RECEIVING STOLEN PROPERTY

G.L. c. 266, § 60

The defendant is charged with knowingly receiving stolen property.

In order to prove the defendant guilty of this offense, the Commonwealth must prove the following three things beyond a reasonable doubt.

***First*: That the property in question was stolen;**

***Second*: That the defendant knew that the property had been stolen; and**

***Third*: That the defendant knowingly (had the stolen property in his [her] possession) (bought the stolen property) (aided in concealing the stolen property).**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the property was stolen – that is, that someone had taken and carried it away without right and without the consent of the owner, while intending to deprive the owner of it permanently. The Commonwealth is not required to prove who it was who stole the property.

The Commonwealth must also prove that the defendant knew or believed that the property was stolen. This is a question of the defendant's actual knowledge or belief at the time. Even if you find that, under the circumstances, a prudent person would have known or believed that the property was stolen, the defendant cannot be found guilty unless the Commonwealth has proved that he (she) actually knew that the property was stolen, or at least believed that it was stolen.

A person's knowledge is a question of fact. Because you cannot look directly into someone's mind, a person's knowledge is normally shown by inferences from all the facts and circumstances surrounding the event. You may infer that the defendant knew that the goods were stolen if the Commonwealth has proved beyond a reasonable doubt that the defendant (possessed) (bought) (helped to conceal) recently stolen goods, and if the facts and circumstances in this case support an inference that the defendant knew that those goods were stolen. You should consider all the facts and circumstances surrounding the defendant's alleged (possession) (purchase) (concealment) of stolen goods in deciding whether or not it is reasonable for you to draw such an inference, and in determining

whether the Commonwealth has proved beyond a reasonable doubt that the defendant knew that the goods he (she) allegedly (possessed) (bought) (concealed) were stolen. Remember, under such circumstances you may, but are not required to, draw an inference that the defendant knew that the goods were stolen.

Commonwealth v. Burns, 388 Mass. 178, 183 n.11, 445 N.E.2d 613, 616 n.11 (1983).

If the case involves receipt rather than purchase or concealment. **Finally, the Commonwealth must show that the defendant knowingly "received" the property. 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.**

The Commonwealth does not have to show that the defendant made any personal profit from receiving or disposing of the stolen property.

SUPPLEMENTAL INSTRUCTIONS

1. "Recently" stolen goods. **The term "recently" is a relative term, and has no fixed meaning. Whether property should be considered to be recently stolen depends on the type of property it is, its size and appearance, its marketability, the circumstances of its recovery, and all the other circumstances of the situation. The longer the period of time since the theft, the less likely it is that you can draw any reasonable inference simply from the defendant's possession of stolen goods.**

Commonwealth v. Kirkpatrick, 26 Mass. App. Ct. 595, 600-601, 530 N.E.2d 362, 366 (1988); *United States v. Redd*, 438 F.2d 335, 336 (9th Cir. 1971). A judge must initially determine as a matter of law whether the facts would warrant the jury in inferring that the theft was recent. *Kirkpatrick, supra* (collecting cases). Whether or not it was recent then becomes a fact issue for the jury unless the theft was so remote or so recent as to render it a question of law. *Commonwealth v. Sandler*, 368 Mass. 729, 744, 335 N.E.2d 903, 913 (1975).

2. Stolen property worth more than $1,200. **If you determine that the Commonwealth has proved beyond a reasonable doubt that the defendant is guilty of receiving stolen property, you must also go on to determine whether the stolen property (was) (**if there were multiple items: **all together were) worth more than $1,200. You may use your general knowledge in evaluating the**

value of a piece of property; it is not required that you have any expert evidence of its value.

So if you verdict is guilty, you must also indicate on your verdict slip whether or not the Commonwealth has also proved beyond a reasonable doubt that the stolen property (was) (all together were) worth more than $1,200.

The sample verdict slip for Larceny by Stealing (Instruction 8.521) may be adapted for such cases.

Effective April 13, 2018, St. 2018, c. 69 increased from $250 to $1,200 the felony threshold for the offenses of receiving stolen property (G.L. c. 266, § 60), larceny (§ 30) and wilful or wanton destruction of property (§ 127). For offenses committed prior to April 13, 2018, this instruction can be utilized, just inserting $250 wherever it refers to $1,200.

Commonwealth v. Kelly, 24 Mass. App. Ct. 181, 183-186 & n.4, 507 N.E.2d 777, 778-780 & n.4 (1987), held that, whether or not the value of the property stolen is alleged in the complaint, in a prosecution for larceny (G.L. c. 266, § 30) "the judge should instruct the jury that if they convict, they must determine by their verdict whether the value did or did not exceed [$1,200] 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" $1,200. *Kelly* also indicated that 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. Tracy*, 27 Mass. App. Ct. 455, 467, 539 N.E.2d 1043, 1050 (1989), cited *Kelly* approvingly in seemingly applying the same rule to receiving stolen property cases. Since the language of G.L. c. 266, § 60 is similar to that of § 30, it appears that a similar approach to instructing the jury should be utilized in prosecutions for receiving stolen property when the evidence indicates a possible value of more than $1,200 but the complaint does not so allege.

Compare *Commonwealth v. Pyburn*, 26 Mass. App. Ct. 967, 968-970, 527 N.E.2d 1174, 1175-1176 (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" $1,200 then 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, 751 N.E.2d 845, 847 & 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").

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).

3. Subsequently learning property stolen. **Even if the defendant did not know that the property was stolen at the time 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.**

Sandler, 368 Mass. at 740-741, 335 N.E.2d at 911; Commissioner of Pub. Safety v. Treadway, 368 Mass. 155, 160, 330 N.E.2d 468, 472 (1975); Kirkpatrick, 26 Mass. App. Ct. at 599, 530 N.E.2d at 365.

NOTES:

1. **Model instruction.** The model instruction has been prepared for instructing a jury relative to a charge of receiving stolen property under G.L. c. 266, § 60. The fact patterns of particular cases may require additional definitions of the three main elements (stolen property, knowledge and possession). See Instructions 3.140 (Knowledge) and 3.220 (Possession).

2. **Inference of knowledge from possession of recently stolen goods.** The jury may draw a permissive inference that the defendant knew the property was stolen from his or her possession of recently stolen property where the facts of the case do not show that the possession was innocent. Such an inference is constitutionally permissible. *Barnes v. United States*, 412 U.S. 827, 841-847, 93 S.Ct. 2357, 2360-2364 (1973). See *Sandler*, 368 Mass. at 741-742, 335 N.E.2d at 911. Such an inference may itself support a finding of knowledge beyond a reasonable doubt. See *Commonwealth v. Sala*, 18 Mass. App. Ct. 762, 766, 470 N.E.2d 807, 810 (1984); *Commonwealth v. Taylor*, 10 Mass. App. Ct. 452, 458 n.8, 409 N.E.2d 212, 216 n.8, aff'd on other grounds, 383 Mass. 272, 418 N.E.2d 1226 (1981). "However, '[c]autious vigilance must be maintained against the employment of a naked legal principle in a factual setting which provides no reasonable basis for the principle's application'" (citation omitted). *Kirkpatrick*, 26 Mass. App. Ct. at 600, 530 N.E.2d at 366.

It is reversible error for the judge to suggest that there is some "burden of explanation" on the defendant with regard to possession of recently stolen property, since the jury is likely to confuse this "burden of explanation" with the burden of proof. *Burns*, 388 Mass. at 180-183, 445 N.E.2d at 614-616. If the defendant does offer an innocent explanation, the Commonwealth is not required to disprove that explanation beyond a reasonable doubt; evidence rebutting a permissible inference is to be weighed by the jury. *Id*., 388 Mass. at 182 n.8, 445 N.E.2d at 616 n.8.

3. **Knowledge.** The defendant's subjective knowledge that the property was stolen is required; a negligent or reckless failure to inquire is not enough. *Commonwealth v. Boris*, 317 Mass. 309, 315-317, 58 N.E.2d 8, 12-13 (1944); *Commonwealth v. May*, 26 Mass. App. Ct. 801, 806-808, 533 N.E.2d 216, 220-221 (1989). The knowledge requirement is satisfied if the defendant either knew or believed that

the property was stolen, or later discovered that it was stolen and undertook to deprive the owner of its use. *Commonwealth v. Dellamano*, 393 Mass. 132, 138, 469 N.E.2d 1254, 1257-1258 (1984); *Sandler*, *supra*; *Treadway, supra*; *Kirkpatrick, supra*.

The defendant's knowledge can be inferred from circumstantial evidence. See, e.g., *Commonwealth v. Imbruglia*, 377 Mass. 682, 693-694, 387 N.E.2d 559, 566-568 (1979) (recent fencing of similar goods); *Commonwealth v. Kelley*, 333 Mass. 191, 194, 129 N.E.2d 900, 902 (1955) (improbable explanation); *Commonwealth v. Matheson*, 328 Mass. 371, 373-374, 103 N.E.2d 714, 715 (1952) (joint occupancy of apartment where goods trafficked openly); *Boris*, 317 Mass. at 316, 58 N.E.2d at 11 (suspicious circumstances of sale which would satisfy a reasonable person that goods were stolen); *Commonwealth v. Billings*, 167 Mass. 283, 285-286, 45 N.E. 910, 910-911 (1897) (possession of unusually large quantity of goods in defendant's home); *Commonwealth v. Leonard*, 140 Mass. 473, 4 N.E. 96, 101-102 (1886) (failure to keep records in ordinary course of business); *Commonwealth v. Dias*, 14 Mass. App. Ct. 560, 562, 441 N.E.2d 266, 267-268 (1982) (same); *Commonwealth v. McGann*, 20 Mass. App. Ct. 59, 66-67, 477 N.E.2d 1075, 1081 (1985) (price; circumstances of receipt; type of seller; location and circumstances of storage); *Commonwealth v. Santucci*, 13 Mass. 933, 934, 430 N.E.2d 1239, 1241 (1982) (improbable explanation; steeply discounted price; cash payment required); *Commonwealth v. Segal*, 3 Mass. App. Ct. 732, 733, 325 N.E.2d 291, 292 (1975) (prior course of dealings with thief); *Commonwealth v. Smith*, 3 Mass. App. Ct. 144, 147, 324 N.E.2d 924, 927 (1975) (possession of many stolen items, whether recently stolen or not). Compare *Commonwealth v. Scarborough*, 5 Mass. App. Ct. 302, 362 N.E.2d 546 (1977) (merely riding as passenger in auto with stolen goods in trunk is insufficient to infer possession and knowledge). For the same reason, the defendant may introduce evidence of his reputation as an honest merchant to disprove his knowledge that the goods were stolen. *Commonwealth v. Gazzolo*, 123 Mass. 220, 221 (1877).

It is irrelevant whether the defendant intended to derive personal benefit from receiving the goods, *Commonwealth v. Bean*, 117 Mass. 141, 142 (1875) (receiver doing personal favor for another equally guilty), or thought the actions justified, *Commonwealth v. Cabot*, 241 Mass. 131, 143-144, 135 N.E. 465, 469 (1922) (knowing use of stolen papers in bar discipline investigation).

4. **Possession.** Buying, receiving, or aiding in the concealment of stolen property are disjunctive, alternate ways of violating the statute. *Commonwealth v. Ciesla*, 380 Mass. 346, 347, 403 N.E.2d 381, 382 (1980). A complaint drawn in the language of G.L. c. 277, § 79 (that the defendant did "buy, receive, and aid in the concealment of" stolen property) is sufficient, even though G.L. c. 266, § 60 is phrased in the disjunctive, and the defendant may be convicted upon proof of any one of the three branches. *Commonwealth v. Valleca*, 358 Mass. 242, 244-245, 263 N.E.2d 468, 469 (1970). The Commonwealth is not required to elect among them before trial. *Commonwealth v. Colella*, 2 Mass. App. Ct. 706, 708, 319 N.E.2d 923, 925 (1974).

Constructive possession is enough. *Commonwealth v. Carroll*, 360 Mass. 580, 586, 276 N.E.2d 705, 710 (1971) (items held by others in a joint criminal enterprise); *Commonwealth v. Settipane*, 5 Mass. App. Ct. 648, 652, 368 N.E.2d 1213, 1216 (1977) (same); *Commonwealth v. Kuperstein*, 207 Mass. 25, 27, 92 N.E. 1008, 1009 (1910) (offering to sell goods to undercover agent); *Smith*, 3 Mass. App. Ct. at 146, 324 N.E.2d at 926 (dominion and control is equivalent of possession). A prosecution based upon concealment can be made out by any purposeful action to withhold the property from its owner or to make it more difficult for the owner to discover. *Ciesla*, 380 Mass. at 349, 403 N.E.2d at 383; *Commissioner of Pub. Safety, supra; Matheson, supra.*

5. **Severance of multiple charges.** As to whether severance of multiple charges of receiving stolen property is required, see *McGann*, 20 Mass. app. Ct. at 63, 477 N.E.2d at 1079.

6. **"Stolen" property**. The Commonwealth must prove that the property was in fact stolen. *Commonwealth v. Budreau*, 372 Mass. 641, 643-644, 363 N.E.2d 506, 508-509 (1977). The stolen property must either be such as could be the subject of larceny at common law, or be listed in G.L. c. 266, § 30(2). *Commonwealth v. Yourawski*, 384 Mass. 386, 387, 425 N.E.2d 298, 299 (1981). It is not necessary to prove who the thief was, or that the defendant received the goods directly from the thief. *Commonwealth v. Grossman*, 261 Mass. 68, 70-71, 158 N.E. 338, 339 (1927).

Circumstantial evidence can suffice to demonstrate that the goods were stolen. *Commonwealth v. Ryan*, 11 Mass. App. Ct. 906, 414 N.E.2d 1020 (1981) . It is insufficient merely to prove that the

defendant was found with common, fungible goods without identifying marks, which are similar to goods previously stolen. *Budreau, supra*; *Billings*, 167 Mass. at 286, 45 N.E. at 911. However, "[t]he law does not require the impossible. Not every exemplar of every kind of property can be individually recognized, and the closer to fungibility the property comes the less possible is accuracy of identification. Likelihood plays a part . . . . Time is a factor too . . ." (citation omitted). Often this is a jury issue. *Commonwealth v. Rossi*, 15 Mass. App. Ct. 950, 952, 445 N.E.2d 1090, 1092 (1983).

7. **Statute of limitations.** Concealing stolen property is not a continuing offense if the defendant took no further actions after the initial concealment, and the statute of limitations runs from the initial concealment date. However, the limitations period begins to run anew from the date of any specific, subsequent affirmative act in aid of the continued purposeful concealment. *Ciesla*, *supra*.

8. **Stealing and receiving same property.** A defendant cannot be convicted both of stealing and receiving the same goods, since receipt of stolen property requires that the property already be stolen at the time of receipt. *Dellamano*, 393 Mass. at 134, 469 N.E.2d at 1255; *Commonwealth v. Haskins*, 128 Mass. 60, 61 (1880); *Commonwealth v. Corcoran*, 69 Mass. App. Ct. 123, 127 n.6, 866 N.E.2d 948, 952 n.6 (2007). 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, 430-432, 159 N.E.2d 330, 332-334 (1959); *Kelley*, 333 Mass. at 195, 129 N.E.2d at 903; *Commonwealth v. Obshatkin*, 2 Mass. App. Ct. 1, 4-5, 307 N.E.2d 341, 343-344 (1974). See Instruction 5.41 (Larceny by Stealing). Each crime should be charged in a separate count or complaint. *Dellamano*, 393 Mass. at 134 n.7, 469 N.E.2d at 1255 n.7. 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, 659 N.E.2d 745, 750 (1996).

However, a conviction for receipt of stolen property does not require the Commonwealth to preclude the possibility that the defendant was the thief. If there is sufficient evidence to support a conviction for receipt of stolen property, such a conviction may stand even if there is also evidence that the defendant may be, or is in fact, the thief, since the jury is free to reject the evidence tending to prove theft and to infer receipt from the fact of possession. Corcoran, 69 Mass. App. Ct. at 127, 866 N.E.2d at 951 (defendant charged only with receipt of stolen property), overruling *Commonwealth v. Janvrin*, 44 Mass. App. Ct. 917, 690 N.E.2d 828 (1998).

9. **Receiving stolen property not duplicative of breaking and entering.** While a defendant cannot be convicted both of larceny and receiving the same stolen property, a defendant may be convicted both of breaking and entering in the nighttime to commit larceny (G.L. c. 266, § 16) and of receiving (G.L. c. 266, § 60) the same stolen property. Commonwealth v. Cabrera, 449 Mass. 825, 874 N.E.2d 654 (2007).

10. **Venue.** Venue lies either where the goods were stolen or where they were received. G.L. c. 277, § 58A. The place of receipt can be established by circumstantial evidence. *Obshatkin*, 2 Mass. App. Ct. at 3, 307 N.E.2d at 343. The Commonwealth is not required to allege or prove either the place of the theft or the place of receipt. *Commonwealth v. Parrotta*, 316 Mass. 307, 308-309, 55 N.E.2d 456, 457 (1944).