8.520, Larceny by Stealing .

The value of the stolen vehicle is not an element of the offense. *Commonwealth. v. Casserly*, 23 Mass. App. Ct. 947, 948 (1986).

SUPPLEMENTAL INSTRUCTIONS

1. "Took." **To prove the first element, the Commonwealth must**

prove beyond a reasonable doubt that the defendant physically transferred the motor vehicle to his (her) own control. 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 (1976) (any separation of property from victim's dominion, even if brief in space and time, sufficient); *Commonwealth v. Salerno*, 356 Mass. 642, 648, (1970) (taking can be proved by circumstantial evidence); *Commonwealth v. Bradley*, 2 Mass. App. Ct. 804, 805 (1974) (momentary transfer sufficient); *Commonwealth v. Flowers*, 1 Mass. App. Ct. 415, 418-19 (1973) (immaterial whether the transfer is done by the robber himself or by another person, even by the victim, acting at the robber's direction).

2. "Of another." **To prove the second element, the Commonwealth must**

prove beyond a reasonable doubt that the motor vehicle was owned or possessed by a person other than the defendant. This may be proved by direct evidence that someone else owned or possessed the motor vehicle. The Commonwealth is not required to prove who owned or possessed the motor vehicle 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, 238-39 (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 (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 (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, 554-55 (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).

3. *Intent to deprive permanently.* To prove the third element, the

Commonwealth must prove beyond a reasonable doubt that the defendant intended to deprive the owner or possessor of (his) (her) (its) vehicle permanently. You may, but are not required, to find such intent if the defendant's conduct showed utter indifference as to whether the vehicle would be recovered.

See Instruction 3.120 (Intent).

Commonwealth v. Salerno, 356 Mass. 642, 648, (1970); *Commonwealth v. Cabot*, 241 Mass. 131, 141-143 (1922); *Commonwealth v. Olivera*, 48 Mass. App. Ct. 907, 909 (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, 456-57 (1994); *Commonwealth v. Coyle*, 17 Mass. App. Ct. 982, 984 (1984); *Commonwealth v. Ellison*, 5 Mass. App. Ct. 862, 862-63 (1977) (intent to make restitution later is not a defense).

4. *Claim of right.* If the defendant took another person's motor vehicle in

an honest 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. Liebenow, 470 Mass. 151, 157 (2014) (the specific intent to steal is negated by a finding that a defendant held an honest, albeit mistaken, belief that he was entitled to the property he took).

B. *Malicious damage to motor vehicle.*

In order to prove the defendant guilty of this offense, the

Commonwealth must prove beyond a reasonable doubt:

First: That the defendant injured or destroyed a motor vehicle

Second: That the vehicle belonged to another person, and

Third: The defendant acted with malice.

The term “malice” refers to a state of mind of cruelty, hostility or revenge. To prove that an act was malicious, the Commonwealth must prove beyond a reasonable doubt not only that it was done deliberately, but also that it was done out of cruelty, hostility or revenge toward another.

Commonwealth v. Chambers, 90 Mass. App. Ct. 137, 143-44 & n.7 (2016).

C. Stealing parts.

In order to prove the defendant guilty of this offense, the Commonwealth must prove beyond a reasonable doubt:

First: That the defendant intentionally took a motor vehicle

Second: That he (she) did so without authority of the owner, and

Third: That he (she) stole from it one or more of its parts or accessories.

Here instruct on Intent (Instruction 3.120) and the definition of stealing from Larceny by Stealing (Instruction 8.520).

D. Possessing or Receiving stolen motor vehicle.

In order to prove the defendant guilty of this offense, the Commonwealth must prove beyond a reasonable doubt:

First: That the defendant (bought) (received) (possessed) (concealed) (obtained control of) a motor vehicle,

Second: That the motor vehicle had been stolen, and

Third: That the defendant knew or believed it had been stolen.

See supplemental instruction on knowledge, below. Where applicable, see instruction on possession (Instruction 3.220)

A person “receives” property by knowingly taking custody or control of it. It is not necessary that the defendant personally possessed the stolen property, as long as it is proved that he (she) knowingly exerted control over it in some way.

Mere presence in a stolen car is insufficient to support an inference of knowledge that the car was stolen, but “presence supplemented by other incriminating evidence will serve to tip the scales.” Commonwealth v. Johnson, 6 Mass. App. Ct. 956, 957 (1978). See Commonwealth v. Boone, 356 Mass. 85, 87 (1969); Commonwealth v. Johnson, 7 Mass. App. Ct. 191, 193 (1979). See also Commonwealth v. Hunt, 50 Mass. App. Ct. 565, 568-69 (2000).

If defendant learns property was stolen after receiving it

Even if the defendant did not know that the property was stolen at the time when he (she) received it, the defendant is still guilty of receiving stolen

property if he (she) subsequently learned that the property had been stolen, and at that point decided to keep it and to deprive the owner of its use.

Commonwealth v. Sandler, 368 Mass. 729, 740-41 (1975); *Commissioner of Pub. Safety v. Treadway*, 368 Mass. 155, 160 (1975); *Kirkpatrick*, 26 Mass.App. Ct. 595, 599 (1988).

E. *Concealing a motor vehicle thief.*

In order to prove the defendant guilty of this offense, the

Commonwealth must prove beyond a reasonable doubt:

First: That a person stole a motor vehicle,

Second: That the defendant knew or believed the person had stolen a motor vehicle, and

Third: That the defendant intentionally concealed that person.

A motor vehicle has been stolen if a person took it away from the person who owned or possessed it with the intent to deprive that person of the vehicle permanently.

See supplemental instruction on knowledge below. Where necessary, see instruction on Larceny by Stealing (Instruction 8.520).

SUPPLEMENTAL INSTRUCTION

Knowledge.

The Commonwealth must prove beyond a reasonable doubt that the defendant actually knew or believed that (the motor vehicle had been stolen) (the person concealed

had stolen a motor vehicle). Mere negligence or failure to exercise a reasonable level of care is not enough. Personal knowledge or belief is required, and our law allows for no substitute.

It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often look to the actions of others in order to decide what their state of mind is. In this case, 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.

You should consider all of the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt, as it must, that the defendant acted with the knowledge that the person he (she) concealed had stolen the motor vehicle in question.

Commonwealth v. Dellamano, 393 Mass. 132, 138 (1984); *Commonwealth v. Boris*, 317 Mass. 309, 315-317 (1944).

NOTES:

1. **Altered vehicle identification number as prima facie evidence of knowledge.** "Evidence that an identifying number or numbers of a motor vehicle or trailer or part thereof has been intentionally and maliciously removed, defaced, altered, changed, destroyed, obliterated, or mutilated, shall be prima facie evidence that the

defendant knew or had reason to know that the motor vehicle, or trailer or part thereof had been stolen.” G.L. c. 266, § 28(a), second par. See Instruction 3.260 (Prima Facie Evidence). See *Commonwealth v. Gonsalves*, 56 Mass. App. Ct. 506, 512 (2002) (emphasizing that “the use of prima facie evidence, sufficient to establish a presumption in favor of the scienter, carries no particular presumption of validity” and that “the presumed fact [scienter] must be proven beyond a reasonable doubt.”

2. **Certificate of title as evidence of unauthorized use.** “[C]ertified copies of any motor vehicle or trailer ownership records, including computer records, in the possession of the registrar of motor vehicles, attested by the registrar or his designee or, if the motor vehicle or trailer is registered or titled in another state, such records similarly certified by the keeper of records of the appropriate motor vehicle department, shall be admissible as proof of ownership of a motor vehicle or trailer and shall be prima facie evidence that the use of the motor vehicle or trailer was unauthorized. If the defendant rebuts such evidence, the commonwealth may be granted a reasonable continuance to enable the owner of the vehicle to be brought into court to testify.” G.L. c. 22C, § 42. This statutory provision should be presented to the jury only as a permissive inference. See Instruction 3.240 (Presumption). Since its language may imply that the effect of the provision disappears if “rebutt[ed],” it is not clear whether it rises to the level of prima facie evidence, which remains evidence even though contrary evidence is introduced. See the notes to Instruction 3.260 (Prima Facie Evidence).

A defendant's reliance on a title certificate in his or her name is not itself a defense to a charge of receiving a stolen motor vehicle, but merely one factor to be weighed in determining whether the Commonwealth has proven that the defendant knew that the vehicle was stolen. *Casserly*, 23 Mass App. Ct. at 948.

3. **Charging both theft and receiving.** A defendant may be charged both with theft of a motor vehicle and receiving that stolen motor vehicle, but may not be convicted of both. *Dellamano*, 393 Mass. at 134 n.4.

4. **Restitution is mandatory.** Upon conviction under this section, in addition to any other punishment, a restitution order is mandatory for any financial loss (including, but not limited to, loss of earnings, out-of-pocket expenses, and replacement costs) sustained by the victim, his dependents or insurer. G.L. c. 266, § 29; G.L. c. 276, § 92A.