

LARCENY OF A CREDIT CARD FROM A PERSON

G.L. c. 266, § 37B(b) – Part I

The defendant is charged with larceny of a credit card from the (person) (possession) of another. To prove the defendant guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

***First*, that a credit card was (on the person) (in the possession, custody or control) of another person;**

***Second*, that the defendant took and carried away that card;**

***Third*, that the defendant did so without the consent of the cardholder;**

***Fourth*, that the defendant did so with the intent to permanently deprive another of the card; and**

***Fifth*, that the defendant did so with the intent to defraud.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that a credit card was (on the person) (in the possession, custody, or control) of a person other than the defendant. (There is no requirement that it be in the possession of the actual cardholder.) A credit card is a device that enables the

cardholder to obtain money, services, or things on credit without immediate payment or by debit from a cash account.¹

The Commonwealth must also prove beyond a reasonable doubt that the credit card was (on the person) (in the possession, custody, or control) of someone other than the defendant. A person obviously possesses something if they have direct physical control of it at a given time. However, a person need not have physical custody of something to possess it. A card is within the possession, custody, or control of a person if they have:

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

(Merely being present in the vicinity of an item or of a person who has it in their possession does not amount to possession, even if one knows that it is there.)

¹ Section 1 of G.L. c. 266, § 37, provides a more expansive definition of a credit card than the one provided in this instruction: A credit card is “an instrument or device, whether known as a credit card, credit plate or other name, or the code of number used to identify that instrument or device or an account of credit or cash accessed by that instrument or device, issued with or without a fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value on credit or by debit from a cash account.”

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant took that card and carried it away. Property is taken and carried away when it is physically transferred from another person's control. It does not matter whether the transfer involved only slight movement or lasted only for a short time.

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the cardholder did not consent to the defendant taking the card and carrying it away. The cardholder is the (person) (entity) named on the face of the card to whom or for whose benefit the card was issued. (It does not matter whether the person from whom the card was taken was the cardholder.)

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that, at the time the defendant took the card, the defendant did so with the intent to permanently deprive the cardholder of it. This intent may be proved by direct evidence or by the surrounding circumstances. For example, if a person takes the property of another and disposes of it with utter indifference as to

whether the owner recovers its possession, the surrounding circumstances would permit an inference that there was an intent to deprive the owner of the property permanently.

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant engaged in this conduct with the intent to defraud. To act with an intent to defraud means to act knowingly with the aim of deceiving or cheating another person or entity. The purpose is often to bring about gain or benefit either for oneself or for another person or entity.² You may examine the evidence in the case, all of the surrounding circumstances, and any reasonable inferences you draw from that evidence to help you determine whether the defendant had an intent to defraud.

See Commonwealth v. O'Connell, 438 Mass. 658, 664 (2003) (Commonwealth need not show intent to defraud particular person, but sufficient that defendant "intended to injure or defraud someone"; proof of intent to defraud may be inferred from the circumstances).

If the defendant had credit cards in the names of four or more other persons.

If the defendant had in their possession or under their control stolen credit cards in the names of four or more

² See *United States v. Phath*, 144 F.3d 146, 149 (1st Cir. 1998); *United States v. Leahy*, 445 F.3d 634, 644 (3d Cir. 2006).

other persons, you may, but are not required to, infer that the defendant had the requisite knowledge and intent at the relevant time.

See G. L. c. 266, § 37B, par. 2.

If the Commonwealth has proven all five elements 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 find the defendant not guilty.