

RECEIVING A LOST OR MISDELIVERED CREDIT CARD

G.L. c. 266, § 37B(c)

The defendant is charged with receiving a credit card which had been lost by or misdelivered from another person (person's possession). To prove the defendant guilty of this offense, the Commonwealth must prove *four* things beyond a reasonable doubt:

First: that the defendant received a credit card that had been lost, mislaid or delivered under a mistake as to the identity or address of the cardholder;

Second: that the defendant knew that the card had been so lost, mislaid or delivered;

Third: that the defendant retained possession of the card with the intent to use, sell, or transfer it to a person other than the issuer or the cardholder; and

Fourth: That the defendant did so with the intent to defraud.

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the credit card in question was lost, mislaid, or delivered due to a mistake of identity or address of the actual cardholder. A credit card is a device that enables the

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

The cardholder is the (person) (entity) named on the face of the card to whom or for whose benefit the card was issued.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that the card had been lost, mislaid, or misdelivered. This requires you to make a decision about the defendant’s state of mind at that time. It is not enough to prove that a prudent person would have known or believed that the card was lost, mislaid, or misdelivered. The Commonwealth must prove the defendant actually knew, or at least believed, that it was. You may examine any evidence regarding the defendant’s actions or words, all of the surrounding circumstances, and any reasonable inferences you draw from that evidence to help you determine whether the defendant knew the card had been lost, mislaid, or misdelivered.

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 third element, the Commonwealth must prove beyond a reasonable doubt that the defendant retained possession of the card with the intent to use or sell or to transfer it to a person other than the issuer or the cardholder. The issuer is the business organization or financial institution, or its authorized agent, which issued the card. The cardholder is the (person) (entity) named on the face of the card to whom or for whose benefit the card was issued. Again, you may examine any evidence regarding the defendant's actions or words, all the surrounding circumstances, and any reasonable inferences you draw from that evidence to help you determine whether the defendant retained possession of the card with the intent to use, sell, or transfer it to a person other than the issuer or the cardholder.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant engaged in the above 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. 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 intended 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 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.

SUPPLEMENTAL INSTRUCTIONS

Possession. What does it mean to possess something? A person possesses an item if they have direct physical control or custody of it at a given time. However, a person need not have physical custody of something to possess it. An item is within the possession, custody, or control of a person if they have:

- **knowledge of the object,**

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).

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

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.

[If a more detailed definition of possession or a definition of constructive possession is required, see Instruction 3.220]