

**LARCENY BY STEALING FROM A
(PERSON 60 YEARS OF AGE OR OLDER) (DISABLED PERSON)**

G.L. c. 266, § 30 (5)

The defendant is charged with larceny by stealing from a (person 60 years of age or older) (disabled person). To prove the defendant guilty of this offense, the Commonwealth must prove the following four things beyond a reasonable doubt:

***First:* The defendant took and carried away property;**

***Second:* The property was owned or possessed by a person (60 years of age or older) (with a disability) on the date of the alleged offense; and**

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

G.L. c. 277, § 39. Commonwealth v. Donovan, 395 Mass. 20, 25-26 (1985); Commonwealth v. Johnson, 379 Mass. 177, 181 (1979).

To prove the first element, the Commonwealth must prove that the defendant “took and carried away” the property in question.

“Taking and carrying away” is accomplished if the defendant

physically transferred the property from the other person's control to their own. It does not matter if the transfer involved only slight movement, or if it lasted only for a short time.

To prove the second element, the Commonwealth must prove that the property was owned or possessed by a person other than the defendant and that the person was (60 years of age or older) (with a disability) on the date of the alleged offense.

[A person with a disability is a person with a permanent or long-term physical or mental impairment that prevents or restricts the individual's ability to provide for their own care or protection.]

G.L. c. 265, § 13K (defining "person with a disability")

To prove the third element, the Commonwealth must prove that the defendant intended to deprive the owner of the property permanently. If a person takes the property of another and disposes of it with indifference to whether the owner recovers its possession that may indicate an intent to deprive the owner of it permanently.

A person's intent is their purpose or objective. This requires you to make a decision about the defendant's state of mind at that

time. You may consider any evidence about the actions or words of the defendant, and all of the surrounding circumstances, to help you determine what the defendant's intent was at that time.

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

SUPPLEMENTAL INSTRUCTIONS

See Instruction 3.120 (Intent).

1. Larceny over \$250. If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant is guilty of larceny, you must go on to determine whether the property that was stolen was worth more than \$250. You may consider any credible evidence in determining the value of a piece of property.

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If your verdict is guilty, you must 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.

For the purposes of larceny from a person 60 or older or a disabled person, the value amount remains at \$250. See G. L. c. 266, § 30(5).

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. *Commonwealth v. Kelly*, 24 Mass. App. Ct. 181, 183-186 & n.4 (1987).

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

2. Single Scheme.

The Commonwealth alleges that property was taken over a period of time [and from different locations]. If each taking was done with a single, continuing intent to steal, or pursuant to a general scheme of plan to steal, you may add those amounts together to determine whether the Commonwealth proved that the defendant took property with a total value of more than \$250.

Commonwealth v. John G. Grant & Sons Co., 403 Mass. 151, 157 (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, 774 (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 (1966) (value of successive larcenies in single scheme may aggregate to grand larceny); *Commonwealth v. Stasiun*, 349

Mass. 38, 45 (1965) (same); *Commonwealth v. Peretz*, 212 Mass. 253, 254 (1912) (same); *Commonwealth v. Pimental*, 54 Mass. App. Ct. 325, 329 (2002) (same); *Slater v. United States Fidelity & Guar. Co.*, 7 Mass. App. Ct. 281, 285 (1979), *rev'd on other grounds*, 379 Mass. 801 (1980) (same); *Commonwealth v. Donovan*, 395 Mass. 20, 27-31 (1985) (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 (1973). Compare G.L. c. 277, § 32 (charging a continuing offense); *Commonwealth v. Sullivan*, 104 Mass. 552, 553 (1870) (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 Donovan*, 395 Mass. at 29 (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 (2001) (*Donovan* inapplicable where circumstances involve more than one discrete offense, such that different property is taken at different times and from different locations).

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

Commonwealth v. Garrity, 43 Mass. App. Ct. 349, 358 n.7 (1997); *Commonwealth v. Larmey*, 14 Mass. App. Ct. 281, 283-285 (1982); *Commonwealth v. Anslono*, 9 Mass. App. Ct. 867, 868 (1980); *Commonwealth v. Ellison*, 5 Mass. App. Ct. 862, 862-63 (1977); *Commonwealth v. White*, 5 Mass. App. Ct. 483, 485-488 (1977).

NOTES:

1. 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. For a full list of what constitutes "property" under the larceny statute, see G.L. c. 266, § 30(2), in addition to those at common law that may be the subject of larceny. See also *Commonwealth v. Yourawski*, 384 Mass. 386, 388 (1981) (intellectual property, such as taped performance, not subject to larceny statute); *Commonwealth v. Beckett*, 373

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Mass. 329, 341-343 (1977) (intent to commit larceny from welfare department inferable from circumstances).

2. Value of property. For the purposes of larceny from a person 60 or older or a disabled person, the value amount remains at \$250. See G. L. c. 266, § 30(5). The jury may use its common knowledge, and does not require expert evidence, in evaluating value. *Commonwealth v. Hosman*, 257 Mass. 379, 386 (1926); *Commonwealth v. McCann*, 16 Mass. App. Ct. 990, 991 (1983).

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” *Commonwealth v. Kelly*, 24 Mass. App. Ct. 181, 183-186 & n.4 (1987). Compare *Commonwealth v. Pyburn*, 26 Mass. App. Ct. 967, 968-970 (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 the 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 (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).

3. Taking and carrying away. *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. Luckis*, 99 Mass. 431, 32-33 (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 (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 (1974) (momentary transfer sufficient); *Commonwealth v. Flowers*, 1 Mass. App. Ct. 415, 418-419 (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).

4. Proof of property “of another”. The identity of the owner or possessor of the property need not be proven provided the Commonwealth has proven beyond a reasonable doubt that the owner or possessor was 60 years or older, or disabled, at the time of the alleged offense. See G.L. c. 277, § 28 (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 (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 a thief); *Commonwealth v. Sullivan*, 104 Mass. 552, 553-554 (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*, 87 Mass. 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 (2002) (“[d]irect proof of ownership, although preferable, is not essential . . .”).

5. Intent to permanently deprive. *Commonwealth v. Salerno*, 356 Mass. 642, 648 (1970); *Commonwealth v. Weston*, 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, 456-457 (1994); *Commonwealth v. Coyle*,

17 Mass. App. Ct. 982, 984 (1984); *Commonwealth v. Ellison*, 5 Mass. App. Ct. 862, 862-863 (1977) (intent to make restitution later is not a defense).

6. Proof of victim's status. Where the Legislature has not expressly provided scienter about age or disability to be an element of the offense, proof that the defendant knew the victim's age or disability is not required. The Commonwealth need only prove that the victim was a person 60 years of age or older at the time of the offense or disabled. See *Commonwealth v. Montalvo*, 50 Mass. App. Ct. 85, 88-89 & n.3 (2000).

7. 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 pretenses." 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 pretenses." 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." *Commonwealth v. Kelly*, 24 Mass. App. Ct. 181, 184 (1987). Proof of any one of the three alternatives will support a conviction for larceny. *Commonwealth v. Leland*, 311 Mass. 447, 448 (1942); *Commonwealth v. Kelley*, 184 Mass. 320, 324 (1903). The Commonwealth cannot be required to elect which of the three alternatives it intends to prove. *Commonwealth v. Corcoran*, 348 Mass. 437, 440-442, (1965); *Commonwealth v. King*, 202 Mass. 379, 386-389 (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 (1980), *aff'd on other grounds*, 383 Mass. 269, *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 (2002).

8. 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).

9. 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 (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, 432-33 (1959); *Commonwealth v. Kelley*, 333 Mass. 191, 195 (1955); *Commonwealth v. Obshatkin*, 2 Mass. App. Ct. 1, 4-5 (1974). See Instruction 5.41 (Larceny by Stealing). Each crime should be charged in a separate count or complaint. *Dellamano*, 393

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Mass. at 134 n.4. 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 (1996).